IN THE SUPREME COURT OF NEVADA

SFR INVESTMENTS POOL, 1, LLC; and STAR HILL HOMEOWNERS ASSOCIATION, Petitioners, v. THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF THE CWABS, INC., ASSET-BACKED CERTIFICATES, SERIES 2006-6, Respondent.	Supreme Court No. 72931

Certified Question from the United States District Court, District of Nevada
The Honorable Richard F. Boulware, United States District Judge
Case No. 2:16-cv-02561-RFB-PAL

ANSWERING BRIEF

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JURISDICTIONAL STATEMENT

This is an original proceeding under NRAP 5, based on a question certified by the Honorable Richard F. Boulware of the United States District Court for the District of Nevada. Jurisdiction is discretionary. This court may decline to respond to the certified question. It may also revise the question and respond to the question as revised. Even though the court directed the real parties in interest to brief the question, it may still decline to respond. See, e.g., Volvo Cars of N. Am., Inc. v. Ricci, 122 Nev. 746, 137 P.3d 1161 (2006) (declining to respond to a certified question after ordering briefing).

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STATEMENT OF THE ISSUES

1. Should this court exercise its discretionary jurisdiction to respond to a certified question regarding a statute found by the United States Court of Appeals for the Ninth Circuit to be facially unconstitutional where: (a) the Legislature has already cured the constitutional infirmity by amending the statute in 2015; (b) this court has already decided interpreting the statute is unnecessary; (c) the requested opinion would be an advisory opinion without any precedential importance; (d) the sole purpose of the requested opinion would be to call into question binding Ninth Circuit precedent and impact only cases pending in federal court; and (e) responding to the certified question would go against the principles of federalism, comity, and judicial efficiency?

2. Assuming the court exercises its discretionary jurisdiction to respond to the certified question, did NRS 116.31168—as it existed prior to October 1, 2015—require homeowners associations to provide notices of default or sale to first deed of trust holders, even if they did not request notice?

3. Assuming the court exercises its discretionary jurisdiction and holds NRS 116.31168—as it existed prior to October 1, 2015—required homeowners associations to provide notices of default or sale to first deed of trust holders, even if they did not request notice, did NRS 116.31168 also incorporate NRS 107.080 and

consequently require homeowners associations to identify the superpriority amounts of their liens?

STATEMENT OF THE CASE

This is a certified question from the United States District Court for the District of Nevada, issued in Case No. 2:16-cv-02561-RFB-PAL. The Bank of New York Mellon (**BoNYM**) commenced the case on November 11, 2016, by filing a complaint for quiet title and other relief against SFR Investments Pool 1, LLC, and other defendants. The complaint seeks an order holding that SFR purchased a property at a foreclosure sale from Star Hill Homeowners Association subject to BoNYM's deed of trust. SFR filed a motion for the federal district court to certify a question to this court on January 4, 2017. The federal district court granted SFR's motion to certify on April 21, 2017, and stayed the case pending this court's resolution of the certified question on May 10, 2017. Discovery is still ongoing; no party has filed for summary judgment; and trial has not yet been scheduled.

The certified question asks "[w]hether NRS § 116.31168(1)'s incorporation of NRS § 107.090 required a homeowner's association to provide notices of default and/or sale to persons or entities holding a subordinate interest even when such persons or entities did not request notice, prior to the amendments that took effect on Oct 1, 2015?" According to the federal district court, the response to this question will guide its application of *Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*,

832 F.3d 1154 (9th Cir. 2016), *cert. denied*, 528 U.S. __, 137 S. Ct. 2296, 2297 (2017). But there is no need for this court to interpret NRS 116.31168 because the federal district court is already under a binding precedent interpreting the statute. The only rationale for this court to interpret the statute is to contradict the Ninth Circuit's interpretation, which is not an appropriate exercise of NRAP 5 jurisdiction.

In addition, the federal district court's question is incomplete. Even if this court repudiates *Bourne Valley*'s interpretation of NRS 116.31168, Chapter 116 sales will remain open to due process challenges in cases pending in federal court. A complete response to the certified question should address the content of the notice that is necessary under state law, as that will affect future litigation in hundreds of cases. If the court were to respond to the certified question and find that NRS 116.31168 required notice to first deed of trust holders, it should also hold that notices of default and/or sale needed to (i) disclose that the lien subject to foreclosure has a superpriority component and (ii) describe the amount of the superpriority component with specificity as required under NRS 107.080.

Neither SFR nor Star Hill addressed in their opening briefs whether this court should decline to exercise its discretionary jurisdiction, or whether the court should amend the certified question if it does choose to exercise jurisdiction. They consequently waived argument on these points on reply.

STATEMENT OF FACTS

While this matter presents a question of statutory interpretation, one fact is important: Star Hills did not, in its notices of lien, default, or sale, or otherwise, disclose either the existence or amount of the superpriority component—if any—of its statutory lien. JA_0006-0007 at ¶¶ 19 – 25.

SUMMARY OF ARGUMENT

This matter fails the standard set forth in *Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 137 P.3d 1161 (2006), for this court to answer a certified question. NRAP 5 provides that the Nevada Supreme Court

> may answer questions of law certified to it by . . . a United States District Court, when requested . . ., if there are involved in [the] proceeding . . . questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of this state.

NRAP 5; *see also Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 749, 137 P.3d 1161, 1163 (2006). According to *Volvo Cars*, the answer to the question must also "help settle important questions of law." *Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 751, 137 P.3d 1161, 1164 (2006).

Here, this court's response to the certified question would not be determinative of any part of the federal action, nor would it resolve an important question of state law. The certified question was already before this court in *Saticoy Bay LLC Series*

350 Durango 104 v. Wells Fargo Mortgage, 133 Nev. Adv. Op. 5, 388 P.3d 970 (Nev. 2017), and the court appropriately decided not to answer it. Rather than decide that NRS 116.31168 incorporates mandatory-notice provisions, this court proceeded to the constitutional question, and concluded, in disagreement with the Ninth Circuit, that nonjudicial foreclosure of a Chapter 116 lien does not constitute state action for purposes of the Due Process Clause of the United States Constitution. In so doing, *Saticoy Bay*'s holding rendered academic in Nevada's courts whether NRS 116.31168 required notice to first deed of trust holders—the answer to this question has no effect on state law or on cases pending in state court. If the court were to now rule that, as a matter of statutory interpretation, the statute *does* incorporate mandatory notice, that would potentially render its decision in *Saticoy Bay* merely an advisory opinion and, further, would suggest this court should have decided the statutory question rather than the constitutional one. *See Sheriff, Pershing Cty. v. Andrews*, 286 P.3d 262, 263 (Nev. 2012) (declining to reach the constitutionality of NRS 212.093 and deciding the case on statutory grounds, stating "[i]t is well settled … that we should avoid considering the constitutionality of a statute unless it is absolutely necessary to do so"). This court correctly concluded in *Saticoy Bay* that it "need not determine whether NRS 116.3116 *et. seq.* incorporates the notice requirements set forth in NRS 107.090." *Saticoy Bay*, 388 P.3d at 974.

Apart from *Saticoy Bay*'s finding, the Legislature amended NRS 116.31168

in 2015, explicitly requiring notice of HOA foreclosure sales to deed of trust holders. The certified question relates to a prior statute that is no longer on the books. A response to the certified question would have no prospective importance and would only spawn confusion as to the Legislature's intent in 2015 and the proper interpretation and application of the 2015 amendments.

The only reason the certified question is salient now is that SFR hopes to undo the precedent published by the United States Court of Appeals for the Ninth Circuit in *Bourne Valley Court Trust v. Wells Fargo Bank,* 832 F.3d 1154 (9th Cir. 2016). In *Bourne Valley*, the Ninth Circuit held nonjudicial foreclosure of a superpriority HOA lien does constitute state action subject to federal due process. *Bourne Valley* also concluded NRS 116.31168 did not mandate notice to first deed of trust holders. The proper way to undo a federal appellate precedent is to petition the United States Supreme Court for a writ of *certiorari*, which investors like SFR have tried once already. *See Bourne Valley Court Tr. v. Wells Fargo Bank, N.A.*, 528 U.S. __, 137 S. Ct. 2296, 2297 (2017).

Seeking to bypass the normal processes, SFR now asks *this* court to contradict the Ninth Circuit's interpretation of NRS 116.31168. Undoing a federal precedent by rendering a contrary interpretation of an already-repealed state statute on an issue this court has already deemed unnecessary to address is not a proper exercise of this court's original jurisdiction under NRAP 5. It would have no impact on state court

cases given this court's holding in *Saticoy Bay* and result only in an advisory opinion the sole purpose of which would be to confuse hundreds of federal court cases already subject to a binding federal appellate precedent. This court should decline to respond to the certified question.

If this court were to conclude this certified question meets the standard under NRAP 5—and it does not—the court should confirm that NRS 116.31168 did *not* incorporate a mandatory notice requirement but rather that it imposed an opt-in notice scheme. This interpretation is supported by the text and the structure of Chapter 116 and subsequent amendments, as well as long-settled canons of construction. Chief among them is the canon that all parts of a statute have meaning; multiple whole sections of Chapter 116 would have been superfluous if the notice provisions of NRS 107.090 incorporated into Chapter 116 mandated notice to holders of a first deed of trust. *Bourne Valley Court Tr. v. Wells Fargo Bank, N.A.*, 832 F.3d 1154, 1159 (9th Cir. 2016). Further, it would render the 2015 amendment to Chapter 116 pointless if the statute already required notice. *See id.* at 1159 n.4.

If the court were to conclude that NRS 116.31168 required notice through an incorporation of NRS 107.090—and the court should *not* so hold—the court should also answer the critical question of what content of notice is required. To answer the certified question by stating that NRS 116.31168 mandates *some* notice, without answering whether it provides sufficient or meaningful notice or opining at all on

the content of the notice, would plainly be a half-measure and a meaningless use of NRAP 5. By its clear terms, NRS 107.090 incorporates NRS 107.080,[1] which requires foreclosure notices to identify, *inter alia*, the *amount* of the senior delinquency. The court should make clear that at a minimum the notice should include all statutorily required facts included in NRS 107.090 and, by incorporation, NRS 107.080, such as (a) the fact that the lien included a senior delinquency because of a superpriority component, and (b) the amount of the delinquency senior to the first deed of trust.

Nevada's doctrine of constitutional avoidance supports this outcome. *See Sheriff, Pershing Cty. v. Andrews*, 286 P.3d 262, 263 (Nev. 2012) (declining to reach the constitutionality of NRS 212.093 and deciding the case on statutory grounds, stating "[i]t is well settled … that we should avoid considering the constitutionality of a statute unless it is absolutely necessary to do so"). In numerous cases, including this instant one, that are pending in both Nevada and federal courts, the HOA did *not* provide notice of the superpriority amount. In such cases, the issue arises whether a scheme that does not require disclosure of the superpriority amount

[1] NRS 107.090 provides, in relevant part, "The trustee or person authorized to record the notice of default shall, within 10 days after the notice of default is recorded and mailed **pursuant to NRS 107.080**, cause to be deposited in the United States mail an envelope, registered or certified, return receipt requested and with postage prepaid, containing a copy of the notice . . ." (emphasis added).

violates due process under the Nevada and United States constitutions. After all, that amount is critical to informing the holder of the first deed of trust not only of the risk that the senior delinquency will result in a loss of a property interest but, more importantly, how to cure it. Holding that NRS 107.090 incorporates NRS 107.080 would resolve any constitutional aspect of this argument, and the cases could proceed on the question whether the foreclosing entities met *statutory* requirements. For these reasons, if the court were to respond to the certified question—it should not—and if the court were to conclude that NRS 116.31168 mandates notice through incorporation of NRS 107.090—it does not—it should also expand the question and include in its answer a holding that NRS 107.090's incorporation would have required HOA notices of default to identify the fact and amount of the superpriority component.

LEGAL ARGUMENT

I. This Court Should Decline to Answer the Certified Question

This court answers a certified question only if it may impact the resolution of the case before the certifying court, and if the question presents an important issue of law. *Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 749, 751, 137 P.3d 1161, 1163-64 (2006). This case meets neither criterion. The certified question is immaterial to the controversy pending in federal court because the sale violated BoNYM's due process rights under *Bourne Valley* regardless of how the court

responds to the certified question. It does not present an important issue of law because (a) this court already declined to answer the certified question, (b) an opinion responding to the certified question would be advisory, and (c) the Legislature already amended NRS 116.31168 to mandate notice and cure the constitutional defect. Also, the case comes to this court in an unusual posture: the federal district court is already subject to binding precedent that directly addresses the certified question. Given this court's *Saticoy Bay* opinion and the Legislature's amendment to NRS 116.31168, this court does not need to—and will never need to—address the question. And the district court needs no guidance; it already has binding guidance from the Ninth Circuit. The only effect of responding to the certified question would be to call the federal appellate precedent into question and generate confusion in hundreds of cases pending in federal court. Prudence, federalism, and comity counsel against interfering with the federal appellate process in this manner.

This court's jurisdiction to answer a certified question arises from NRAP 5. NRAP 5 is based on the Uniform Certification of Questions of Law Act of 1967 (**UCQLA**), "as are most other states' analogous rules or statutes." *Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 749-50, 137 P.3d 1161, 1164 (Nev. 2006). Jurisdiction is discretionary, and this court does not need to respond to a certified question even after ordering briefing. A party may address whether the court should

answer the question in an answering brief after the court orders briefing. That is what happened in *Volvo Cars*: "In their answering brief, the Riccis raise the threshold issue of whether evidentiary issues are properly the subject of questions certified under NRAP 5." *Volvo Cars*, 122 Nev. at 750, 137 P.3d at 1163. This court found that certification was not appropriate under NRAP 5 because the question did not raise an issue that could be determinative of the controversy. BoNYM also raises a threshold objection in this matter. Responding to the certified question is improper under NRAP 5, as interpreted by this court in *Volvo Cars* and by sister courts construing similar rules/statutes.

Volvo Cars reviewed case law from other states interpreting the UCQLA and applied California's standard for assessing whether a certified question ought to be nswered. Under the standard applied in *Volvo Cars*, this court will consider "certified questions when its answers may 'be determinative' of part of the federal case, there is no controlling [Nevada] precedent, and the answer will help settle important questions of law." *Volvo Cars*, 122 Nev. at 750-51, 137 P.3d at 1164. *Volvo Cars* applied California's approach, finding it "best serves the purposes of NRAP 5: federalism, comity, and judicial efficiency." *Id.* *Volvo Cars* cited *Western Helicopter v. Rogerson Aircraft*, 311 Or. 361, 811 P.2d 627, 632-34 (1991), which provides an in-depth discussion of federalism, comity, and judicial efficiency in the context of certified questions. *Volvo Cars* at 751, 137 P.3d at 1164 n.10.

Western Helicopter discusses seven factors to weigh in deciding whether to respond to a certified question. The seven factors are: **(a)** whether there is controlling state law precedent; **(b)** whether the federal court is likely to apply *Pullman* abstention; **(c)** state-federal comity; **(d)** whether responding to the question would settle an important area of law; **(e)** whether the issue is contested; **(f)** whether the case in federal court is final; and **(g)** whether the court should rephrase the question. *W. Helicopter*, 811 P.2d at 631-34. These factors weigh against certification here, where the history of *Bourne Valley*, *Saticoy Bay*, and the 2015 amendment would make a response advisory.

A. State-Federal Considerations Disfavor a Response

The unique circumstance this case presents—a federal district court certifying a question on which there is binding precedent from the federal court of appeals—counsels against a response because it would harm, rather than bolster, comity between this court and the federal court of appeals. The Ninth Circuit has already rendered a judgment, and the U.S. Supreme Court has declined to review that judgment. The Ninth Circuit has concluded that the notice scheme in Chapter 116 in effect at the time of the foreclosure sale was unconstitutional. This court should decline to act as an appellate court over the Ninth Circuit.

In general, acceptance of certification should be exercised to support comity between our state and federal court systems. As the Oregon Supreme Court

explained in *Western Helicopter*, federalism and comity are at the heart of certified jurisdiction practice. Certification is particularly appropriate if the federal *Pullman*[2] doctrine may apply, and a decision of the state court would avoid a federal court making a decision of constitutional law concerning a state statute.

> Acceptance of certification in *Pullman*-style abstention cases is important to the smooth functioning of the federal judicial system, because the alternative to certification is federal court abstention and the attendant delay until resolution . . .
>
> * * *
>
> By contrast, **acceptance of certification in other cases, where abstention would not be the likely alternative, would do little to facilitate the functioning of the federal system**. Rather, certification would simply give the parties and the certifying court a definitive answer to a question of Oregon law that the certifying court itself has the authority to decide.

W. Helicopter, 811 P.2d at 632 (emphasis added). This court cannot now avoid the federal court's ruling that Chapter 116's notice scheme is unconstitutional. The Ninth Circuit has already ruled and that decision is binding on the federal courts in the Ninth Circuit.

[2] In *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L.Ed. 971 (1941), the United States Supreme Court directed the federal courts to abstain in cases where an unsettled question of state law may be dispositive of a claim that state action violated the federal constitution because the answer to the state law question may obviate the need to decide a federal constitutional question.

Certification would promote tension, not comity, between the state and federal courts. Ordinarily, comity favors responding to a certified question out of deference to the certifying court. Given that the district court already has a binding interpretive precedent, however, answering the certified question would do little to facilitate the functioning of the federal courts. To the contrary, it would at best undercut the Ninth Circuit's prerogative as the court with appellate jurisdiction over the certifying court.[3] The sole effect of responding to the certified question would be to call the Ninth Circuit's decision into doubt—and to do so only in cases pending in federal court. This court would simply insert itself as an appellate authority over the Ninth Circuit. NRAP 5 is not intended to allow such an intrusion into the federal courts.

B. The Question Does Not Present an Important Issue of Law

Under *Volvo Cars*, a certified question must present an *important* issue of law. *Volvo Cars*, 122 Nev. at 751, 137 P.3d at 1164. This case does not. An important question of law is one of great public interest that affects substantial property or constitutional rights of public corporations and many citizens. *See, e.g.*, *In re Oahe*

[3] While SFR correctly notes that a state court of last resort has the final word when interpreting state statutes, this rule does not govern in this case. This court already concluded in *Saticoy Bay* that a nonjudicial foreclosure sale is not state action, making an interpretation of NRS 116.31168 unnecessary. *Saticoy Bay* came on the heels of the Legislature's 2015 amendment, which removed the at-issue language from the statute.

Conservancy Subdistrict, 85 S.D. 443, 453, 185 N.W.2d 682, 688 (1971).[4] A question that is of limited legal consequence is not an important question of law worthy of certification. *W. Helicopters*, 811 P.2d at 633; *Opinion of the Justices*, 162 A.3d 188, 201 (Me. 2017). A question that can be resolved by applying established law is not important. Certification should not be used as a means of securing advisory opinions. *Proprietors Ins. Co. v. Cohen*, 451 N.W.2d 904, 906 (Minn. Ct. App. 1990).

The present question does not qualify as important under *Volvo Cars*. Whether the pre-2015 version of NRS 116.31168 required notice to holders of first deeds of trust is a question of limited legal consequence and of no prospective effect. The question will affect some cases pending in federal court, but that does not mean it is an "important" question. At least four factors make this question "unimportant" under NRAP 5. **First,** *Saticoy Bay* makes the question irrelevant in state court; by holding that the non-judicial foreclosures at issue do not constitute state action and so trigger due process concerns, state courts never need to reach the issue of whether NRS 116.31168 requires mandatory notice to holders of first deeds of trust. The question is therefore relevant only in the limited number of cases pending in federal

[4] *Oahe* did not involve certification of a question from a federal court, but the explanation of what constitutes an important question of law was on point.

court. **Second**, the 2015 amendment makes the question irrelevant for *all* cases—in federal *and* state court—that involve a foreclosure sale after October 1, 2015.

Third, the federal courts already have binding appellate precedent on this issue. Even if this court disagrees with *Bourne Valley*, that is not a sufficient reason under NRAP 5 to accept certification, particularly where the court's answer would have no effect on any case in state court. **Fourth**, the split between *Bourne Valley* and *Saticoy Bay* does not create an important issue under NRAP 5, because this court cannot resolve the split with the Ninth Circuit by answering the certified question. SFR argues that this court's intervention is necessary to make the law consistent in state and federal court. Ensuring consistency in the law is not one of the factors favoring certification—NRAP 5 is not a tool for this court to change the outcome of decided cases and precedent in federal court. Harmonizing the law in this manner is instead a rationale for the United States Supreme Court to grant *certiorari* review. *See, e.g.*, Supreme Court Rule 10(b) (favoring for *certiorari* review in cases where a state court of last resort decided an important issue of federal law in a manner that conflicts with a federal appellate court). The United States Supreme Court, however, found the divergence between *Bourne Valley* and *Saticoy Bay* insufficiently important to justify *certiorari* review when it was sought in *Bourne Valley*. But there will be additional cases from the federal and state courts that can become vehicles for Supreme Court review. The certified question does not permit this court

to revisit the disagreement on the doctrine of state action and, in any event, this court cannot create harmony by reversing an existing decision. Because no important issue of law will be decided, the court should decline certification under NRAP 5.

C. The Certified Question Is Not Determinative

Volvo Cars requires a question to be determinative of at least part of the federal case. The certified question fails this standard because BoNYM's due process argument would remain intact even if this court finds NRS 116.31168 required notice to holders of first deeds of trust. Having found state action, *Bourne Valley* recognizes a federal due process right that can be violated facially or in the application of a statute. Even if this court interprets NRS 116.31168 as having required some kind of notice prior to the 2015 amendment, *Bourne Valley*'s central holding—that a Chapter 116 foreclosure involving a superpriority lien constitutes state action—would remain undisturbed. Pointing out the absurd practical effect of the "opt-in" notice scheme, the Ninth Circuit commented:

> [D]espite that only the homeowners' association knew when **and to what extent** a homeowner had defaulted on her dues, the burden was on the mortgage lender to ask the homeowners' association to please keep it in the loop regarding the homeowners' association's foreclosure plans. How the mortgage lender, which likely had no relationship with the homeowners' association, should have known to ask is anybody's guess.

Bourne Valley Court Tr. v. Wells Fargo Bank, N.A., 832 F.3d 1154, 1158 (9th Cir. 2016) (emphasis added).

Bourne Valley's concern that the statute did not require an HOA to disclose "to what extent" a homeowner had defaulted is instructive. It is not sufficient that a notice of default and/or sale be given to the first deed of trust holder. The notice must also disclose the *extent* of the homeowner's default. Disclosing the extent of default is important because the lien created by NRS 116.3116 is not fully senior to a first deed of trust—only nine months' worth of common assessments, plus maintenance and nuisance abatement costs, if any, have priority over a deed of trust. The lien is otherwise junior, and unless the statute requires the association to give notice of the extent of a default, the first deed of trust holder cannot tell whether its interest is in danger. The statute will remain facially unconstitutional under *Bourne Valley,* even if this court answers the certified question in the manner SFR requests.

Star Hill's notices of default and sale failed to apprise BoNYM whether the lien even included a superpriority component. *See infra* Section III. The notices failed to identify the *amount* of the superpriority component, if any. *See infra id*. Critically, the notices did not say what BoNYM needed to do to satisfy the superpriority lien. *See infra id.* An "elementary and fundamental requirement" of due process is "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Tulsa Prof'l Collection Services, Inc. v. Pope*, 458 U.S. 478, 484 (1988) (*quoting Mullane*, 339 U.S. at 314). Under the facts of this case,

Star Hill committed at least an as-applied due process violation by failing to disclose the existence and amount of the superpriority component. Even if the court were to determine NRS 116.31168 mandated notice through incorporation of NRS 107.090—it did not—the due process issue will remain due to the as-applied violation, and the certified question is not determinative.[5]

D. The Totality of Factors Favor Not Answering the Question

This matter presents three unique factors not present in *Volvo Cars*, or any other case applying NRAP 5. **First**, the certifying court already has precedent to guide—and bind—it. *Bourne Valley* answered the very question the federal district court certified to this court. The United States Supreme Court declined *certioriari* on *Bourne Valley*'s analysis despite being aware of the split with *Saticoy Bay*. **Second**, this court has already held that whether NRS 116.31168 mandated notice is not necessary to decide. **Third**, the Legislature has amended NRS 116.31168 to

[5] The court's review remains non-determinative of the federal case or BoNYM's notice argument even if, as urged in the alternative in Part III, *infra*, this court expands the question to consider the import of NRS 107.090's incorporation of NRS 107.080, and the latter statute's requirement that the amount of the senior delinquency be noticed. Either this court will rule that Chapter 116, and any provisions incorporated into Chapter 116, does not require the amount of senior delinquency to be noticed to holders of first deeds of trust, and BoNYM's claim of deficient notice will proceed on facial and as-applied constitutional grounds, or the court will rule Chapter 116 and incorporated provisions do require the amount of the superpriority component to be noticed to holders of first deeds of trust, and BoNYM's claim of deficient notice will proceed on statutory and as-applied constitutional grounds.

actually mandate notice, making the notice issue relevant only to cases involving a pre-October 2015 sale that are already pending in federal court. While due process is an issue in those cases, the certified question has zero importance beyond them. This trio of unique circumstances makes certification contrary to comity, judicial efficiency, and federalism.

II. This Court Should Adopt the *Bourne Valley* Analysis

If the court were to elect to answer the certified question, it should conclude, in agreement with *Bourne Valley*, that NRS 116.31168 does *not* incorporate a mandatory notice requirement from NRS 107.090. Prior to the 2015 amendments, Chapter 116 did not mandate notice to holders of first deeds of trust. Instead, the statute contained "request-notice" or "opt-in" notice provisions, requiring notice *only* if lienholders requested it in advance. *See, e.g.*, NRS 116.31163(2) (2014) (requiring notice of default to "any holder of a security interest encumbering the unit owner's interest **who has notified the association**, 30 days before the recordation of the notice of default, of the security interest.") (emphasis added); NRS 116.311635 (2014) (requiring notice of sale to "[t]he holder of a recorded security interest or the purchaser of the unit, **if either of them has notified the association**, before the mailing of the notice of sale, of the existence of the security interest, lease of contract of sale, as applicable.") (emphasis added). As *Bourne Valley* explained, NRS chapter 116 "required a homeowners' association to alert a mortgage lender it

intended to foreclose only if the lender had affirmatively requested notice." *Bourne Valley Court Tr. v. Wells Fargo Bank, N.A.*, 832 F.3d 1154, 1156 (9th Cir. 2016).

The pre-2015 version of NRS 116.31163(2) required notice of default to be sent to "any holder of a security interest encumbering the unit's owner's interest who has notified the association, 30 days before the recordation of the notice of default, of the security interest." NRS 116.31163(2) (2014). Likewise, NRS 116.311635(1)(b)(2) required the notice of sale to be sent to the holder of a recorded security interest if the security interest holder "has notified the association, before mailing of the notice of sale of the existence of the security interest." NRS 116.311635(1)(b)(2) (2014). In *SFR Investments*, this court discussed these statutes and recognized that they operate as an "opt-in" scheme. "Before [foreclosure], the HOA must give notice of sale to the owner and to the holder of a recorded security interest **if** the security interest holder 'has notified the association, before mailing of the notice of sale of the existence of the security interest.'" *SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408, 411 (Nev. 2014) (emphasis added) (citing NRS 116.311635(1)(b)(2)).

SFR misreads *SFR Investments*, saying this court already deemed NRS 107.090 incorporated. This misstates the holding of *SFR Investments*, for two reasons. **First**, the scope and effect of NRS 116.31168's reference to NRS 107.090 was not at issue in *SFR Investments*—it was not controverted; it was not briefed; and

it was not important to the court's resolution of the case. Dicta is not controlling. A statement in a case is dictum when it is unnecessary to a determination of the question involved. *Argentena Consol. Min. Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 536, 216 P.3d 779, 785 (2009). This court's passing reference to NRS 107.090 in *SFR Investments* is dicta.

Second, *SFR Investments* did not say NRS 116.31168 mandated notice. It merely mentioned, in passing, that NRS 107.090 is incorporated into NRS 116.31168. This is also not controverted; the statutory language was apparent and *Bourne Valley* itself recognized that "Section 116.31168(1) stated, '[t]he provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed.'" *Bourne Valley*, 832 F.3d at 1159. The key issue is not whether NRS 116.361168 incorporated NRS 107.090, but whether that incorporation somehow resulted in NRS 116.31168 mandating notice to junior lienholders. It did not.

The text of NRS 116.31168, and the structure of Chapter 116, confirm that NRS 116.31168 was a request-notice provision and did not import any mandatory notice provisions of NRS 107.090. The title of NRS 116.31168 is, "Foreclosure of liens: **Requests** by interested persons for notice of default and election to sell or notice of sale." NRS 116.31168 (emphasis added). NRS 116.31168(1), the provision incorporating NRS 107.090, read, before 2015: "The provisions of NRS

107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed. **The request** must identify the lien by stating the names of the unit's owner and the common-interest community." *Id.* (emphasis added). The use of the definite article "the" confirms the 1993 Legislature understood notice would be *only* to those who requested it.[6] NRS 116.31168 did not mandate notice to a first deed of trust holder, even after NRS 107.090 is applied.

Consideration of the other sections added to Chapter 116 in 1993 further supports the conclusion that NRS 116.31168 did not mandate notice by incorporating NRS 107.090. If NRS 116.31168 mandated notice to all lienholders junior to the superpriority lien, then both NRS 116.31163 and NRS 116.311635 would be completely superfluous and a dead letter at the very time they were enacted. *S. Nev. Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 117 P.3d 171, 173 (2005) (a statute must be interpreted "in a way that would not render words or phrases superfluous or make a provision nugatory") (internal quotation marks omitted); *see also Bourne Valley Court Tr. v. Wells Fargo Bank, N.A.*, 832 F.3d 1154, 1159 (9th Cir. 2016). Just as importantly, the Legislature would have had no reason to amend NRS 116.31168 if the statute already required notice to mortgagees

[6] This is confirmed by the deletion, in the 1993 amendments, of the sentence that followed: "The association must also give reasonable notice of its intent to foreclose to all holders of liens in the unit who are known to it." NRS 116.31168(1) (1991).

whose interests may be extinguished. *Bourne Valley* got it right—NRS 116.31168 did not mandate notice to first deed of trust holders that had not requested it.[7]

III. In the Alternative, if the Court Answers the Question, It Should Rephrase It and Hold that Incorporation of NRS 107.090 into NRS 116.31168 Would Have Required Notices of Default and/or Sale Sent to First Deed of Trust Holders to Disclose Whether the Lien Included a Superpriority Component and the Amount of the Superpriority Component

This court has discretion to reframe the certified question; it is not bound to answer the question as posed. *See, e.g., W. Helicopters Services, Inc. v. Rogerson Aircraft Corp.*, 311 Or. 361, 370-71, 811 P.2d 627, 633-34 (1991); Wright & Miller § 4248 at 177-78. If the court responds to the certified question, it should address an important issue the federal district court did not include in its certification order: if NRS 116.31168 mandated notice to first deed of trust holders, what was the content necessary for notices of default and/or sale to include? This additional issue

[7] In *Saticoy Bay*, rather than decide that NRS 116.31168 incorporates mandatory-notice provisions, this court proceeded to a constitutional question, and concluded, in disagreement with the Ninth Circuit, that the non-judicial foreclosures at issue did not constitute state action. If the court were to now rule that, as a matter of statutory interpretation, the statute *does* incorporate mandatory notice, that would render its decision in *Saticoy Bay* merely an advisory opinion and, further, would suggest that the court there ought to have decided the statutory question rather than the constitutional one. Rather, given a traditional canon of constitutional avoidance, it appears the court in *Saticoy Bay* believed that NRS 116.31168 did *not* incorporate a mandatory-notice provision, thus necessitating the constitutional decision and disagreement with the Ninth Circuit. Either deciding that NRS 116.31168 does not incorporate mandatory notice or declining to answer the certified question would thus be consistent with *Saticoy Bay* and would preserve the validity of that decision.

will be critically important for the resolution by the federal court of the facial and as-applied due process challenges in this case, and others. Indeed, answering the question of *whether* notice was required, without answering the question of what notice means, would be at best a half-measure. It would proliferate, rather than resolve, disputes.

If this court construes NRS 116.31168 to incorporate a mandatory notice requirement, and goes no further, BoNYM's due process challenge will not be over. It will only raise more questions. BoNYM will then argue that NRS 116.31168 mandates, and BoNYM received, constitutionally inadequate notice. At a minimum, it is critical that mortgage lenders facing a default be afforded an opportunity to cure a default. *See, e.g., Bourne Valley Court Tr. v. Wells Fargo Bank, N.A.*, 832 F.3d 1154, 1158 (9th Cir. 2016) ("Before it takes an action that will adversely 'affect an interest in life, liberty, or property . . ., a State must provide 'notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'") (citing *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795, 103 S. Ct. 2706, 77 L.Ed.2d 180 (1983)). After all, a notice that the *homeowner* is in default does not inform the holder of a first deed of trust that his property right is at risk *at all*, since it may be that there is no superpriority lien or other senior delinquency. Further, without knowledge of the *amount* of a superpriority lien, the holder of a first deed of trust is

afforded no opportunity to cure. *See Garcia v. Fed. Nat'l Mortg. Ass'n*, 782 F.3d 736, 743 (6th Cir. 2015) (holding that in the "foreclosure context" a constitutionally adequate notice is met when given "timely and adequate notice of the reasons for the default in advance of the foreclosure and an opportunity to cure any default"). No opportunity to cure is given if the holder of the first deed of trust is not informed of the *amount* of the senior delinquency. In sum, the pre-amendment NRS 116.31168 would fail a facial constitutional challenge even if this court determines it mandated notice unless the statute is construed to require disclosure of the existence and amount of the superpriority component.

This court can provide needed clarity, and potentially avoid a constitutional question, by making clear that NRS 107.080 is incorporated by NRS 107.090. For context, NRS 107.080 describes the form, content, and timing of notices, whereas NRS 107.090 contemplates who, other than the borrower and property owner, receives notice. NRS 107.090 explicitly incorporates NRS 107.080: NRS 107.090(3) provides the trustee must see that the "notice of default is recorded and mailed pursuant to NRS 107.080." If this court holds NRS 116.31168 mandated notice via NRS 107.090, it should also affirm that NRS 116.31168 incorporated NRS 107.080. This is important because NRS 107.090 includes no content requirements for notice and would hardly suffice to pass constitutional standards if it merely requires some vague notion of notice. NRS 107.080(3)(a), by contrast, requires that

the notice "[d]escribe the deficiency in performance or payment" and, if permitted by the obligation, "contain a notice of intent to declare the entire unpaid balance due," except that acceleration may not occur if the deficiency is cured. If NRS 116.31168(1) requires notice to a holder of a first deed of trust pursuant to NRS 107.090, which in turn adopts content requirements from NRS 107.080, to be substantially compliant the notice must at a minimum describe "the type of default, failure to pay …, and provide[ ] … a simple means of determining the amount in arrears." *Riley v. Greenpoint Mortg. Funding, Inc.*, No. 2:10-CV-1873-RLH-RJJ, 2011 WL 1979831, at *3 (D. Nev. May 20, 2011).

This court should not address whether the content of notice required by Chapter 116 satisfies federal due process; that question should be reserved for the federal courts in light of this court's finding in *Saticoy Bay* that there is no state action. However, if this court affirms that NRS 116.31168, by incorporating NRS 107.090 and in turn NRS 107.080, requires that notice include the fact and amount of a delinquency senior to the first deed of trust, such as a superpriority lien, it may serve the purpose of avoiding another finding of unconstitutionality in the federal courts. If the court finds NRS 116.31168 incorporates NRS 107.090's mandatory notice provisions, it also should resolve the statutory question of the content of notice and find that NRS 116.31168 incorporate NRS 107.080(3) and hold that notices of default and sale must include a description of the superpriority component—a

description that includes (a) the existence of a superpriority component and (b) the dollar amount necessary to pay off the superpriority component.

CONCLUSION

The federal litigation over the interpretation of NRS 116.31168 and NRS 107.090 is final, it relates to a statutory problem the Legislature fixed more than two years ago, and its effects will only be felt in federal court. This is not a question that the court should answer; NRAP 5 is not a rule of *de facto* appellate jurisdiction over the Ninth Circuit when the Ninth Circuit interprets a Nevada statute. If the court does answer the question, it should confirm *Bourne Valley* interpreted the statute correctly, or, in the alternative, it should also address the contents required to be included in an association's notice.

DATED this 4th day of October, 2017.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this opening brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this opening brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 7,482 words.

FINALLY, I CERTIFY that I have read this **Answering Brief**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this answering brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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…

I understand that I may be subject to sanctions in the event that the accompanying answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 4th day of October, 2017.

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PROOF OF SERVICE

I certify that I electronically filed on the 4th day of October, 2017, the foregoing **ANSWERING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal either are registered with the CM/ECF or have consented to electronic service.

[ ] By placing a true copy enclosed in sealed envelope(s) addressed as follows:

[X] (By Electronic Service) Pursuant to CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF systems sends an e-mail notification of the filing to the parties and counsel of record listed above who are registered with the Court's CM/ECF system.

[X] (Nevada) I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

/s Ariel Stern
An employee of Akerman LLP