IN THE SUPREME COURT OF NEVADA

U.S. BANK N.A., AS TRUSTEE FOR THE SPECIALTY UNDERWRITING AND RESIDENTIAL FINANCE TRUST MORTGAGE LOAN ASSET-BACKED CERTIFICATES SERIES 2006-BC4, Appellant, vs. THUNDER PROPERTIES, INC.; AND WESTLAND REAL ESTATE DEVELOPMENT AND INVESTMENTS, Respondents.	Supreme Court No. 81129

Certified Question from the United States Court of Appeals for the Ninth Circuit
Case No. 17-16399

OPENING BRIEF

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RULE 26.1 DISCLOSURE

1. U.S. Bank is a wholly owned subsidiary of U.S. Bancorp.

2. U.S. Bancorp is a publicly held company whose shares are traded on the New York Stock Exchange. It has no parent company and no publicly held company owns more than 10% of U.S. Bancorp's shares.

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JURISDICTIONAL STATEMENT

This is an original proceeding under NRAP 5, based on a question certified by the Ninth Circuit. Jurisdiction is discretionary. *See, e.g., Volvo Cars of N. Am. Inc. v. Ricci*, 122 Nev. 746, 137 P.3d 1161 (2006).

ROUTING STATEMENT

NRAP 5(a) allows only the supreme court to hear certified questions.

STATEMENT OF THE ISSUES

(1) When a lienholder whose lien arises from a mortgage for the purchase of property brings a claim seeking a declaratory judgment that the lien was not extinguished by a subsequent foreclosure sale of the property, is that claim exempt from statutes of limitations under *City of Fernley v. Nevada Department of Taxation*, 366 P.3d 699 (Nev. 2016)?

(2) If a claim described in (1) is subject to a statute of limitations:

(a) Which limitations period applies?

(b) What causes the limitations period to begin to run?

STATEMENT OF THE CASE

U.S. Bank seeks a declaration in federal district court that its deed of trust survived an HOA foreclosure. It alleges the deed of trust survived because tender was futile and therefore excused.

The federal district court dismissed U.S. Bank's suit as untimely because it was not filed within five years of the sale. (AA196; AA29.) U.S. Bank appealed to the Ninth Circuit, which certified two questions. First, is this suit exempt from statutes of limitations under *City of Fernley v. Nevada Department of Transportation*? If not, what statute applies and when does it start to run?

The Court should answer "yes" to the first certified question. Because U.S. Bank seeks only prospective relief that would resolve a continuing dispute about the parties' rights, its suit is exempt from the statute of limitations under *City of Fernley*.

If the Court applies a statute of limitations, it should adopt either a period that is coextensive with the validity of the deed of trust under NRS 106.240, or the limitations period its *Berberich* decision recently applied to similar suits by HOA foreclosure buyers. If it applies the statute from *Berberich*, the limitations period should not begin to run until the HOA buyer or its successor in interest repudiates the deed of trust by taking some action inconsistent with U.S. Bank's rights as a lienholder and then informing U.S. Bank.

STATEMENT OF FACTS

I. Factual Background

In 2006, Bryan and Michelle Rodriguez obtained a $212,672.00 loan, which they secured with a deed of trust against their property. (AA4.) The deed of trust was later assigned to U.S. Bank. (AA4.)

The property was part of Woodland Village Homeowners Association. (AA9.) In 2010, Woodland recorded a notice of delinquent assessments against the property, followed by a notice of default and notice of sale. (AA9-10.) So far as U.S. Bank's complaint alleges, no party tendered the superpriority debt, but tender was futile because "Woodland Village and/or its agents would have rejected the attempted tender." (AA5; *accord* AA9.)

On February 10, 2011, Woodland foreclosed and bought the property itself, winning a $200,000 house for a credit bid of $5,562.25. (AA4; AA6.) It later sold the property to Westland Real Estate Development and Investments, which sold the property to appellee Thunder Properties Inc. in 2013. (AA6.)

II. Procedural History

U.S. Bank filed the present lawsuit on August 25, 2016, about five and a half years after the foreclosure sale. (AA1.) It sought a declaratory judgment that its deed of trust had survived the sale or, in the alternative, sought damages from Woodland and its foreclosure trustee. (AA13.) Its claims against Woodland and the trustee were dismissed without prejudice because U.S. Bank had not yet completed the mediation process mandated by NRS 38.310. (AA33.) Its declaratory judgment claim against Thunder went forward.

Thunder moved to dismiss the declaratory judgment claim as time-barred. (AA35-45.) It argued the claim was for quiet title under NRS 40.010, and subject to

a five-year limitations period under NRS 11.070 or 11.080. (AA40-41.) It argued the claim accrued on the day of the foreclosure sale, so the statute of limitations ran in February 2016. (AA41-42.)

U.S. Bank responded that the claim was not technically quiet title but rather a declaratory judgment about the enforceability of the deed of trust. Because enforcement of the deed of trust was not time-barred, it argued, neither was a declaratory claim about enforcing the deed of trust. (AA48.) It argued NRS 11.070 and 11.080 did not apply: 11.070 concerns suits "founded upon title," but U.S. Bank has never claimed title; 11.080 concerns suits "for recovery of real property," and U.S. Bank is not attempting to recover real property. (AA47-48.) Even if they did apply, these statutes did not begin running on the sale date. (AA49-50.) Finally, U.S. Bank argued Thunder cannot claim clear title through expiration of a statute of limitations without satisfying the requirements of adverse possession. (AA50-52.)

The district court adopted Thunder's arguments and ruled U.S. Bank's suit was untimely. (AA195-196; *see also* A28-32 (logic of earlier statute of limitations ruling incorporated into dismissal order).) It reasoned that U.S. Bank's cause of action had accrued at the time of the foreclosure sale, triggering a five-year statute of limitations that ran before U.S. Bank filed suit. (AA195, AA29.) It dismissed U.S. Bank's complaint with prejudice. (AA196.)

It did not, however, decide whether U.S. Bank's deed of trust survived the HOA's sale. It did not address U.S. Bank's arguments about Thunder needing to satisfy the requirements of adverse possession in order to clear its title through the expiration of a statutory period. (*See* AA192-196.) Its reasoning did not require it to decide whether the sale had extinguished the deed of trust; instead it ruled the statute had begun running because the deed of trust had been "called into question" (AA195). And it did not declare the deed of trust extinguished; it merely granted Thunder's motion to dismiss and ordered entry of judgment for Thunder. (AA196.) The judgment likewise said nothing about the deed of trust's validity. (AA197.)

Because the district court did not decide whether the deed of trust survived, it did not resolve the parties' dispute. If U.S. Bank tried to foreclose nonjudicially, for example, and Thunder sued to stop the foreclosure, the district court's ruling would not be *res judicata* entitling Thunder to prevail. Claim preclusion would not apply, since U.S. Bank would not be asserting any claims. *Cf. Facklam v. HSBC Bank USA*, 401 P.3d 1068, 1071 (Nev. 2017) (nonjudicial foreclosure is not a "judicial action" regulated by statutes of limitations). And issue preclusion would not apply because a decision about the deed of trust's validity was not "necessary to the [district court's] judgment," *Alcantara ex rel. Alcantara v. Wal-Mart Stores Inc.*, 321 P.3d 912, 917 (Nev. 2014)—by the district court's logic, U.S. Bank's suit is time-barred

regardless of whether its deed of trust is valid. (*See* AA195 (statute began running when deed of trust's validity was "called into question"); AA29 (same).)

Rather than schedule a foreclosure and further complicate the dispute, U.S. Bank appealed in July 2017. (AA198.) After full briefing and oral argument, the Ninth Circuit stayed consideration pending this Court's decision in *Berberich v. Bank of America N.A.*, 136 Nev. 93, 460 P.3d 440 (2020). When *Berberich* did not decide the relevant questions, the Ninth Circuit certified them to this Court, which accepted certification through an order dated September 11, 2020.

SUMMARY OF THE ARGUMENT

U.S. Bank seeks prospective relief only: a declaration as to whether its deed of trust remains enforceable. Because U.S. Bank seeks prospective relief, no statute of limitations applies under *City of Fernley v. Nevada Department of Taxation*, 366 P.3d 699 (Nev. 2016), and its suit may go forward.

Federal courts take a slightly different approach to statutes of limitations and declaratory judgments—they look through the declaratory form of the lawsuit to the substance of the parties' dispute. Under this approach, a declaratory suit is time-barred only if it would entitle the plaintiff to some affirmative relief that is itself time-barred. In this case, the affirmative relief U.S. Bank seeks is foreclosure. Foreclosure is not time-barred, so U.S. Bank's declaratory suit is timely.

If the Court rejects the federal approach and seeks to apply a Nevada statute, U.S. Bank argues that none of the statutes apply on their own terms. NRS 11.070 and 11.080 govern suits about title, not about liens, and NRS 11.190(3) clearly does not apply. Rather than applying the four-year catch-all, however, this Court has held that it should seek and apply an analogous statute of limitations if possible. The analogous statute it should apply is NRS 11.080, which would apply to a suit by Thunder seeking to raise the same issues.

In that case, the statute should not begin running on the date of the sale. An HOA sale has no effect on a senior deed of trust when the superpriority debt is tendered or when tender is excused, and this Court has already held that, after tendering, a lienholder does not have to file a suit to protect its interest. Instead, as with a quiet title suit by a party in possession of the premises, the statute of limitations should not begin to run until the lienholder's interest is disturbed—until an adverse party takes action inconsistent with the continued validity of the lien.

ARGUMENT

I. No Statute of Limitations Applies.

A. *City of Fernley* holds no statute applies to prospective relief.

U.S. Bank seeks declaratory relief under three statutes: the Federal Declaratory Judgment Act, 28 U.S.C. § 2201; Nevada's version of the Uniform Declaratory Judgments Act, NRS 30.040; and Nevada's quiet title statute, NRS

40.010. (AA10.) None of these statutes contains a statute of limitations, and no statute of limitations expressly applies itself to them. *Cf. Luckenbach S. S. Co. v. United States*, 312 F.2d 545, 548 (2d Cir. 1963) ("Limitations statutes do not apply to declaratory judgments as such."). In fact, Nevada applies no limitations period at all to suits seeking declaratory relief.

In *City of Fernley v. Nevada Department of Taxation*, the City of Fernley sought to invalidate a state revenue distribution statute as inconsistent with the Nevada Constitution. *City of Fernley v. Nev. Dep't of Tax.*, 366 P.3d 699, 707–08 (Nev. 2016). It also sought money damages as compensation for revenues it had been denied under the allegedly unconstitutional statute. *Id.* at 708.

Before reaching the merits, this Court assessed whether the city's claims were barred by the statute of limitations, and it gave different answers for the two different sorts of relief Fernley requested, explaining, "The statute of limitations applies differently depending on the type of relief sought." *Id.* at 706. As to money damages, the Court applied the four-year catch-all statute. *Id.* at 707. Because Fernley had known about its damages claim for eleven years, the four-year statute barred it from seeking damages for the allegedly unconstitutional denial of revenue.

On the other hand, the four-year statute did not bar the declaratory judgment claim. *Id.* This ruling was required by "the doctrine of constitutional supremacy," and aimed to stop statutes of limitations from interfering with judicial review. *Id.*

But it also reached more broadly. It approvingly quoted a New York case—one without constitutional issues—as "holding that no statutory limitation applies 'when a declaratory judgment will serve a practical end in determining and stabilizing an uncertain or disputed jural question, either as to present or prospective obligations.'" *Id.* at 706 (quoting *Kirn v. Noyes*, 31 N.Y.S.2d 90, 93 (1941)[1]).

City of Fernley also approvingly quoted a Michigan case involving the constitutionality of a tax statute, but the Michigan case's reasoning (like *City of Fernley*'s) was only partly about constitutional law. *See id.* at 706–07 (citing *Taxpayers Allied for Constitutional Taxation v. Wayne Cty.*, 537 N.W.2d 596, 600 (Mich. 1995)). Like *City of Fernley*, the Michigan Supreme Court said applying a statute of limitations to declaratory claims about the constitutionality of statutes would frustrate judicial review. *Taxpayers Allied,* 537 N.W.2d at 600 ("To hold otherwise would truncate the constitutional right.").

Yet the Michigan court also made a prudential argument with equal force outside constitutional cases: if the court held prospective relief was time-barred, that would not settle the dispute over the tax statute's validity; instead it would force the plaintiffs to sue for damages after the state again collected the allegedly invalid tax.

[1] *Kirn* did not actually involve a statute of limitations, but, because Nevada law applies to the present case rather than New York law, what *Kirn* actually said is less important than the way this Court interpreted and used *Kirn*.

Id. For that reason, the court concluded that applying a statute of limitations to lawsuits seeking prospective relief would be "very impractical." *Id.*

B. U.S. Bank seeks prospective relief.

City of Fernley's distinction between prospective and retrospective relief is very simple. It does not depend, as courts held in other federal District of Nevada cases, on whether a declaratory suit seeks "to prevent future constitutional violations." *Bank of N.Y. Mellon v. Foothills at MacDonald Ranch Master Ass'n*, 329 F. Supp. 3d 1221, 1234 (D. Nev. 2018) (citing *Fernley*). *City of Fernley* also applies regardless whether the impetus for the declaratory relief arose in the past or is expected in the future. *Bank of N.Y. Mellon v. Willow Creek Cmty. Ass'n*, No. 2:16-cv-00717-RFB-BNW, 2019 WL 4677009, at *3 (D. Nev. Sept. 25, 2019) (unpublished) (citing *Fernley*). Instead *City of Fernley* asks only whether the relief is declaratory: "There are two types of relief: retrospective relief, such as money damages, and prospective relief, such as injunctive or declaratory relief." 366 P.3d at 706. There is no question which side of this line U.S. Bank's claim falls on. U.S. Bank seeks declaratory relief, which is prospective.

The reason prospective declaratory relief is not subject to limitation is the same practical reason identified in *Taxpayers Allied*, on which *Fernley* heavily relied. In both *Taxpayers Allied* and *Fernley*, applying a statute of limitations would not have resolved the parties' dispute because the constitutional issue would have

been left unaddressed. A ruling that a particular cause of action was time-barred would not stop new causes of action from accruing. Each time an unconstitutional tax was collected (*Taxpayers Allied*) or each time revenue was unconstitutionally withheld (*Fernley*), a new damages claim would arise with a new limitations period.

The same problem exists here. U.S. Bank does not seek damages for an injury it suffered on the sale date—if it did, then a statute of limitations would apply. Instead, U.S Bank seeks judicial confirmation that it may enforce the deed of trust in the future, for example through the following actions:

- inspecting the property (*see* AA80 (section 7 providing, "Lender . . . may make reasonable entries upon and inspections of the Property"));
- claiming insurance proceeds if the property is destroyed (*see id.* (section 5 providing, "If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument . . . ."));
- requiring Thunder to maintain the property (*see id.* ("Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property."));
- demanding rents under the Uniform Assignment of Rents Act (*See* NRS 107A.010 *et seq*.);

- continuing to pay taxes and insurance to preserve its interest in the property; and
- foreclosing.

The district court's order does not resolve any of these questions, and all of them can still be raised and decided through some other cause of action. U.S. Bank could do any of the following:

- demand rents or an inspection and then sue if Thunder refused,
- bring a judicial foreclosure suit,
- schedule a nonjudicial foreclosure[2] and litigate the deed of trust's validity if Thunder sued to stop the sale, or
- schedule a nonjudicial foreclosure, buy the property at the sale, and sue to eject Thunder from the property.

But each of these other avenues, especially the nonjudicial foreclosure, requires escalating the conflict in some way, complicating the issues, incurring avoidable fees, and perhaps exposing U.S. Bank to damages claims by Thunder.

For this reason, many states do not impose a statute of limitations on quiet title actions seeking prospective relief regarding the status of title (as opposed to

[2] Despite the time that has passed since the HOA sale, U.S. Bank has the right to initiate non-judicial foreclosure under NRS 107.080. *See Facklam v. HSBC Bank USA*, 401 P.3d 1068, 1071 (Nev. 2017) (statutes of limitations do not apply to nonjudicial foreclosure).

possession of the property).[3] Applying a statute of limitations to such a claim leaves the parties without a means for determining the status of the title. No statutory default rule determines whether U.S. Bank's deed of trust continues to encumber Thunder's property; thus, U.S. Bank has no way to have a determination whether it may enforce the lien interest. The same pragmatic concerns that underlie the reasoning in *City of Fernley* apply here: rather than extending an ill-suited statute of limitations to leave the parties with an unresolved dispute, the Court should follow its precedent and not apply any statute of limitations to U.S. Bank's claims.

The existence of ongoing conflict demonstrates the district court did not resolve the controversy by dismissing the case. The ongoing conflict illustrates why *Fernley* is dispositive: U.S. Bank sought a declaration regarding present and future rights, not retroactive or coercive relief.

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[3] *See, e.g.*, *Williams v. Mertz*, 549 So. 2d 87, 88 (Ala. 1989) ("This was a quiet title action, and there is no statute of limitations for quiet title actions."); *Kean v. Forman*, 752 A.2d 906, 908 (Pa. Super. Ct. 2000) (holding a quiet title action seeking to remove cloud on title is not subject to any statute of limitations); *Ditta v. Conte*, 298 S.W.3d 187, 192 (Tex. 2009) ("We have held that as long as an injury clouding the title remains, so too does an equitable action to remove the cloud; therefore, a suit to remove the cloud is not time-barred."); *Branting v. Salt Lake City*, 153 P. 995, 1001 (Utah 1915) ("the action is purely one to remove a cloud or to quiet title [to real property], the statute of limitations has no application"); *Van Sant v. City of Seattle*, 287 P.2d 130, 132 (Wash. 1955) ("Respondent's action was brought to remove a cloud on his title, and such actions are not subject to the statute of limitations."); 54 C.J.S. Limitations of Actions § 42 ("an action which in essence is an action to remove clouds from title is not subject to the period of limitations prescribed for a possessor action").

C. No statute of limitations applies to defenses.

Holding U.S. Bank's action timely under *Fernley* also works in harmony with another limitations doctrine: limitations apply to claims, not to issues or defenses.

In *Dredge Corp. v. Wells Cargo Inc.*, a plaintiff brought a declaratory claim, asking a district court to rule that it was no longer bound by its contract with the defendant because the defendant had breached the contract first. 389 P.2d 394, 396 (Nev. 1964). The district court refused. It ruled the defendant had breached "the contract at a time more than 6 years before this suit was commenced," so "this action in all of its interrelated aspects was barred by limitations." *Id.*

This Court reversed. Anticipating *Fernley*'s distinction between retrospective and prospective relief, it explained, "Of course a claim for coercive relief (damages and an accounting) is subject to the bar of limitations." *Id.* But, it reasoned, Nevada's statutes of limitations apply to "cause[s] of action," and the plaintiff's "request . . . for a declaration of nonliability . . . does not present a 'cause of action' in the sense that term is used in N.R.S. 11.010." *Id.* (citing *Luckenbach S.S. Co. v. United States*, 312 F.2d 545 (2d Cir. 1963)).

> [T]hat is to say, [the plaintiff] does not contend that it has a 'cause of action' not to convey—rather, its position is that it has a valid reason or defense for not doing so—namely, Wells' breach of its obligation to perform under the contract. The subject matter of its request, therefore, is in the nature of a defense. Limitations do not run against defenses. The statute [of limitations] is available only as a shield, not as a sword.

Id. (citing *N. Pac. Rwy. v. United States*, 277 F.2d 615, 623–24 (10th Cir. 1960)).

Like the plaintiff in *Dredge Corp.*, U.S. Bank is not demanding "coercive relief" like damages, and it is not asserting a "cause of action" in the relevant sense. Instead, like the *Dredge Corp.* plaintiff, it wants to take an action outside of court: the *Dredge Corp.* plaintiff wanted to disregard a contractual duty, and U.S. Bank wants to foreclose. And like the *Dredge Corp.* plaintiff, U.S. Bank anticipates its out-of-court action will provoke a lawsuit, so it seeks a declaratory judgment that would protect it from the anticipated lawsuit.

D. The Court may need to distinguish among U.S. Bank's theories.

U.S. Bank's complaint asserted more than one basis for its requested declaratory judgment, and the present argument applies more clearly to some theories than to others.

To the extent U.S. Bank seeks equitable relief from an otherwise valid sale based on procedural irregularities, *see Nationstar Mortg. LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 405 P.3d 641, 648 n.11 (Nev. 2017), there is some intuitive argument for requiring it to seek equitable relief from the sale within some limitations period after the sale occurred. (*See* AA8-9 (seeking relief because notices were inadequate, the sale was commercially unreasonable, and Woodland Village promised the deed of trust would not be invalidated).)

However, U.S. Bank's complaint also claims tender was futile and would have been rejected. (AA9.) Where the tendering party knew tender "would have been rejected," tender is excused, and the deed of trust survives as if tender had occurred. *7510 Perla Del Mar Ave Tr. v. Bank of Am. N.A.*, 458 P.3d 348, 351–52 (Nev. 2020).

Thunder may argue that there is a presumption the deed of trust was extinguished, so even U.S. Bank's claim relating to tender needed to be brought within four years. But there is no such presumption. Nothing in Chapter 116, or this court's precedents, creates a presumption that an HOA lien foreclosure involves a superpriority component. To the contrary, forcing lenders to sue to overcome a "presumption of extinguishment" would contradict the purpose of non-judicial foreclosure. When tender occurs or is excused, it "cure[s] the default and prevent[s] foreclosure as to the superpriority portion of the HOA's lien by operation of law." *Bank of Am. N.A. v. SFR Invs. Poo1 1 LLC* (*Diamond Spur*), 427 P.3d 113, 120 (Nev. 2018). No legal action is necessary.

Responding to an argument that the tendering party had to keep the tender good by paying it into court, this Court held,

> To judicially impose such a rule would only obstruct the operation of the split-lien scheme. The practical effect of requiring the first deed of trust holder to pay the tender into court is that a valid tender would no longer serve to discharge the superpriority portion of the lien. Instead, the tendering party would have to bring an action showing that the tender is valid and paid into court before the lien is discharged. With such conditions, ***a tendering party***

> ***could only achieve discharge of the superpriority portion of the lien by litigation. This process negates the purpose behind the unconventional HOA split-lien scheme: prompt and efficient payment of the HOA assessment fees on defaulted properties***.

Id. at 120–21 (emphasis added). A presumption of extinguishment would create exactly the same problem—it would force banks that paid the superpriority component to sue for a declaratory order. There is no reason to impose a judicial-action requirement, especially when nothing in Chapter 116 or this Court's precedents supports a presumption of extinguishment. Many HOA sales involve a superpriority component, but not all—for example, a sale can occur after a homeowner pays off all the delinquent assessments but not the costs of collection or the lender can tender. The statute expects lenders to pay, as BANA did here—there is no presumption of non-payment.

Put more succinctly: after tender, the deed of trust's survival does not need to be litigated. The deed of trust survives automatically.

If the deed of trust survived automatically, "by operation of law," *id.* at 120, then U.S. Bank is not seeking equitable relief from the sale but simply a declaration of whether its deed of trust still encumbers the property. That declaration, sought for purposes of "determining and stabilizing an uncertain or disputed jural question, either as to present or prospective obligations," is clearly prospective relief under *City of Fernley*. 366 P.3d at 706.

II. A Declaratory Suit Can Be Untimely Only If Coercive Relief Is Untimely.

Nevada's Uniform Declaratory Judgments Act instructs that it "shall be so interpreted and construed as to . . . harmonize, as far as possible, with federal laws . . . on the subject of declaratory judgments . . . ." NRS 30.160. Like *City of Fernley*, federal law focuses on the remedy sought: "an action for declaratory relief will be barred to the same extent the applicable statute of limitations bars the concurrent legal remedy." *Algrant v. Evergreen Valley Nurseries Ltd.*, 126 F.3d 178, 181 (3d Cir. 1997); *see also Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993). In other words, "[w]hen the declaratory judgment sought by a plaintiff would declare his entitlement to some affirmative relief, his suit is time-barred if the applicable limitations period has run on a direct claim to obtain such relief." *118 E. 60th Owners Inc. v. Bonner Properties Inc.*, 677 F.2d 200, 202 (2d Cir. 1982).

This is also the approach California courts take when applying similar statutes of limitations: "The Legislature has not established a specific statute of limitations for actions to quiet title. Therefore, courts refer to the underlying theory of relief to determine the applicable period . . . . An inquiry into the underlying theory requires the court to identify the nature (i.e., the "gravamen") of the cause of action." *Salazar v. Thomas*, 236 Cal. App. 4th 467, 476, 186 Cal. Rptr. 3d 689, 694–95 (2015), as modified on denial of reh'g; *see also Berberich v. Bank of Am. N.A.*, 460 P.3d 440, 443 (Nev. 2020) (citing *Salazar* for guidance in applying NRS 11.080).

The most important "affirmative relief" that U.S. Bank seeks is nonjudicial foreclosure. So long as a nonjudicial foreclosure would be timely, a declaratory judgment suit concerning the legality of foreclosure is also timely.

Foreclosure is timely. The deed of trust remains valid and enforceable until ten years after the note becomes fully due. NRS 106.240. There is no evidence in the complaint or in the public records that the due date has been accelerated, so the deed of trust remains enforceable until ten years after the maturity date—that is, until June 1, 2046. (*See* AA75 (maturity date is June 1, 2036).)

Even a suit on the note would be timely. The borrower's note is a negotiable instrument under UCC article 3, so its statute of limitations is found in NRS 104.3118(1): "an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within 6 years after the due date or dates stated in the note or, if a due date is accelerated, within 6 years after the accelerated due date." Without any acceleration,[4] U.S. Bank would retain the right to bring a timely claim to enforce the note until June 1, 2042.[5]

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[4] Acceleration is relevant to an action on the note. U.S. Bank maintains it is not relevant to the ancient mortgage statute, NRS 106.240.

[5] Even if the statute of limitations on the note had expired, that would not prevent U.S. Bank from conducting a nonjudicial foreclosure on the deed of trust. *Facklam v. HSBC Bank USA for Deutsche ALT-A Sec. Mortg. Loan Tr.*, 401 P.3d 1068, 1071 (Nev. 2017) ("[A] lender may recover on a deed of trust even after the statute of limitations for contractual remedies on the note has passed.").

It is not by happenstance or mistake that the Nevada Legislature has not established a statute of limitations that applies to the type of claim U.S. Bank brought here. As with many other states, Nevada law recognizes that there is no purpose in setting a time limitation on how long a party has to bring an action to establish the status of its title or interest in real property when no other law provides the answer. This case fits squarely in the framework of *City of Fernley*, with U.S. Bank seeking prospective relief so it can decide whether to seek to enforce its deed of trust. This Court should answer the Ninth Circuit's first question in the affirmative, indicating that no statute of limitations applies to U.S. Bank's claim.

III. In the Alternative, the Court Should Apply the Limitation from *Berberich*

If the Court concludes a statute of limitations applies, and it is not the statute of limitations for enforcing the note, then a difficulty arises. No statute of limitation's text clearly addresses a suit by a lienholder regarding the validity of its lien—not NRS 11.070, not NRS 11.080, and certainly not NRS 11.190(3).

The lack of a specifically applicable statute of limitations might cause the Court to consider applying the four-year catch-all statute. It should not. Instead this Court's precedent directs it to seek and apply an analogous statute of limitations. The most closely analogous statute is the five-year statute this Court's recent *Berberich* decision would apply to this suit if Thunder had filed it, and it begins to run only once a dispute arises concerning the validity of U.S. Bank's lien.

A. Textually, NRS 11.070 and 11.080 do not apply.

The district court's ruling rested on two Nevada statutes: NRS 11.070 and NRS 11.080. (AA30.) But neither of these statutes sets a single limitations period for all quiet title actions—neither statute actually mentions "quiet title actions" as such. Instead, NRS 11.080 governs suits "for the recovery of real property," and NRS 11.070 governs any "cause of action or defense to an action, founded upon the title to real property." Neither section applies here.

This is not an "action for recovery of real property" governed by NRS 11.080. NRS 11.080 "clearly does not apply where . . . there is no attempt to recover possession or establish title." *Cella v. Cosgro*, 115 Cal. App. 2d 816, 821, 253 P.2d 57, 60 (1953); *see also Kerr v. Church*, 329 P.2d 277, 281 (Nev. 1958) (adopting *Cella v. Cosgro*'s rule); 43A C.J.S. Injunctions § 118, *Suit in equity—Action relating to the recovery of real property* (describing "action[s] for recovery of real property" as including "unlawful detainer suit[s]" and "action[s] of ejectment."). U.S. Bank is not "attempt[ing] to recover possession." U.S. Bank has no right to possession "without a foreclosure and sale." NRS 40.050.

This is also not an action "founded upon the title to real property" under NRS 11.070 because U.S. Bank also does not claim "title." Nevada follows the lien theory of mortgages, under which the "mortgagee is regarded as owning a security interest only and both legal and equitable title remain in the mortgagor until foreclosure."

Restatement (Third) of Property (Mortgages) § 4.1 cmt. a & *Note on Mortgage Theories Followed by American Jurisdictions*. U.S. Bank acknowledges Thunder is the title owner of the property.

Thunder argued in the district court that the court should "read NRS 40.010 and NRS 11.070 together" and conclude that the statute of limitations in NRS 11.070 applies to all quiet title actions brought under NRS 40.010. (AA41.) This suit arises under NRS 30.040, which allows declaratory judgments about the validity of a deed, as well as under NRS 40.010. But even if this suit arose solely under NRS 40.010, the differing texts of NRS 40.010 and NRS 11.070 rule out the "reading together" that Thunder requested.

NRS 40.010 allows suits by anyone who claims "an estate *or interest*" in the property. NRS 40.010 (emphasis added). NRS 11.070, on the other hand, establishes a statute of limitations only for actions "founded upon *title*." The broader word "interest" does not appear in NRS 11.070. Unsurprisingly, given this difference, this Court has never applied NRS 11.070 to suits by mortgagees related to the enforceability of their mortgages.

U.S. Bank has never claimed "title" to this property, but merely a beneficial interest in the deed of trust encumbering it—exactly the sort of "interest" to which NRS 11.070 and NRS 11.080, by their plain terms, do not apply.

B. NRS 11.190(3) does not apply.

The three-year statute, NRS 11.190(3), applies to "action[s] upon a liability created by statute, other than a penalty or forfeiture." "[L]iability means legal responsibility for one's acts or omissions." *Liability*, The People's Law Dictionary, https://dictionary.law.com/Default.aspx?selected=1151 (accessed October 23, 2020). In civil litigation, it most commonly refers to money damages—"[a] financial or pecuniary obligation in a specified amount." *Liability*, Black's Law Dictionary (10th ed. 2014) (citation omitted).

The Nevada Supreme Court and federal District of Nevada have applied NRS 11.190(3) to cases like the following:

- claims alleging violations of consumer protection statutes, *Wensley v. First Nat'l Bank of Nevada*, 874 F. Supp. 2d 957, 963 (D. Nev. 2012);
- claims alleging a notary violated the statutes governing notaries, *Torrealba v. Kesmetis*, 124 Nev. 95, 103, 178 P.3d 716, 722 (2008); and
- claims based on an "alleged failure . . . to comply with the Bulk Sales Act," *Kellar v. Snowden*, 87 Nev. 488, 492, 489 P.2d 90, 93 (1971).

In short, NRS 11.190(3) applies to claims based on "a duty [that] exists only by virtue of a statute," or when "an obligation to pay is fixed in the act itself." *Gonzalez v. Pac. Fruit Express Co.*, 99 F. Supp. 1012, 1015 (D. Nev. 1951).

U.S. Bank's claim against Thunder does not allege Thunder is liable at all—U.S. Bank does not demand damages from Thunder. It does not allege Thunder is liable because it violated a duty that "exists only by virtue of a statute." *Id.* It does not assert "an obligation to pay [that] is fixed" in any "act" of the legislature. *Id.*

Instead it alleges U.S. Bank's deed of trust is superior to Thunder's title because tender was futile and therefore excused (AA9), and because the sale was unfair in numerous ways and produced a grossly inadequate price (AA7-8). Neither of these theories depends on violations of a statute. As to the futile tender, U.S. Bank does not claim any party violated any legal duty, but merely that the superpriority lien was satisfied by option of law—a theory based entirely on the common law, relying on no provisions of any statute.

As to the unfair foreclosure, the obligation to conduct a fair foreclosure sale would still exist "but for" NRS chapter 116. *Torrealba*, 178 P.3d at 722 (three-year statute applies only where "liability . . . would not exist ***but for*** the statute" (emphasis added)). The obligation to conduct a fair sale, and courts' power to set aside unfair sales, existed decades before NRS chapter 116 was adopted. *See, e.g.*, *Golden v. Tomiyasu*, 387 P.2d 989 (Nev. 1963). When both a statute and a preexisting common-law duty create a liability, NRS 11.190(3) does not apply. *Gonzalez*, 99 F. Supp. at 1015 (three-year statute did not apply because "it is clear that the employee would be entitled to a judgment against the employer notwithstanding the provisions

of the Industrial Act . . . . [and] the employee is not required to rely on the Industrial Act at all as a basis for recovery" (citation omitted)).

As to both of U.S. Bank's theories: even if U.S. Bank's claims did assert violations of duties that would not exist but for NRS chapter 116, then U.S. Bank's lawsuit would still not be an "action upon a liability" because it is not trying to hold Thunder liable for anything. This Court recently rejected that very argument in an unpublished decision. In *U.S. Bank Trust N.A. v. SFR Investments Pool 1 LLC*, 461 P.3d 159 (Table), 2020 WL 1903156 (Nev. Apr. 16, 2020) (unpublished), U.S. Bank Trust filed a lawsuit against SFR, asserting a claim for quiet title / declaratory judgment establishing that its security interest was not extinguished by a homeowner association's foreclosure sale. The district court dismissed the amended complaint, holding that it was barred by NRS 11.190(3)(a)'s three-year limitation period. On appeal, this Court reversed the dismissal of the quiet-title claim. *Id.* at *1. The Court held that because "a quiet title action does not seek to hold anyone liable but instead simply seeks a determination regarding the parties' respective rights with regard to the subject property," the three-year limitations provision under NRS 11.190 (3)(a) does not apply to claim seeking to establish the validity of a deed of trust. *Id.*

C. The four-year catch-all statute of limitations does not apply.

Despite the above statutes not applying, the four-year catch-all statute in NRS 11.220 also does not apply. It is precisely the statute this Court in *Fernley* decided not to apply to prospective relief, as discussed above. 366 P.3d at 705–07.

If the Court rejects U.S. Bank's *Fernley* argument, it should not apply the catch-all because the catch-all statute applies only to actions not otherwise "not hereinbefore provided for." NRS 11.220. By "hereinbefore," the statute refers specifically to the statutes of limitations earlier in NRS chapter 11, but the statute's caption more accurately describes the way the statute has been applied: "Action for relief not ***otherwise*** provided for." NRS 11.220 (emphasis added); *Perry v. Terrible Herbst Inc.*, 383 P.3d 257, 261 n.3 (Nev. 2016) (catch-all statute does not apply "where the state legislature has provided ***another*** more specific limitations period" (emphasis added)). The four-year statute does not apply if some other statute limits the time during which the cause of action can be brought, regardless of whether that statute is actually "hereinbefore" as the text provides.

U.S. Bank's claim is "otherwise provided for." As U.S. Bank argued above, "[w]hen the declaratory judgment sought by a plaintiff would declare his entitlement to some affirmative relief," such as foreclosure, then "his suit is time-barred if the applicable limitations period has run on a direct claim to obtain such relief." *118 E. 60th Owners, Inc. v. Bonner Properties, Inc.*, 677 F.2d 200, 202 (2d Cir. 1982). In

other words, the time limit for a declaratory judgment about the permissibility of foreclosure is the time limit for foreclosure itself.

Nevada does not have a statute of limitations or statute of repose for nonjudicial foreclosure because a nonjudicial foreclosure is not a cause of action to which such statutes could apply. *See Facklam v. HSBC Bank USA*, 401 P.3d 1068, 1071 (Nev. 2017). It does have a different sort of time limit, however. NRS 106.240 provides that a deed of trust terminates ten years after the debt it secures becomes wholly due, or ten years after any publicly recorded extended due date. Because of this limitation, there is no concern a lender will sue to enforce an ancient forgotten mortgage, and there is no need to apply the catch-all to prevent absurd outcomes.

By their nature, deeds of trust frequently need to last decades, and disputes about a deed of trust's validity might easily arise decades after the deed is executed. The ancient mortgage statute at NRS 106.240—not the catch-all statute at NRS 11.220—is the correct mechanism for terminating a deed of trust and any related disputes, and until NRS 106.240 permanently cuts off a beneficiary's rights, the beneficiary should be able to sue for a determination of those rights.

D. Without a clearly applicable statute, the Court should analogize.

Even if the Court decides no other statute governs U.S. Bank's claim, it should still not apply "catch-all statute of limitations where there is a more closely analogous statute." *Perry v. Terrible Herbst Inc.*, 383 P.3d 257, 261 n.3 (Nev. 2016).

Perry dealt with claims under Nevada's Minimum Wage Amendment. *Id.* at 258. The amendment "does not specify a statute of limitations for the right of action it establishes." *Id.* at 258; *see also* Nev. Const. art. 15, § 16. Claims under the amendment also do not fall under any of the ordinary limitations periods in NRS chapter 11—they are not "action[s] upon a liability created by statute," for example, because the amendment is not a statute but part of the constitution.

Although no other statute of limitations applied exactly, *Perry* refused to apply the catch-all statute. Instead it "analogize[d]." *Perry*, 383 P.3d at 261. Because claims under the amendment were closely analogous to claims under the minimum wage statute, the court applied NRS 608.260, the two-year limitations period for statutory minimum wage claims. *Id.* It supported this decision by citing *White Pine Lumber Co. v. City of Reno*, in which this Court had considered whether the catch-all statute applied to takings claims against the government. 801 P.2d 1370, 1371 (Nev. 1990). The court concluded it did not—a takings claim was analogous to a suit against an adverse possessor, so the fifteen-year period in NRS 40.090 applied. *Id.*

Several statutes are analogous enough to prevent application of the catch-all:

(1) NRS 106.240, discussed above, preserving the deed of trust until at least 10 years after the debt's maturity date;

(2) the fifteen-year statute of limitations for actions against an adverse possessor who (like Thunder in this case) has not proved payment of property tax, NRS 40.090;

(3) the statute of limitations for judicial foreclosure, which is six years after the debt's maturity date or acceleration under NRS 104.3118(1); or

(4) the five-year statute of limitations for title disputes, NRS 11.080, as U.S. Bank argues below.

Given their length, the first three analogous limitation periods obviously do not prohibit U.S. Bank's suit. The fourth is the five-year statute the district court applied, but as U.S. Bank argues below, the statute of limitations did not run out even if the five-year statute applies.

E. The Court should apply the limitation from *Berberich*.

The five-year statute of NRS 11.080 is clearly analogous because it is the statute that would apply if Thunder had sued to resolve the same issues. In *Berberich v. Bank of America N.A.*, the Court considered whether, more than six years after an HOA sale, the buyer could sue for a declaration that the sale had extinguished a deed of trust. 460 P.3d 440, 441 (Nev. 2020). The district court had ruled the buyer could

not file the suit, citing precedent that applied NRS 11.080 to HOA buyers' suits and held the five-year statute ran from the sale. *Id.* at 442.

The Court agreed NRS 11.080 applied: "We have previously stated that NRS 11.080 provides a five-year statute of limitations that governs quiet title actions." It cited three prior Nevada cases to support this conclusion that NRS 11.080 applies generally to quiet title actions—and it did so even though, strictly speaking, the titleholder's suit did not concern title but the validity of a lien. *See Berberich*, 460 P.3d at 441; *see also id.* at 441–43 (opinion contains no suggestion that the lienholder defendant disputed the validity of the plaintiff's title).

There are several reasons to rule NRS 11.070 or 11.080 analogous to this case. NRS 11.070 applies to actions "founded upon" title, and the validity of a title is not fundamentally different from the validity of a lien: both are interests in property, and the former owner of the property at issue here could have filed a similar suit raising similar issues about the HOA sale. *See, e.g., Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 366 P.3d 1105 (Nev. 2016) (suit by title owner contesting HOA sale). Further, while U.S. Bank's suit is founded upon a lien, the lien ultimately rests on the prior owner's title, so—while the prior owner's title is not at issue—this action could be called "founded upon" title in an indirect and analogous sense.

Finally, in addition to *Berberich*, a number of decisions have applied a five-year statute from NRS 11.070 or NRS 11.080 to cases determining the validity of

deeds of trust after HOA sale. *See, e.g., Bank of N.Y. Mellon v. Nev. Assoc. Servs.*, No. 2:17-cv-00022-GMN-BNW, 2020 WL 3118413, at *3 n.1 (D. Nev. May 27, 2020) (unpublished); *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank N.A.*, 388 P.3d 226, 232 (Nev. 2017). Other cases have analyzed these statutes' text and concluded they do not apply to suits by lienholders. *See, e.g.*, *Deutsche Bank Nat'l Trust Co. v. SFR Invs. Pool 1 LLC*, No. 2:17-cv-01166-JAD-DJA, 2020 WL 1693036, at *2–3 (D. Nev. Apr. 7, 2020) (unpublished). But the cases concluding NRS 11.070 or NRS 11.080 applies, even if incorrect as argued above, are evidence that the statutes almost apply—that the situations to which they properly apply are closely analogous to suits filed by lienholders after an HOA sale.

i. The statute begins running when the property right is disturbed.

Even though the *Berberich* Court applied the five-year statute to the plaintiff's six-year-old claim, it decided the suit was timely. Analyzing the text of NRS 11.080, it noted the statute applies to actions to "recover" real property, and that it barred suits only when the plaintiff was not "seized or possessed of the property within five years before commencing the action." *Id.* (citation omitted). Both the word "recover" and the past tense of the phrase "***was*** seized or possessed" indicated that NRS 11.080 barred suits by title claimants who had lost possession: "the limitations period in NRS 11.080 does not run against a plaintiff seeking to quiet title while still seized or possessed of the property." *Id.*

More precisely, "the limitations period is triggered when the plaintiff is ejected from the property or has had the validity or legality of his or her ownership or possession of the property called into question." *Id.* at 443. But "[m]ere notice of an adverse claim is not enough to commence the owner's statute of limitations." *Id.* (citation omitted). For example, "[a] notice of default issued on a deed of trust has been found insufficient to dispute an owner's possession." *Id.* A notice of default by a lender does not cast doubt on a title owner's control of the property or suggest any other party is entitled to possess it. *Id.*

Berberich was not the first time this Court applied this principle. In *Bentley*, a water rights case under NRS 11.070, a defendant argued that the plaintiff could not challenge a diversion agreement that had been publicly recorded in 1987. *Bentley v. State, Office of State Engineer*, No. 64773, 2016 WL 3856572, at *10 (Nev. July 14, 2016) (unpublished). This Court disagreed: mere notice of an agreement to divert water was not enough to start NRS 11.070's five-year clock because, despite the diversion agreement, the plaintiffs were still "seized or possessed" of the water. *Id.* The Court held the statute of limitations first began running when the defendants seized the water and prevented it from flowing to the plaintiffs. *Id.*

ii. The sale, by itself, does not press an adverse claim.

Thunder will likely argue that, under *Berberich*, the HOA sale itself necessarily challenged the lien and started the statute running, but this position is inconsistent both with *Berberich* and this Court's decisions about tender.

As *Berberich* and *Bentley* held, "mere notice" of a title dispute does not start the statute running. *Berberich*, 460 P.3d at 443; *accord Bentley*, 2016 WL 3856572, at *10. Instead the statute did not begin running until someone "presses an adverse claim" or "eject[s]" the title owner from the property. *Berberich*, 460 P.3d at 443. Merely threatening to enforce a lien was not sufficient because it was consistent with the title owner's present control of the property. *Id.* Likewise, merely recording a water diversion agreement was inadequate; the defendant needed to actually divert the water. *Bentley*, 2016 WL 3856572, at *10.

In short, to start the statute running, mere words are not enough. The party threatening a plaintiff's property interest must take some action inconsistent with the plaintiff's rights—something like ejecting a title owner or diverting a water flow.

The HOA sale in this case was an action and not merely words, but it was not an action inconsistent with U.S. Bank's rights. Where a lender has tendered the superpriority debt, or where tender is excused as U.S. Bank alleges here, a foreclosure does not conflict with the lienholder's rights; rather, the foreclosure is simply "void as to the superpriority portion." *Bank of Am. N.A. v. SFR Invs. Pool 1*

LLC, 427 P.3d 113, 120–21 (Nev. 2018); *7510 Perla Del Mar Ave Trust v. Bank of Am. N.A.*, 458 P.3d 348, 352 (Nev. 2020) (deed of trust survives where tender is excused). Foreclosure after tender is perfectly consistent with the deed of trust's continued existence—the deed of trust survives automatically, "by operation of law," and the mortgage lender has no obligation to file suit to preserve its interest. *Bank of Am. N.A.*, 427 P.3d at 120–21.

Because the sale was not inconsistent with U.S. Bank's rights in the property, it did not start the clock for U.S. Bank to sue to protect its rights. Further, because U.S. Bank's deed of trust does not grant title to the property or any right to possess it, Thunder's title ownership and possession of the property are not inconsistent with the deed of trust's validity, and they do not start the clock either.

iii. Thunder can sue, so U.S. Bank can sue.

Berberich makes clear that, unless Thunder at some point loses possession of the property for five years, it can sue U.S. Bank at any time to determine whether the sale extinguished the deed of trust. Thunder's suit would resolve the exact same dispute as the present suit and would turn on the same futility of tender issue U.S. Bank is trying to raise now. There is only one practical difference between that hypothetical suit and this one: this suit is already underway, and judicial economy suggests it should continue.

If Thunder can seek relief against U.S. Bank, then U.S. Bank can file a declaratory suit to determine whether Thunder is entitled to that relief. That is precisely what declaratory judgment acts are for: "[t]he Declaratory Judgment Act was designed to relieve potential defendants from the Damoclean threat of impending litigation which a harassing adversary might brandish, while initiating suit at his leisure or never." *Societe de Conditionnement en Aluminium v. Hunter Eng'g Co.*, 655 F.2d 938, 943 (9th Cir. 1981) (citation omitted).

CONCLUSION

Before the advent of declaratory judgment acts, parties wanting their rights clarified often had to manufacture a cause of action. To determine a contract's meaning, for example, "one or the other party" would have to "act on his own assumption of his rights, purport to breach the contract . . . and then await a suit for damages or other coercive relief." Edwin Borchard, *The Federal Declaratory Judgments Act*, 21 U. Va. L. Rev. 35, 40 (1934).

This rule caused problems. A lessee wanting to tear down a building on the leased premises had to actually begin tearing it down before a court would decide whether demolition was legal under the lease. *Id.* A railroad wanting to lay new tracks without agency permission had to actually lay the tracks and risk criminal liability before a court would decide whether the agency had any right to withhold permission in the first place. *Id.* at 41–42. As one legislative sponsor of declaratory

judgments put the matter, "Under the present law you take a step in the dark and then turn on the light to see if you stepped into a hole. Under the declaratory judgments law you turn on the light and then take the step." *Id.* at 41.

Under the federal district court's ruling, U.S. Bank is back in the dark, hoping its next step won't land in a hole—it has to foreclose its deed of trust before confirming it actually has a deed of trust to foreclose. If its foreclosure turns out to be wrongful, it may inflict damages on Thunder that would have been avoided if a court had just told U.S. Bank its rights. "No civilized system should require such a disastrous step as a condition of obtaining a judicial judgment." *Id.*

The Court should follow *Fernley* and hold no statute of limitations applies, or follow federal precedent and apply the statute of limitations for foreclosure. If the Court applies some other statute of limitations, it should follow *Berberich* and hold that the statute of limitations does not begin running until some party takes action inconsistent with the continued existence of U.S. Bank's lien, and that the foreclosure of an allegedly junior subpriority HOA lien does not qualify.

DATED: November 25, 2020.

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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 answering 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 8,858 words.

FINALLY, I CERTIFY that I have read this **Opening 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: November 25, 2020.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on November 25, 2020, the foregoing **OPENING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the Court's electronic file and serve system. I further certify that all parties of record to this appeal are either registered with the Court's electronic filing system or have consented to electronic service and that electronic service shall be made upon and in accordance with the Court's Master Service List.

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/ Patricia Larsen
An employee of AKERMAN LLP