IN THE SUPREME COURT OF NEVADA

Case No. 81293

SFR INVESTMENTS POOL 1, LLC, A NEVADA LIMITED LIABILITY COMPANY

Appellant/Cross-Respondent,

vs.

U.S. BANK N.A., A NATIONAL BANKING ASSOCIATION, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF THE LXS 2006-4N TRUST FUND, ERRONEOUSLY PLED AS U.S. BANK, N.A., AND NATIONSTAR MORTGAGE, LLC, A FOREIGN LIMITED LIABILITY COMPANY,

Respondents/Cross-Appellants.

Appeal from the Eighth Judicial District Court, Department IV
District Court Case No. A-14-705563-C

BRIEF OF AMICUS CURIAE FEDERAL HOUSING FINANCE AGENCY IN SUPPORT OF RESPONDENTS/CROSS-APPELLANTS AND AFFIRMANCE OF THE DISTRICT COURT'S JUDGMENT

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae the Federal Housing Finance Agency ("FHFA") respectfully supports Respondents U.S. Bank N.A., as trustee for the certificateholders of the LXS 2006-4N Trust Fund ("U.S. Bank"), and Nationstar Mortgage, LLC ("Nationstar," and, together with U.S. Bank, the "Servicers"). The district court correctly held that Nevada's ancient lien statute, NRS 106.240, did not terminate the deed of trust at issue (the "Deed of Trust"). This appeal will directly impact the interests of FHFA and the entities under its conservatorship—the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac," and, together with Fannie Mae, the "Enterprises")—as well as the interests of FHFA as the Enterprises' Conservator and regulator.

The Enterprises are federally chartered entities that Congress created to enhance the nation's housing-finance market. They own millions of mortgages nationwide, including hundreds of thousands in Nevada. In 2008, Congress enacted the Housing and Economic Recovery Act ("HERA"), which established FHFA as an independent agency of the federal government and as the Enterprises' regulator. *See* Pub. L. No. 110-289, 122 Stat. 2654 (codified as 12 U.S.C. § 4511 *et seq*.). HERA vests FHFA with the power to place the Enterprises into conservatorship or receivership under statutorily defined circumstances, mandating

that as Conservator, FHFA succeeds to all "rights, titles, powers, and privileges" of an entity in conservatorship with respect to its assets. 12 U.S.C. § 4617(b)(2)(A). On September 6, 2008, FHFA's Director placed the Enterprises into FHFA's conservatorship, where they remain today.

FHFA has previously appeared as amicus curiae in cases before the U.S. Court of Appeals for the Ninth Circuit involving the application of NRS 106.240. Most notably, counsel for FHFA participated in oral argument in the appeal of *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, No. 19-17445 (9th Cir.), arguing that the district court there erred in applying NRS 106.240 to terminate a deed of trust that was the subject of an active litigation. On June 1, 2021, the Ninth Circuit issued its decision reversing the district court. SFR now seeks rehearing of that appeal and argues that the Ninth Circuit should have waited for a decision in this appeal before issuing its ruling. *See* Pet. for Rehearing or Rehearing En Banc, *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, No. 19-17445 (9th Cir.) (ECF No. 65-1) at 14-17. While it is FHFA's position that the Ninth Circuit panel did not err in issuing its opinion, FHFA nevertheless seeks to ensure that its arguments before the Ninth Circuit regarding NRS 106.240's application are also properly before this Court.

When FHFA acts in its capacity as Conservator, its actions are deemed non-governmental for many substantive purposes. While this brief addresses FHFA's

statutory powers as Conservator, FHFA submits the brief exclusively in its capacity as an agency of the United States.[1] In that capacity, FHFA has an interest in this case because if this Court were to reverse the district court's ruling, that decision would significantly hinder the Enterprises' abilities to fulfill their statutory missions and could hamper FHFA in effectuating its powers to ensure that the Enterprises are effectively supporting the secondary mortgage market.

[1] Under the Nevada Rules of Appellate Procedure, agencies of the United States, such as FHFA, are permitted to file amicus curiae briefs without consent of the parties or leave of court, and without a corporate disclosure statement. NRAP 26.1, 29(a). FHFA nevertheless moves for leave to file this brief due to the timing of its filing.

INTRODUCTION

Over the past several years, FHFA, the Enterprises, and their contractually authorized loan servicers (such as Servicers here) have litigated whether 12 U.S.C. § 4617(j)(3), the "Federal Foreclosure Bar," protects deeds of trust from extinguishment via foreclosure when owned by the Enterprises. This Court has confirmed dozens of times that it does.

With their direct attacks on the Federal Foreclosure Bar barred by precedent, the purchasers of those foreclosed properties now seek to prolong litigation by invoking a new theory—based on NRS 106.240—in the hopes of avoiding the federal law protecting the Enterprises' interests. Swift action is needed by this Court to prevent a new wave of litigation from these purchasers, who have every incentive to delay resolution of their cases while they collect market rents on properties that they acquired for pennies on the dollar.

While case law and the legislative history of NRS 106.240 may be sparse, that which exists demonstrates what is obvious: A statute intended to enhance the marketability of title by clearing long-forgotten liens cannot be wielded as a sword to terminate property interests that are the subject of active and ongoing litigation. FHFA supports Servicers' arguments regarding NRS 106.240, but writes separately to provide four additional points.

First, both the 1917 legislation that contained NRS 106.240 and Nevada's principles of statutory construction confirm that the statute does not apply during pending litigation regarding the lien. The legislation that enacted NRS 106.240 provided an exception to its application in the instance of properly noticed litigation. Further, even read in isolation, applying the statute to a lien that is the subject of active litigation would be an absurd result.

Second, the structure and statutory history of NRS 106.240 demonstrate that the term "wholly due" means a loan's maturity date and may not be altered by notices of default. A narrow reading of the term would best comport with the plain text of the statute, especially when compared to other statutory provisions governing notices of default.

Third, this Court's decision in *Glass* provides a compelling alternative basis to affirm the district court's decision. Contrary to SFR's contentions, the loan at issue could not have been accelerated prior to the recording of the notice of default, as Nevada Law precludes that result.

Lastly, equitable considerations must be taken into account and bar NRS 106.240's application here in any event.

Accordingly, the Court should affirm the district court's ruling below.

ARGUMENT

I. NRS 106.240 Does Not Apply in the Midst of Litigation About the Lien

The district court's conclusion that NRS 106.240 was tolled by the filing of SFR's quiet-title action, 8JA_1681-82, ¶ O, is consistent with the legislation that contained NRS 106.240 and Nevada's principles of statutory construction. Those authorities demonstrate that it would be nonsensical to apply a statute intended to clear property records of abandoned and forgotten liens to property interests subject to active legal disputes. This Court should affirm the district court's decision on the grounds that NRS 106.240 does not apply to liens that are the subject of ongoing litigation.

A. The Act Containing the Statute Codified as NRS 106.240 Included an Exception for Pending Litigation

The statutory history of NRS 106.240 demonstrates that it does not apply in the midst of properly noticed litigation to determine a deed of trust's validity.[2] The statute as enacted—comprising more than just the text codified as NRS 106.240—addresses notices of pending litigation expressly. Given this text and structure, NRS 106.240 does not apply in the circumstances here.

[2] "Statutory history" refers to the evolution of a statutory scheme as evidenced by its actual, *enacted* provisions; it is often contrasted with "legislative history" in its sense of referring to *unenacted* material like floor statements, committee reports, and the like. *See, e.g.*, *Chhetri v. United States*, 823 F.3d 577, 587 n.13 (11th Cir. 2016) (differentiating statutory history from legislative history).

As enacted in 1917, the legislation providing for NRS 106.240 was captioned "An Act to quiet title to real estate by defining when the lien of an attachment and mortgage *and the notice of the pendency of an action* expires." *See* Stat. of Nev. (1917) at 41 (emphasis added); *see also Coast Hotels & Casinos, Inc. v. Nevada State Labor Comm'n*, 34 P.3d 546, 551 (Nev. 2001) ("The title of a statute may be considered in determining legislative intent."). It contains three interrelated substantive sections. Stat. of Nev. (1917) at 41.[3] The first states that liens arising from writs of attachment are extinguished after ten years, which is not at issue here.[4] The second is NRS 106.240.[5] The third states that "Notice of the pendency of any action"—presumably including litigation papers served upon a party as well as publicly recorded lis pendenses—"shall not constitute notice or be of any force or effect *after the expiration of ten years from the time of the filing of such notice*." *Id*. (emphasis added).[6]

Notices of pending litigation, such as lis pendenses, exist to confirm that a live dispute exists where "the title to [a] property is disputed." *LaSalle Bank N.A.*

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[3] The statute contains a fourth section repealing any other laws "in conflict herewith." *Id*.

[4] That provision remains in effect. *See* NRS 108.250.

[5] The law remains in force substantially as enacted, having been amended in 1965 to confirm that the "mortgage" clause applies to deeds of trust. Stat. of Nev. (1965) at 1229.

[6] That provision remains in effect. *See* NRS 108.260.

v. Hammer Family 1994 Trust, 131 Nev. 1310, 2015 WL 1423421 at *1 (Nev. 2015) (unpublished). Thus, a lis pendens functions "to cloud title *before* a sale of property occurs *so that the claims of a party may be resolved ….*" *Coury v. Tran*, 895 P.2d 650, 653 (Nev. 1995) (emphasis changed).

By positioning the pending-action provision *after* the writ- and mortgage-expiration provisions, the Legislature manifested an intention for the pending-action provision to operate as an *exception* to the preceding provisions' operation, i.e., that serving a quiet-title complaint or recording a lis pendens in relation to a mortgage preserves the mortgage until either the matter is resolved or the ten-year period for doing so expires, whichever is later. Holding otherwise would potentially place the two provisions in conflict in situations like the one arising here, as a lis pendens relating to a mortgage could not have any continuing "force or effect" if the underlying mortgage were terminated in the midst of litigation. "When two statutory provisions conflict," Nevada law compels courts to "harmonize conflicting provisions so that the act as a whole is given effect." *State v. Eighth Jud. Dist. Ct. (Logan D.)*, 306 P.3d 369, 380 (Nev. 2013) (citations omitted). And "when a scheme contains a general prohibition contradicted by a specific permission, 'the specific provision is construed as an exception to the general one.'" *Id.* at 381 (citing *RadLAX Gateway Hotel, L.L.C. v. Amalgamated Bank*, 566 U.S. 639, 645 (2012)).

The full statute thus provides that, while mortgages will ordinarily terminate ten years after the debt becomes "wholly due," notices of pending litigation regarding the mortgage forestall that outcome so long as they remain valid and effective until ten years after their issuance. As a result, the district court was correct in holding that SFR's filing of its quiet-title action would have the effect of tolling NRS 106.240's 10-year clock.

B. Applying NRS 106.240 in the Midst of Litigation Would Yield Absurd and Unreasonable Results

Even read in isolation—i.e., without the adjacent section effectively providing an exception for properly noticed litigation—NRS 106.240 would not apply in the midst of litigation. Applying the statute to terminate a lien whose validity is the subject of an active legal dispute between the lienholder and the titleholder would violate Nevada's canon against interpreting statutes to require absurd results. As this Court has explained: "When interpreting a statute, this court resolves any doubt as to legislative intent in favor of what is reasonable, and against what is unreasonable. … A statute should be construed in light of the policy and the spirit of the law, and the interpretation should avoid absurd results." *Hunt v. Warden*, 903 P.2d 826, 827 (Nev. 1995).

Similarly, this Court has recognized that that application of a seemingly clear statute may reveal "a latent ambiguity" that becomes apparent only when applied in specific circumstances. *Witherow v. State Bd. of Parole Comm'rs*, 167

P.3d 408, 410 (Nev. 2007); *ASAP Storage, Inc. v. City of Sparks*, 173 P.3d 734, 745 (Nev. 2007). When that happens, courts must construe the statute's language in light of "the Legislature's intent," *Witherow*, 167 P.3d at 411, and guided by "existing law and historical practice," *Nevada State Democratic Party v. Nevada Republican Party*, 256 P.3d 1, 9-10 & n.9 (Nev. 2011). Read in isolation, NRS 106.240 would contain a latent ambiguity: It says nothing about whether it would function to terminate a lien whose validity is the subject of timely, properly noticed litigation.

Applying NRS 106.240 to terminate a lien that is already the subject of litigation would contradict the statute's purpose and yield absurd results; it would therefore violate both Nevada's general doctrine on statutory interpretation and its more specific doctrine on latent ambiguity. The purpose of NRS 106.240—like the purpose behind other states' ancient-lien statutes—is to clear land records of abandoned or forgotten liens, thereby making title marketable without the need for quiet-title litigation.[7] As one federal court explained, ancient-lien statutes "have

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[7] Many states have ancient-lien statutes. *See* Joyce Palomar, *Mortgages, Deeds of Trust, and Releases*, 3 PATTON AND PALOMAR ON LAND TITLES § 567 at n.39 (3d ed. Nov. 2019) (listing ancient-lien statutes). Courts and commentators universally agree that such statutes' purpose is to make title marketable by clearing liens that appear from the record to have been abandoned or forgotten, without the need for a quiet-title action. *See* Study H-401 - Marketable Title (Ancient Mortgages and Deeds of Trust), CA Mem. 81-32, at 3 (Jun. 10, 1981), http://www.clrc.ca.gov/pub/1981/M81-32.pdf (purpose is to "increase[]

Footnote continued on next page

the obvious purpose of clearing titles of old and obsolete mortgages." *LBM Fin. LLC v. Shamus Holdings, Inc.*, No. CIV. 09-11668-FDS, 2010 WL 4181137, at *4 (D. Mass. Sept. 28, 2010) (cleaned up). Applying NRS 106.240 to terminate the lien at issue here would contradict that purpose, as the titleholder (SFR) could not plausibly consider the lien abandoned or forgotten, given that this is a quiet-title action in which the lienholder is defending the lien's ongoing validity. SFR could not reasonably believe the lien was obsolete, and no sound policy supports extinguishing it.

Indeed, adopting SFR's interpretation would create undesirable incentives for both titleholders and lienholders. Titleholders would stand to gain from prolonging quiet-title litigation until ten years have passed from an event that they can allege, however implausibly, triggered NRS 106.240, thereby maintaining title (and the concomitant ability to collect rents) until the ancient-lien litigation concludes. As the court observed in *Shamus Holdings*, those seeking the extinguishment of a lien would be incentivized to engage in abusive practices and delay tactics in order to stave off judgment until after the statutory deadline. *See*

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marketability of land titles" by easing the burden of "legal technicalit[ies] that serves only to cloud titles and make real property less marketable."); *see also* IV Am. L. of Prop. § 18.96 (1952); Paul E. Basye, CLEARING LAND TITLES, §§ 71, 76 (1953). Admittedly, there is no legislative history describing the purpose of NRS 106.240, but there is no reason to think the Nevada Legislature enacted the statute with any other purpose in mind.

2010 WL 4181137, at *4. Lienholders, in turn, would be incentivized to rush to foreclose in every case, rather than seek to negotiate settlements or other compromises once the title record is settled. Mortgage servicers and lenders would seek to fast-track cases, forgo necessary discovery, file emergency motions, expedite court dates, and otherwise strain judicial resources so that cases can be resolved before the 10-year deadline.

All of these incentives are in diametric opposition to Nevada's policy favoring alternative dispute resolution in foreclosure actions, requiring mediation as part of the foreclosure process, and aiming "to secure the just, speedy, and inexpensive determination of every action and proceeding." *See Pasillas v. HSBC Bank USA*, 255 P.3d 1281, 1284 (Nev. 2011) (describing Nevada's Foreclosure Mediation Program); NRCP 1. Accordingly, the same application of "common sense" employed in *Shamus Holdings* should guide the Court here in concluding that NRS 106.240 could not terminate the Deed of Trust during the pendency of this action.

II. NRS 106.240 Does Not Allow a Notice of Default to Make a Deed of Trust "Wholly Due"

As this Court noted in *Feenstra,* NRS 106.240's legislative history is sparse and unilluminating, and neither the legislature nor this Court has defined the term "wholly due." 117 Nev. at 95 n.7. However, given the plain language of NRS 106.240, its statutory history, and the structure of Chapter 106, the only reasonable

reading of "wholly due" is the maturity date stated in the deed of trust, or, if relevant, a recorded written extension of that date.

NRS 106.240 provides that a recorded deed of trust "not otherwise satisfied and discharged of record," terminates ten years after the debt secured by the deed of trust becomes "wholly due" under "the terms thereof or any recorded written extension thereof." The explicit reference to only two types of written instruments—(1) the "deed of trust" itself, and (2) "any recorded extension thereof," NRS 106.240—matters for determining when the obligation a lien secures becomes "wholly due" for purposes of NRS 106.240. Had the Nevada legislature intended notices of default to trigger 106.240, it could have said so explicitly in the statute; the legislature was obviously aware of notices of default given its comprehensive regulation of their form and content. *See* NRS 107.080 (requiring a trustee to record a notice of default prior to initiating power of sale); NRS 107.087 (providing requirements for content, recording, and posting of notices of default).

The statutory history of NRS 106.240 and the Nevada provisions governing notices of default confirm this point. Nevada's legislature enacted the precursor to NRS 106.240 in 1917, a time when Nevada had not yet enacted any statute mandating or addressing notices of default. *See* Nevada Laws 1917, c. 37 § 2. It is axiomatic that the Legislature cannot have intended notices of default to trigger the

ancient-lien statute when it was first enacted, as notices of default did not even exist under Nevada law at the time. Nevada enacted its first statute addressing notices of default ten years later, in 1927. Nevada Laws 1927, c. 173, § 1.

Had the legislature at that time intended notices of default to be treated as documents that could trigger the ancient-lien statute, it could easily have said so, but it did not. Nor did it do so in 1949, 1957, 1959, or 1961 when it amended the statutory provisions governing notices of default, or enacted new ones. *See* Nevada Laws 1949, at 70, c. § 1; 1957 Statutes of Nevada, at 631, c. 356 § 1; 1959 Statutes of Nevada, at 10, c. 11 § 1; 1961 Statutes of Nevada, at 23-24, c. 23 § 1; *id*. at 74-75, c. 67 § 1. When the Legislature amended NRS 106.240 in 1965 to include more documents as potential triggers—deeds of trust in addition to mortgages, and recorded extensions in addition to both—it could have added notices of default, but it did not do so. Indeed, although Nevada made sweeping changes to the laws governing foreclosures following the 2008 housing crisis—particularly with regard to the type and form of notice required to be given to borrowers—NRS 106.240 remained untouched, and remains much in the same form in which it has existed since 1917. This history refutes any contention that the Nevada Legislature intended notices of default—a statutory creation—to trigger NRS 106.240, a statute that for more than a century has conspicuously omitted any mention of them.

SFR's invocation of pre-1917 cases discussing acceleration does not undermine this analysis, let alone support its cause. *See* Appellant's Am. Reply Br. on Appeal and Answering Br. on Cross-Appeal at 18-20 ("SFR Reply Br."). Those cases merely confirm that loans issued before 1917 sometimes contained acceleration provisions. They do not resolve whether any particular provision, if invoked, would make a loan "wholly due" for purposes of NRS 106.240. SFR's citation to *Bergenfield* as a source for statutory interpretation is similarly inapposite. *See* SFR Reply Br. at 17-18 (discussing *Bergenfield v. U.S. Bank Nat'l Ass'n*, 2017 WL 4544422, at *4 (D. Nev. Oct. 10, 2017)). *Bergenfield* does not address the complete statute—it too ignores the pending-litigation provision—and its analysis does not otherwise support SFR's reading of "wholly due." Rather, *Bergenfield*'s analysis of the statutory history merely confirms that the legislature intended NRS 106.240 to quiet title when properly applied, a point that FHFA does not contest. See 2017 WL 4544422, at *4.

Additionally, contrary to SFR's contentions, this Court has not held that the term "wholly due" includes acceleration. *See* SFR Reply Br. at 27-28 (citing *First Am. Title Ins. Co. v. Coit*, 412 P.3d 1088 (Table), 2018 WL 1129810, at *1 (Nev. 2018) (unpublished)). The appellants in *Coit* argued that NRS 106.240 was a statute of limitations that did not begin to run until all installment payments had come due. *See* Appellants' Opening Brief at 25, *Coit*, 412 P.3d 1088 (Table), 2017

WL 2505842 (filed Mar. 30, 2017). *Coit* does not interpret NRS 106.240 substantively, instead rejecting the argument on procedural grounds. The Court went no farther than to "question the merit of [appellants'] argument" in a footnote acknowledging its waiver, non-committal dicta that cannot plausibly be read to provide a definitive interpretation of "wholly due" under NRS 106.240. 2018 WL 1129810 at *1 n.1. Indeed, in discussing the status of the loan, the Court declined to refer to the accelerated loan as "wholly due," and instead stated it was "due in full." *Id.* If the Court had intended a brief, procedural footnote in an unpublished three-paragraph decision to carry the weight SFR contends, it would have said so.

III. The Court May Affirm the District Court's Decision under *Glass*

FHFA also supports Servicers' arguments that the Court's decision in *Glass v. Select Portfolio Servicing, Inc.*, 466 P.3d 939 (Table), 2020 WL 3604042, at *1 (Nev. 2020) (unpublished), provides an additional basis to affirm the district court's decision, but writes separately to address the application of NRS 107.080

SFR contends that the notice of default here was not the instrument that *accelerated* the loan at issue, so rescinding that Notice could not have *decelerated* it. *See, e.g.*, SFR Reply Br. at 28-31; *see also id.* at 24. Incorrect. The notice of default at issue in *Glass* contained the same clause SFR cites, stating that the trustee "has declared and hereby does declare" the loan to be accelerated. *See* App'x at 316, *Glass*, No. 78325 (filed July 24, 2019). In any event, Nevada law

makes recording the notice of default a *precondition* to acceleration: NRS 107.080 provides that acceleration cannot occur until 35 days after the notice of default is recorded and mailed to the borrower. *See* NRS 107.080(3)(a); *Glass*, 2020 WL 3604042, at *1. Rescinding the notice thus automatically undoes any corresponding acceleration.

SFR similarly claims that the Enterprises' servicing guides imply that acceleration happens before a notice of default is recorded. SFR Reply Br. at 31. That implication is not correct, but in any event those servicing guidelines cannot and do not supersede applicable Nevada law, and NRS 107.080 allows acceleration only *after* the borrower is mailed a recorded notice of default. *See* NRS 107.080(3) (2010). Thus, any "acceleration letter" that SFR posits was sent could not have started the NRS 106.240 clock.

Here, as in *Glass*, the recorded rescission retracted the notice of default and decelerated the loan, thereby stopping NRS 106.240's ten-year clock. *Glass*, 2020 WL 3604042, at *1. Accordingly, the Court can affirm the district court's decision below under its reasoning in *Glass*.

IV. The Court Can and Should Consider the Equities Favoring Servicers

Even if the Court concluded that NRS 106.240 applied to the Deed of Trust, equitable considerations would prevent it from terminating U.S. Bank's lien here.

A. *Feenstra* Shows that Equitable Considerations Must Be Taken into Account when Applying NRS 106.240

In *Pro-Max Corp. v. Feenstra*, this Court confirmed that equitable defenses may preclude the application of NRS 106.240. *See* 16 P.3d 1074, 1077-78 (Nev. 2001). In *Feenstra*, although NRS 106.240's ten-year period had clearly expired, the noteholders argued that the corporation was estopped from invoking the statute, as the corporation had represented in prior litigation that it would pay off the notes. *Id.* Faced with this argument, the Court did *not* hold that NRS 106.240 applied automatically to terminate the notes. *See id.* at 1077-78. Instead, it remanded the case for further proceedings on whether the noteholder's equitable-estoppel defense precluded the company's invocation of the statute. *Id.* at 1079. *Feenstra* thus confirms that equitable considerations are not off limits in NRS 106.240 cases, since estoppel is an equitable defense. *See NGA #2 LLC v. Rains*, 946 P.2d 163, 168-69 (Nev. 1997).

Feenstra's holding is not limited to estoppel. FHFA is aware of no authority indicating that a court's equitable authority is limited to a single defense, nor does *Feenstra* contain language suggesting such a narrow holding. In any event, equitable estoppel is a form of equitable tolling. *See, e.g., Ramirez-Carlo v. United States*, 496 F.3d 41, 49 (1st Cir. 2007) ("the Supreme Court [has] treated equitable estoppel as a form of equitable tolling") (citing *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)).

Construing *Feenstra* narrowly would conflict with this Court's *Shadow Wood* decision, which held that the enactment of conclusive recitals in NRS 106.3116 "did not eliminate the equitable authority of the courts to consider quiet title actions when an HOA's foreclosure deed contains conclusive recitals." *Shadow Wood Homeowners Ass'n, Inc. v. N.Y. Cmty. Bancorp, Inc.*, 366 P.3d 1105, 1112 (Nev. 2016). NRS 106.240 operates like the statute at issue in *Shadow Wood* by "conclusively presum[ing]" an outcome. NRS 106.240. Accordingly, the equitable authority the *Shadow Wood* court invoked to overcome the conclusive presumptions of NRS 106.3116 suffices to overcome NRS 106.240, as *Feenstra* confirms.

B. SFR's Arguments Against Considering the Equities are Unpersuasive

SFR's contention that the text of NRS 106.240 precludes equitable considerations, e.g., Appellant's Opening Br. at 23-27 ("SFR Opening Br."), has no basis in Nevada law. Its arguments are based on a misreading of inapplicable federal caselaw involving distinguishable statutes that conflict with controlling Nevada authority.

SFR reads *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017) ("*CPERS*"), as articulating a generally applicable rule against taking equitable considerations into account when applying any statutes that "destroy [an] underlying right" or otherwise "supply complete

repose." SFR Opening Br. at 25-26. But *CPERS* was a *federal-law* case; the claim arose under the Securities Act of 1933. 137 S. Ct. at 2047. So whatever *CPERS* might mean for the operation of *federal* statutes, it does not control the operation of *Nevada* statutes. *See Johnson v. United States*, 559 U.S. 133, 138 (2010) (U.S. Supreme Court is "bound by [a state] Supreme Court's interpretation of state law"). This Court has the final say on such matters, *id*., and it has already explained in *Feenstra* that equitable considerations must be taken into account when applying NRS 106.240.

Even if *CPERS* applied to state statutes, it would not preclude the Court from considering equitable factors here. The *CPERS* Court explained that equitable tolling is available "where there is a particular indication that the legislature … anticipated the extension of the statutory period under certain circumstances." 137 S. Ct. at 2050. Here, as described above, there is just such a "particular indication." Within the very same statute, the Nevada legislature provided that notices of pending litigation would be effective for ten years or until the underlying litigation was resolved. *See supra* at 4-6.

SFR argues that NRS 106.240 is most appropriately deemed a "statute of repose," which supposedly insulates it from any equitable considerations. SFR Opening Br. at 23-24. This is incorrect.

First, NRS 106.240 may well not be a statute of repose. As the Supreme Court has recognized, the "general usage of the legal terms ['statute of limitations' and 'statute of repose'] has not always been precise." *CTS Corp. v. Waldburger*, 573 U.S. 1, 14 (2014). Although the distinction between the two can be murky, neither this Court nor the Ninth Circuit has ever described NRS 106.240 as a statute of repose, and this Court declined to do so in *Glass*, ignoring an amicus's assertion that "NRS 106.240 is a statute of repose …." *Br. of Amicus Curiae TRP Fund VIII, LLC*, 2020 WL 5548894 (Aug. 13, 2020) at *2 (point heading). The ambiguity surrounding these labels undermines any argument that depends upon NRS 106.240 definitively being one or the other, such as SFR's argument that the equities are irrelevant when applying statutes of repose. *See* SFR Opening Br. 23-24; SFR Reply Br. at 39.

Second, the label given to NRS 106.240 does not matter. Even if NRS 106.240 were labeled a statute of repose, equitable considerations would not be barred entirely. Indeed, *CPERS* acknowledges that equitable considerations are *not* off limits when applying statutes of repose. There, the U.S. Supreme Court noted that, for statutes of repose, remedies like equitable tolling were precluded only "*in most circumstances*," effectively acknowledging that in *some* circumstances, statutes of repose "may be tolled by equitable considerations." 137 S. Ct. at 2053 (emphasis added). Indeed, federal courts recognize that other states

have legislatively and judicially crafted equitable exceptions to certain statutes of repose. *See, e.g.*, *McCullough v. World Wrestling Entertainment, Inc.*, 172 F. Supp. 3d 528, 551-55 (D. Conn. 2016) (tolling statute of repose based on "continuing course of conduct" doctrine established by Connecticut Supreme Court). As noted above, Nevada has done so too, in NRS 108.260 and *Feenstra*.

Whatever label one applies to NRS 106.240, the Court can and should take equitable considerations into account.

C. The Equities Favor Servicers

SFR seeks a windfall, arguing that Servicers have unclean hands because they supposedly slept on their rights, thus depriving them of equitable remedies. SFR Reply Br. at 39-40. SFR's arguments ignore that Servicers recorded a timely rescission of the notice of default. But even if the loan had remained accelerated, the equities would still favor Servicers and parties like them. Servicers here, much like FHFA and the Enterprises in countless other cases, have actively and vigorously sought to validate their rights under the Deed of Trust in litigation, thus demonstrating the intent to enforce them. At all times, SFR has resisted and denied the ongoing validity of the Servicers' property interests. To apply NRS 106.240 to extinguish the Deed of Trust during the litigation would effectively reward SFR for prolonging the proceedings.

SFR invokes the presumption that Servicers are "charged with knowledge of the law" and argues that a party reading the property records should have known that NRS 106.240 would operate as SFR says it would. SFR Opening Br. 20, 23. But the law here consists of more than just NRS 106.240; it also includes the law governing recorded rescissions explained in *Glass*, the law governing a tender of the superpriority lien amount, and the noticed litigation preservation provision (NRS 108.260) discussed above. With *all* relevant law accounted for, one could not reasonably infer from the public property records that the lien had been "regularly satisfied" and "discharged," or that NRS 106.240 functioned to terminate the lien given the recorded rescission, NRS 108.260, and the pending litigation. Applying NRS 106.240 to produce such an outcome would exemplify the sort of "breathtakingly broad" application of a statute that this Court has held "is probably legislatively unintended." *See Shadow Wood*, 366 P.3d at 1110.

SFR's position would also serve to undermine the years of work by this Court and the Ninth Circuit in resolving the substantial volume of litigation regarding the effect of HOA foreclosures on Enterprise lien interests. *E.g.*, *Daisy Trust v. Wells Fargo Bank, N.A.*, 445 P.3d 846, 849-50 (Nev. 2019); *Berezovsky v. Moniz*, 869 F.3d 923 (9th Cir. 2017). Those decisions have confirmed that the Federal Foreclosure Bar preserves liens that Nevada HOA foreclosures could otherwise extinguish, and the clarity they provide has dramatically reduced and

streamlined burdensome litigation in Nevada courts. Allowing NRS 106.240 to terminate the Deed of Trust here would usher in a wave of new litigation seeking, for all intents and purposes, to re-litigate and erase those results. The public interest favors resolving title disputes efficiently, not creating incentives for parties to prolong them, as SFR attempts to do here.

Further, FHFA respectfully suggests that when the Court considers the equities here, it take into account not just SFR's actions in this case, but its behavior as a litigant in other cases involving the Federal Foreclosure Bar. As this Court is well aware, SFR's attempts to avoid the lien interests encumbering the properties it purchased at HOA Sales and prolong litigation are not limited to this case. To the contrary, SFR's challenges to FHFA, the Enterprises, and banking entities like Servicers have been myriad but uniformly unsuccessful in opposing application of the Federal Foreclosure Bar. Given this history, it is clear that SFR is not an innocent purchaser who would be surprised or prejudiced to learn that Servicers intended to enforce their lien interests. Quite the opposite, SFR is well aware of the Servicers' intent to enforce their interests, as it has continuously challenged those interests under every legal basis imaginable. It would thus be wholly inequitable to permit NRS 106.240 to terminate the Deed of Trust here—thus rendering the Deed of Trust presumed satisfied and discharged—when SFR

has denied the validity of it and dozens of similar Enterprise property interests in successive litigation for years.[8]

Lastly, affirming the judgment will also serve the interests of justice. SFR, like other similarly situated HOA foreclosure sale purchasers, has every incentive to needlessly prolong any appeal, as delay in judgment accrues to their benefit. Having acquired its properties for far less than fair market value, SFR can reap substantial profits by renting out the property at market rates. Meanwhile, owners of loans like Servicers and the Enterprises—which made a substantially larger, market-priced investment in the now-defaulted loans secured by the properties—receive no return whatsoever. In substance, until the case is resolved, SFR will reap the entire return on the Servicers' capital investments.

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[8] Recently, state and federal appellate courts have admonished purchasers of properties sold at HOA sales (other than SFR) for raising frivolous arguments. The Nevada Court of Appeals found it necessary "to remind [purchaser's] counsel of his obligations under RPC 3.1 to only advance arguments if there is a basis in law and fact for doing so and, when existing precedent does not align with his clients' interests, to present good-faith arguments for its modification or reversal." *TRP Fund IV, LLC v. Ditech Fin. LLC*, 478 P.3d 937 (Nev. App. 2021) (unpublished disposition). The Ninth Circuit also ordered counsel for another purchaser to show cause why he should not be sanctioned for raising similar foreclosed arguments after having been admonished for doing so in prior decisions. *See Nationstar Mortg. LLC v. Saticoy Bay LLC, Series 9229 Millikan Ave.*, 996 F.3d 950, 959 (9th Cir. 2021); *see also Alessi & Koenig, LLC v. Saticoy Bay Series 10250 Sun Dusk Lane*, 804 F. App'x 475, 478 (9th Cir. 2020) (unpublished memorandum); *Ditech Fin. LLC v. Saticoy Bay LLC Series 8829 Cornwall Glen*, 794 F. App'x 667, 668-69 (9th Cir. Feb. 20, 2020) (unpublished memorandum) (warning counsel against "taking positions that are irreconcilable with published, on-point decisions").

Accordingly, this Court should find that SFR has acted contrary to equity and hold that NRS 106.240 does not apply here.

CONCLUSION

For these reasons, FHFA supports Servicers' request that this Court affirm the district court's decision.

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CERTIFICATE OF SERVICE

Pursuant to NEFCR 9(b)(d)(e), I certify that on June 22, 2021, a true and correct copy of the **BRIEF OF AMICUS CURIAE FEDERAL HOUSING FINANCE AGENCY IN SUPPORT OF RESPONDENTS/CROSS-APPELLANTS AND AFFIRMANCE OF THE DISTRICT COURT'S JUDGMENT**, was transmitted electronically through the Court's e-filing system to the attorney(s) associated with this case.

Role	Party Name	Represented By
Appellant/ Cross-Respondent	SFR Investments Pool 1, LLC	Diana S. Ebron (Kim Gilbert Ebron) Jacqueline A. Gilbert (Kim Gilbert Ebron) Karen L. Hanks (Kim Gilbert Ebron) Jason G. Martinez (Kim Gilbert Ebron)
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ATTORNEY'S CERTIFICATE PURSUANT TO
NEVADA RULE OF APPELLATE PROCEDURE 28.2

1. 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:

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3. Finally, I hereby certify that I have read this appellate 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 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 and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: June 22, 2021.

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