IN THE SUPREME COURT OF THE STATE OF NEVADA

WELLS FARGO BANK,

Appellant,

vs.

DUKE RENSLOW and TINA RENSLOW,

Respondents.

SUPREME COURT NO. 58283

District Court Case No. CV10-03382

APPEAL
From the Second Judicial District Court
The Honorable Patrick Flanagan, District Judge

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

Page

Snell & Wilmer
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TABLE OF CONTENTS
(cont.)

Page

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TABLE OF AUTHORITIES

Page

FEDERAL CASES

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TABLE OF AUTHORITIES
(cont.)

Page

STATE CASES

STATUTES & RULES

TABLE OF AUTHORITIES
(cont.)

Page

MISCELLANEOUS REFERENCES

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This is an appeal from an unjust order following a Foreclosure Mediation in which Wells Fargo offered the Renslows forbearance or a substantial reduction in their mortgage. Though the mediation did not permit Wells Fargo to proceed in foreclosure against the Renslows, the Renslows nonetheless appealed, seeking a judicial rewrite of their mortgage. Wells Fargo was rewarded for its reasonable and flexible offer of a substantial modification with a $30,000 sanction and a radical judicial modification of the interest term of the mortgage Wells Fargo is servicing. The district court's sledgehammer sanction and the slashing of the interest rate to 2% effect an unconstitutional taking, violate the Contract Clause, rest upon what the very district judge below has suggested is a violation of the separation of powers, and flout due process.

The arguments of the Renslows and their amici against these points all fail in turn. First and foremost, they fail to rebut the many constitutional deficiencies Wells Fargo has already catalogued. But their many attempts to change the subject also fail. The Attorney General's suggestion that a bank foreclosing is somehow engaged in conflict of interest behavior is both incorrect and irrelevant. The suggestion that Wells Fargo has no standing to contest the Order is baseless, given that it begs the question of who was ordered to live within the court's redrawn contract if not Wells Fargo. The suggestions that this Court should not decide the important constitutional issues before it, or that Wells Fargo somehow waived its objections to the radical order below, likewise fail badly. But more importantly, Nevada homeowners, the Nevada financial services community, and the other branches of Nevada's government all need this Court to decide this case, to know what the law is and will be. This Court should take this occasion to recognize that, however well-intentioned, the Foreclosure Mediation Program should now end, for constitutional reasons that are presented starkly in the record of this unfair, draconian sanction order that baldly rewrote a contract based on the Renslows'

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appeal, and not Wells Fargo seeking a certificate to foreclose in the first place. This Court should reverse.

I. The Responses of the Renslows and Their Amici Underscore That the District Court's Order Is a *Per Se* Regulatory Taking, and Is Also a Taking Under Penn Central and Its Progeny.

A. The Foreclosure Mediation Program Here Effects a *Per Se* Regulatory Taking By Appropriating Collateral and Redistributing It From the Beneficiary to the Indisputably Defaulting Borrower.

The Renslows and their amici argue that there is no *per se* regulatory taking in keeping a security holder from their collateral when a mortgagee defaults. They are wrong. The Renslows have a contract to pay money in return for an interest in land. They are in default, and no one says they are not. Under their contract, when they do not make their payments, they can be foreclosed. Foreclosure is the exercise of the collateral-holder's bedrock right – the right to exclude. As the Supreme Court has stated, "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979)). Recognizing how fundamental that right is, if a regulation permanently deprives a property owner of his or her right to exclude, there is a *per se* physical taking. *Id.* at 435-36. The Foreclosure Mediation Program, here and every time it bars the exercise of the right to exclude, effects a *per se* regulatory taking.

A second, similar path through federal Takings Clause jurisprudence leads to the same conclusion. Both Wells Fargo and the Attorney General agree that continuing physical invasion or occupation of property, however minor in scope, constitutes a *per se* regulatory taking. *See Loretto*, 458 U.S. at 434-35 (cited by

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WF, at 8:25-8:27[1]); *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 538 (2005) (cited by AG, at 13:10). While the Attorney General's brief has the law right, its position rests upon the wishful and blatantly incorrect assertion that follows its citation to *Lingle*: "Physical occupation of properties is not an issue." (*Id.* at 13:11-13:12). This makes no sense. Of course physical occupation is an issue. Foreclosure is an exercise of the right to exclude the defaulting party from the physical property that is the collateral. The district court negated the right to exclude, and installed the defaulting Renslows physically in the property for the foreseeable future. This quite literally is an occupation, which under everyone's authority makes it a *per se* regulatory taking.

Nevada case law and statutory law compel this result even more clearly than does the case law of the U.S. Supreme Court. No one disputes Wells Fargo's position that the Takings Clause of the Nevada Constitution is more even protective of property rights than the Takings Clause in the U.S. Constitution. *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 670, 137 P.3d 1110, 1127 (2006). While the Attorney General's brief fails even to cite or discuss any of Nevada's more stringent law on takings, and fails even to discuss NRS Chapter 37, which lists permissible and impermissible takings, that brief (fatally) concedes the existence of public use here, describing the Foreclosure Mediation Program as a "public program adjusting the benefits and burdens of economic life to promote the common good." (AG, at 13:24-13:26) Civil Rights for Seniors describes the public purpose of the Program thus: to "keep Nevadans in their homes."

These public purposes make what happened in the district court a prohibited regulatory taking. Neither the Renslows nor their amici have any real explanation

[1] Wells Fargo's Opening Brief is cited herein as WF; the Attorney General's Brief is cited as AG; the Renslows' Brief as REN, and the Civil Rights For Seniors' Brief as CRS, all at [page:line].

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of how Nevada, for these public purposes, can take property rights from Wells Fargo and FHLB – here, the bedrock negative property right, to foreclose and exclude – and transfer them to the Renslows as the correlative positive property right – to occupy. NRS 37.010(2) could not be clearer that Nevada cannot do this. It states: "the public uses for which private property may be taken by the exercise of eminent domain do not include the direct or indirect transfer of any interest in the property to another private person or entity." And yet the interest in property that is foreclosure has been taken, and the converse right against foreclosure has been conferred. This is a public use, and it does not comply with NRS 37.010, as the Attorney General's silence on this statutory subsection underscores.

All occupation aside, the Renslows and their amici have no answer to the case on all fours that makes the state's appropriation of interest here a prohibited *per* se taking. Wells Fargo cited *Brown v. Legal Foundation of Washington* for the proposition that when the state redirects interest payments from one party to another, that is a *per se* taking. (WF, at 9:5) The Washington law in *Brown* was an impermissible per se regulatory taking, because it took interest from client trust accounts for a public good – poverty law. The Renslows' brief, while failing to discuss *Brown*, makes crystal clear the parallel here: "the reduction in interest resulted from the need of government to enforce its police powers to help the people." While assisting poverty law programs and helping the people are good general goals, the American form of government does not countenance the state simply taking interest from A and giving it to B for whatever it deems a good reason. Neither the Renslows nor their amici even cite *Brown*, for it controls and they have no argument to the contrary. This Court should reverse.

B. The District Court's Order Also Effects a Regulatory Taking Under *Penn Central* and Cases Following It.

Even if this Court determines that the Foreclosure Mediation Program did not result in a *per se* physical taking, the regulatory takings framework still applies. A

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three-part balancing test determines when a regulation that does not deprive one of all economic use is nonetheless a taking. That test consists of: (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *see McCarran Int'l Airport*, 122 Nev. at 663, 137 P.3d at 1122 (applying *Penn Central*).

Forced loan modifications have a serious economic impact on lenders, resulting in a permanent change to the loan terms, requiring them to accept less money for the property than negotiated, and preventing the lenders from protecting their investment by seeking foreclosure after default has occurred. The Foreclosure Mediation Program also interferes with the lenders' investment-backed expectations, forcibly changing the contract by lowering the interest rate and payments made to the lenders and requiring the lenders to accept far less than they originally agreed to be paid. This is not a brief delay on the return of the investment as the Respondents contend; the modification permanently changes the terms of the loan, substantially lowering the value of the investment. Finally, the Foreclosure Mediation Program does not conform to the "background principles of the State's law," allowing the State to modify loans and preclude foreclosure where no such regulation or general policy existed before. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 635 (2001) (O'Connor, J., concurring) (considering "the regulatory backdrop against which an owner takes title to property from the purview of the *Penn Central* inquiry").

The Renslows argue that *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) does not control here, because (they contend) the Frazier-Lemke Act was more stringent than the Foreclosure Mediation Program. They are wrong. The Foreclosure Mediation Program is more clearly a taking than was the Frazier-

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Lemke Act. Under Frazier-Lemke, banks had the right to refuse to sell the farmland at its current appraised value to bankrupt farmers occupying the land and receive rent instead. *Radford*, 295 U.S. at 575. The Foreclosure Mediation Program does not allow for such refusal, permanently changing the terms of mortgages without input from the mortgage holder. Despite Respondents' assertions, the Frazier-Lemke Act did not apply to all loans, only those in default (as in the Foreclosure Mediation Program), and did not result in loss of all economic value to the lender, as lenders still received rent. *Id.* Also, the modified Frazier-Lemke Act later approved by the Supreme Court allowed banks to retain the mortgage until repaid, foreclose on the property, or conduct a judicial public sale. *Wright v. Vinton Branch of the Mountain Trust Bank*, 300 U.S. 440, 457-58 (1937). The Foreclosure Mediation Program here prevented foreclosure or sale, and required Wells Fargo to take less money than it bargained for, just like the Frazier-Lemke Act the Supreme Court voided. *Radford* gives this Court good reason to reverse.

II. The Responding Briefs Fail To Address the Many Important Reasons the District Court's Action Violates the Contract Clause.

The Responses then fail to explain how NRS 107.086 is reasonable and necessary to the purported public purpose it serves. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 29 (1977) (to survive Contract Clause challenge, law must be ***reasonable and necessary*** to serve important public purpose). One way in which a law can impair contracts and still be reasonable and necessary is if it is narrowly tailored to fit a temporary emergency, as in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). The Attorney General wishfully and without support asserts that Nevada's Foreclosure Mediation Program does not differ from *Blaisdell*. (AG, at 10) This is clearly wrong. There is no sunset provision in NRS 107.086. Minnesota's Depression-era foreclosure moratorium law did not impair the integrity of the mortgage indebtedness (here, the sanction reduced it by

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$30,000), interest kept accruing (here, interest was slashed), and the mortgagee could recover a deficiency if the mortgagor failed to redeem (the Court has already stopped the servicer from seeking to be made whole for default through foreclosure). Lacking the attributes that made the Minnesota law reasonably and narrowly tailored, NRS 107.086, as applied here, violates the Contract Clause.

The Attorney General's brief notwithstanding, *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935) is still good law, and controls. In *Kavanaugh*, the Court held that an Arkansas law diluting the rights and remedies of mortgage bondholders was invalid under the Contract Clause. *Id.* That law extended the time required to enforce payment, greatly increased the time from default to sale, cut penalties for late payment, and took possession from the foreclosure sale purchaser during the redemption period. *Id.* at 57-59. Where the time from default to sale had been sixty-five days, under the new legislation it was two and a half years. *Id.* at 61-62. The *Kavanaugh* law was invalid because – distinguished from *Blaisdell*, and like NRS 107.086 – it lacked protections for lenders. *Id.* at 63.

The Attorney General's suggestion that *East N.Y. Sav. Bank v. Hahn*, 326 U.S. 230 (1945) somehow makes *Kavanaugh* irrelevant misreads *Hahn*. In that case, the New York legislature *increased* the amortization of principal repeatedly during a temporary foreclosure moratorium – it didn't rewrite contracts to slash interest and principal as happened for the Renslows, which is much more like what happened in *Kavanaugh*. And in *Hahn* the creditors' interests were well-protected not only by increased amortization, but also "frequent reconsideration" of the law. *Id.* at 235. There is no reconsideration of the law here (frequent or otherwise), no protection for Wells Fargo (only economic loss), and rather than judiciously extended emergency powers, a permanent "emergency" cramming down of rewrites of mortgages. *Hahn* does not help the Attorney General.

The Attorney General's suggestion that *Koscot Interplanetary, Inc. v. Draney*, 90 Nev. 450, 530 P.2d 108 (1974) somehow saves NRS 107.086 from a

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Contract Clause challenge fails badly. *Koscot* holds that contracts dealing with pyramid schemes can be declared void as against public policy. Is every contract Nevada wishes to impair to be likened to a Ponzi scheme? This is a dangerous argument that creates an exception that eats the rule that is the Contract Clause. Neither the Nevada nor the U.S. Constitutions confer upon the Legislature the sweeping, Orwellian power entailed by the Attorney General's position to rewrite any contracts deemed bad or inconvenient by the state. Are loans to buy cars next? Perhaps cellphone contracts? This is why there is a Contract Clause in both Constitutions. Even if this Court adopts the Attorney General's dangerous expansion of *Koscot*, it is not federal law and cannot bear on Wells Fargo's federal claims here.

The Renslows' argument that there is no right to non-judicial foreclosure here because the Legislature could bar the practice fails. Nevada can no more violate the Contract Clause in regulating non-judicial foreclosure than it could violate the Equal Protection Clause by making foreclosure a function of race or gender.

III. The Responses Fail To Explain Why the Foreclosure Mediation Program Is Not an Administrative Agency, as the District Court Once Said It Was, and Make Arguments Actually Supporting Wells Fargo's Points.

The Renslows and their amici fail to demonstrate in their Responses why the Foreclosure Mediation Program does not violate the separation of powers doctrine. They sidestep two important points. First, not knowing what to do with the statement, the Renslows and the Attorney General ignore altogether that the very same District Court whose ruling is now upon reviewed previously acknowledged that "the Foreclosure Mediation Program is certainly an Administrative Agency." (*See* CRS, at 14:22-14:23.) That even the court below recently recognized this fact – with the emphatic modifier "certainly," no less – is a powerful indicator that the Program violates the separation of powers. The Civil Rights for Seniors brief at

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least mentions the district court's striking admission, but then points out that Judge Flanagan took back the statement in a later opinion – without supplying any argument as to why he wasn't right in the first place. This is entirely unpersuasive. Second, none of the Responses address Wells Fargo's point that the Foreclosure Mediation Program is fundamentally analogous to the administrative process for hearings on unemployment benefits in the Employment Security Division. If this Court affirms that Nevada's Constitution lets it administer the Foreclosure Mediation Program, the Legislature could as easily appoint it to run a new program designed to let car buyers contest matters relating to their car – after all, such matters end up in litigation, the program could prevent justiciable disputes, and it aids the public. There is also no reason the Legislature could not also reassign the Employment Security Division's benefits hearings to the Judiciary. Once this Court lets itself become an administrative agency doing prelitigation consumer protection work, the separation of powers is lost.

The arguments the Responses do address also show why the Foreclosure Mediation Program violates the separation of powers. In seeking to assert that the Program's subject matter is inherently judicial, the Attorney General argues that the justiciable dispute in this case is one "as to the legality of its [Wells Fargo's] attempt to foreclose." (AG, at 7:4) That makes Wells Fargo's point. The Foreclosure Mediation Program is supposedly to foster mediation of foreclosures, not to adjudicate the legality of foreclosures. Lawsuits against lenders or servicers are for that. But there is no such suit here. By acknowledging that the justiciable controversy, if any, would be over whether Wells Fargo can foreclose, the Attorney General is actually conceding the lack of a justiciable controversy where default is conceded (as here). The lack of a justiciable controversy here is fatal to the Program, because of this Court's teaching that the judicial power is "the authority to hear and determine justiciable controversies." *Galloway v. Truesdale*, 83 Nev. 13, 422 P.2d 237 (1967); *see also Halverson v. Hardcastle*, 123 Nev. 245, 163 P.3d

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428 (2007). The legislature may not confer or impose non-judicial powers upon the judiciary. *Id.*

The final answer of the Responses is that an Illinois case, *Wenger v. Finley*, 541 N.E.2d 1220 (Ill. Ct. App. 1989), makes the Foreclosure Mediation Program an exercise of the judicial power. This is entirely wrong. The Illinois dispute resolution program in *Wenger* was to "include, but not be limited to, disputes referred from the Court system." *Id.* at 1221. It is of course uncontroversial that a program *mediating pending judicial disputes* is judicial in character. But the point of the Foreclosure Mediation Program is just the opposite – it mediates decisions to foreclose that have not ripened into case. Likewise, the Illinois program was voluntary, "organized to provide mediation services at no charge to disputants who agree to utilize its services," and funded from fees for filing cases, because it was in aid of those very filers. *Id.* By contrast, the Foreclosure Mediation Program is mandatory and prelitigation, which means it invades social and private ordering outside and before any case, and can result (as here) in rewriting contracts. The two programs are night and day, and Illinois provides no example of a court administering a program that caters only to nascent issues that are not filed cases.

IV. As The Responses Illustrate, the District Court's Ruling Below Violated Wells Fargo's Right to Due Process, By Adjudicating Claims That Do Not Exist and Effecting Relief Without Notice as to the Matter Actually Being Adjudicated.

The responses of amici actually underscore the violation of Wells Fargo's right to due process that was effected in this matter. The Attorney General begins by correctly noting that the core of due process is notice and an opportunity to be heard, citing *Mathews v. Eldridge*. The problem is that the district court, by imposing what amounted to the HAMP modification, and by making specific factual findings about premediation negotiations, made itself a court of HAMP. There are two problems with that. One is that the proceeding authorized by NRS 107.086(5) is one about good faith participation in a mediation, so there was no

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notice of the further proceeding and findings to be had, and Wells Fargo timely objected to the court making those findings. The second problem is that there is no private right of action under HAMP. (WF, at 22 (collecting cases))

Amici confirm that they are engaging in, and asking this Court to indulge in, the nudge-nudge, wink-wink creation of a private right of action under HAMP without notice to Wells Fargo. The second argument in the Attorney General's brief is that Wells Fargo "Ignores its Own Breach of Its Contract Obligations Under HAMP." (AG, at 4:1-5:20) Worse yet, in trying to create a justiciable controversy to avoid the separation of powers problems in this case, the Attorney General identifies the case or controversy not as good faith or bad faith in a mediation, but instead, tellingly, as "a justiciable controversy as to the legality of its [Wells Fargo's] attempt to foreclose." (AG, at 7:4) This is of course entirely wrong. The Foreclosure Mediation Program is not really supposed to be a *sub rosa* way to sneak claims of illegal foreclosure into court without a complaint, an answer, and due process. It is supposed to be about the mediation and nothing more. Yet the court below punished Wells Fargo for prelitigation conduct, and the Attorney General asks this Court to approve the district court's result as one having to do with the legality of foreclosure and Wells Fargo's supposed breaches of HAMP, for which there is no private right of action. This is not notice and an opportunity to be heard as in *Mathews v. Eldridge*. It is a statutory bait and switch that punishes Wells Fargo for matters the statute and case law have told it were not at issue below. This Court should reverse.

V. The Remaining Arguments Amici Raise, Which All Amount to Invitations To Avoid the Important Issues Presented By This Appeal, Each Fail in Turn.

A. The Attorney General's "Conflict of Interest" Argument Aims Only to Distract From the Constitutional Issues and Lacks Merit.

To distract from the issues of Wells Fargo's appeal, the Attorney General starts with a broadside attack on Wells Fargo's motives consisting of a supposed

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"conflict of interest," and "pure avarice." This is baseless, for many reasons. First, Wells Fargo offered the Renslows a forbearance or modification. That the Renslows rejected the forbearance and modification offers, which the record appears to indicate amounted to $268 per month instead of $600 per month, is their prerogative, but this is not the record for fulminating about avarice. *See* JA 156, 158, 175, 186, 195. Second, the Attorney General invites this Court to sit as a rewriter-in-chief of Nevada contracts – which is precisely what the Takings Clause and Contract Clause stand against. The Attorney General, remarkably, accuses Wells Fargo of acting in its own economic interest, as if it should not, and as if it is the role of the state to reorder Wells Fargo's conduct to conform to the Attorney General's notion of how noteholders and servicers work together. Wells Fargo has participated voluntarily in many mortgage modifications and it will continue voluntarily to do so. But the Attorney General's suggestion that Wells Fargo cannot be permitted freedom of choice under its contracts not only the Contract Clause, and the Takings Clause, but basic American notions of freedom of contract and freedom to choose. Third, FHLB has not joined the parade of amici here to argue that Wells Fargo violated its interests in the foreclosure. FHLB's deafening silence refutes the suggestion that Wells Fargo somehow acted against FHLB's interests in this matter.

Finally, the Attorney General seeks backdoor judicial notice of argumentative advocacy pieces attacking foreclosure. (AG at 3-4, n.4-6) This Court should decline, as other courts have, to notice and treat as fact, "every miscellaneous allegation that has been in the press with regard to mortgages, notarization, robo-signing, and assignments . . ." *Giza v. AMCAP Mortg., Inc.*, 441 B.R. 395, 400 n.8 (Bankr. W.D. Mass. 2011); *see also Crawford v. Countrywide Home Loans, Inc.*, 647 F.3d 642, 645 n.2 (7th Cir. 2011).

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B. Wells Fargo Has Standing to Attack the District Court's Order in All Particulars: the $30,000 Sanction; the Prohibition Against Foreclosure; and the Modification of the Interest Rate Affecting Monthly Payments.

In its amicus brief, Civil Rights for Seniors contends that Wells Fargo lacks standing to bring claims other than its objection to the $30,000 sanction. Yet Wells Fargo has standing to litigate foreclosure; it always had the right to foreclose on the property. *See, e.g.*, *Lozano v. Ocwen Fed. Bank*, 489 F.3d 636, 637 n.2 (5th Cir. 2007). Indeed, the Attorney General spends pages arguing that loan servicers, such as Wells Fargo, typically seek foreclosure. (AG, at 3-6) The district court's rewrite of the borrower's contract also requires Wells Fargo to accept payments below the investment value originally negotiated. For these reasons, Wells Fargo has standing to bring all claims in this appeal.

C. Civil Rights for Seniors' Argument That Wells Fargo Waived Its Arguments Is Wrong and Provides No Reason for This Court to Decline to Reach the Important Issues of This Case.

Nevada's government, public, and businesses all need to know whether the Foreclosure Mediation Program is constitutional. The Attorney General and the parties all engaged the important constitutional issues presented. None argued waiver. This Court should decide this important question, which has drawn both amici and news coverage.[2] One amicus, Civil Rights for Seniors – ironically in a

[2] *See, e.g.*, Foreclosure Victory Rings Hollow for Reno Man, Las Vegas Sun, Jan. 4, 2012, http://www.lasvegassun.com/news/2012/jan/04/nv-foreclosure-pioneer/; Cy Ryan, State's Top Court to Rule on Constitutionality of its Foreclosure Mediation Program, Las Vegas Sun, Dec. 14, 2011, http://www.lasvegassun.com/news/2011/dec/14/states-top-court-rule-constitutionality-program-it; Joseph Becker, A Repellant for Tyrants: Part III, Nev. Pol'y Res. Inst., Nov. 22, 2011, http://www.npri.org/publications/pub_detail.asp?id=852; Kyle Gillis, Second Lawsuit Challenges Constitutionality of Foreclosure Mediation Program, Nev. J., Oct. 25, 2011, http://nevadajournal.com/2011/10/25/second-lawsuit-challenges-constitutionality-foreclosure-mediation-program; Cy Ryan, State Supreme Court Orders Banks Be Sanctioned for Not Following Foreclosure Mediation, Las Vegas

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late-filed brief – suggested that this Court *not* reach the merits of this appeal because of a supposed waiver. Yet the purpose of an amicus curiae is "to advocate a position not out of a direct interest in the litigation but from its own views of what is legally correct and beneficial to the public interest." *Connerly v. State Personnel Bd.*, 129 P.3d 1, 9 (Cal. 2006). That is why constitutional arguments by amici on both sides can be helpful. It is also why third party arguments about case-posture specific matters such as supposed waivers are not appropriate.

This Court has the authority to address the constitutional issues on appeal in this case and should do so as these are important issues that will recur. *See, e.g., Somee v. State*, 124 Nev. 434, 444, 187 P.3d 152, 159 (2008); *Grey v. State*, 124 Nev. 110, 120, 178 P.3d 154, 161 (2008); *Sterling v. State*, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992); *State v. Glusman*, 98 Nev. 412, 418, 651 P.2d 639, 643 (1982). And Wells Fargo objected to the result below. It opposed the modification of the mortgage, opposed being judged for premediation conduct, asserted rights to foreclose, and fought the sanction.

D. This Court Has Not Decided the Constitutionality of the Law, and Should Now, As There Is No Constitutionality By Estoppel.

Wishing fervently that this Court not analyze the important constitutional issues before it, amici suggest to this Court that the issue of constitutionality was already decided in a variety of ways in which it could not possibly have been decided. First, they argue that the fact that the Legislature passed the law represents the considered judgment of the Legislature as to constitutionality. This is an unavailing bootstrap. While the Legislature did pass AB 149, the same is true of all laws eventually stricken as unconstitutional. Second, amici point to Chief

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Sun, Oct. 20, 2011, http://www.lasvegassun.com/news/2011/oct/20/state-supreme-court-goes-after-two-banks-foreclosu; Jason Hidalgo, Special Report: Landmark Case Could Redefine Mortgage Mediation in Nevada, Reno-Gazette J., Aug. 14, 2011.

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Justice Hardesty's testimony before passage of the bill. This Court does not give advisory opinions, and one member and leader of this Court opining about the Judiciary's willingness to help in a time of economic distress does not constitute a legal opinion of constitutionality, much less one of the full Supreme Court. Third, amici point out that the Court hasn't, *sua sponte*, stricken the law as unconstitutional in cases not presenting that issue, but that is not surprising, much less controlling. Fourth, that a different bank expressed support before AB 149 passed does not decide this case. Nevada needs this Court to rule for the first time on these issues. This Court should reverse.

VI. CONCLUSION

Based on the foregoing, the Court should declare the Program unconstitutional on one of the above bases, reverse the district court's imposed loan modification, reinstate the terms of the original loan, and vacate the sanctions imposed against Wells Fargo.

Dated this 19th day of January, 2012.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Appellant's Reply Brief complies with the typeface and type style requirements of NRAP 32(a)(4)-(6), because this brief has been prepared in a proportionally spaced typeface using a Microsoft Word 2003 processing program in 14-point Times New Roman type style.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it is does not exceed 15 pages.

Finally, I hereby certify that I have read the Appellant's Reply 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 this 19th day of January, 2012.

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CERTIFICATE OF SERVICE

As an employee of Snell & Wilmer L.L.P., and I certify that I served a copy of the foregoing **APPELLANT'S REPLY BRIEF** on the 19th day of January, 2012, via electronic service through the Supreme Court of Nevada's ECF System upon each party in the case who is registered as an electronic case filing user and First Class U.S. Mail to all parties who are not registered as follows:

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