No. 16-1208

IN THE
Supreme Court of the United States

BOURNE VALLEY COURT TRUST,
Petitioner,
v.

WELLS FARGO BANK, N.A.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENT

ANDREW M. JACOBS
SNELL & WILMER LLP
One Arizona Center
Suite 1900
Phoenix, AZ 85004

AMY F. SORENSON
KELLY H. DOVE
W. DANNY GREEN
SNELL & WILMER LLP
15 West South Temple
Suite 1200
Salt Lake City, UT 84101

NEAL KUMAR KATYAL
Counsel of Record
FREDERICK LIU
EUGENE A. SOKOLOFF
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Respondent

QUESTION PRESENTED

Whether a state statute that impairs the private ordering of rights in property through nonjudicial foreclosure proceedings is a form of state action subject to the Due Process Clause.

RULE 29.6 DISCLOSURE STATEMENT

Wells Fargo Bank, N.A.'s parent corporation is Wells Fargo & Co., and Wells Fargo & Co. is a publicly held company that owns 10% or more of Wells Fargo Bank, N.A.'s stock. No other publicly held company owns 10% or more of Wells Fargo Bank, N.A.'s stock.

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INTRODUCTION

This case presents an urgent question regarding the scope of the state action doctrine: Does the Due Process Clause apply to statutes that impair the private ordering of property rights through nonjudicial foreclosures? The question is the subject of an acknowledged and square conflict between Nevada's Supreme Court and the Ninth Circuit. And its importance nationwide is undisputed. Respondent Wells Fargo Bank, N.A., therefore agrees with petitioner Bourne Valley Court Trust that this Court should grant review.

The parties part ways, however, on the merits. The Ninth Circuit held that Nevada's super-priority lien statute must comply with the Due Process Clause

because it gives a homeowners' association the right to extinguish security interests that are senior as a matter of private ordering. Pet. App. 15a. That decision is correct. It is "beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment." *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948). Yet the Nevada Supreme Court has now expressly split with the Ninth Circuit, concluding that the statute "do[es] not implicate due process." *Saticoy Bay LLC Series 350 Durango 104* v. *Wells Fargo Home Mortg., N.A.*, 388 P.3d 970, 974 (Nev. 2017). The Nevada Supreme Court "acknowledge[d]" the Ninth Circuit's decision in this case, but "decline[d] to follow its holding." *Id.* at 974 n.5.

Given this acknowledged and square conflict, the outcome of over a thousand pending cases will now turn on whether the parties are in federal or state court. And because Nevada's statute is patterned on a uniform law, the split creates uncertainty across the country. This Court should grant certiorari and affirm the Ninth Circuit's decision in this case.

STATEMENT

A. Statutory Background

Secured creditors have long relied on the "cardinal rule" that "the first in time is the first in right." *United States* v. *City of New Britain*, 347 U.S. 81, 85-86 (1954); *see also Rankin* v. *Scott*, 25 U.S. (12 Wheat.) 177, 179 (1827) (Marshall, C.J.) ("The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction, * * * unless the lien be intrinsically defective, or be displaced by some act of the party holding it,

which shall postpone him *** to a subsequent claimant."). One effect of that rule is that, while a foreclosure sale extinguishes all interests in a parcel of real property that are junior to the foreclosed lien or mortgage, senior interests—such as mortgages recorded earlier in time—are left untouched. *See Restatement (Third) of Property (Mortgages)* § 7.1 (1997). Not in Nevada.

Nevada law lets a homeowners' association jump the line. Nevada Revised Statutes § 116.3116 allows a homeowners' association a lien on a homeowner's property for unpaid dues, fines, or other costs. That lien is "prior to" a first security interest, such as a mortgage or home equity loan, "to the extent of the assessments for common expenses" for up to nine months prior to foreclosure. Nev. Rev. Stat. § 116.3116(2). Other provisions of the statute allow a homeowners' association to foreclose on such a lien without going to court. *See id.* §§ 116.31162-.31168.

In 2014, Nevada's Supreme Court held that the State's super-priority lien statute gives homeowners' associations more than a *payment* priority. In a sharply divided 4-3 decision, the court held that the statute "establishes a true priority lien" that "is senior to the first deed of trust" such that "its foreclosure will *extinguish* the first deed of trust." *SFR Invs. Pool 1, LLC* v. *U.S. Bank, N.A.*, 334 P.3d 408, 412 (Nev. 2014) (emphasis added). In other words, a homeowners' association can foreclose on a lien for up to nine months of unpaid dues—typically worth only a few thousand dollars—and sell a member's property free and clear of all other interests, even first-priority liens.

B. Factual And Procedural Background

1. In 2001, Renee Johnson purchased a home in a planned development in North Las Vegas, Nevada. Pet. App. 4a. She financed that purchase with a loan for $174,000, secured by a first deed of trust. *Id.* Wells Fargo acquired all beneficial interest in the note and deed of trust in February 2011. *Id.*

In August 2011, Johnson fell $1,298.57 behind on payments to her homeowners' association. *Id.* at 5a. In May 2012, the homeowners' association foreclosed on a lien for the unpaid dues and sold Johnson's home in a nonjudicial foreclosure sale. *Id.* at 29a-30a. The foreclosure deed was subsequently recorded, and the property was transferred to Bourne Valley. *Id.* at 30a. The property's assessed value was $90,543; the sale price was $4,145. *Id.*

2. Eight months after the foreclosure sale, Bourne Valley filed a quiet title action in Nevada state court. *Id.* The suit was removed to the U.S. District Court for the District of Nevada based on diversity of citizenship, and Bourne Valley moved for summary judgment. *Id.* Relying on the super-priority lien statute and the Nevada Supreme Court's decision in *SFR*, Bourne Valley argued that the foreclosure sale extinguished Wells Fargo's first deed of trust. *Id.* at 30a-31a. Wells Fargo opposed, arguing among other things that Bourne Valley had failed to establish that Wells Fargo received notice of the sale and thus failed to demonstrate that the sale comported with federal due process requirements. *Id.* at 31a-32a.

The District Court granted summary judgment for Bourne Valley. *Id.* at 42a. The court proceeded on the assumption that the super-priority lien statute required the homeowners' association to provide

notice of the sale to Wells Fargo. *See id.* at 36a-37a. It then concluded that the foreclosure deed, which recited compliance with the statute, "constitute[d] 'conclusive proof' " that notice was provided to Wells Fargo. *Id.* at 37a. The court thus rejected Wells Fargo's due process argument. *Id.*

3. The Ninth Circuit vacated the District Court's ruling and remanded. *Id.* at 15a. Rejecting the assumption on which the District Court's opinion rested, the Court of Appeals concluded that the super-priority lien statute did *not* necessarily require actual notice of sale to mortgage lenders like Wells Fargo. *Id.* at 9a-12a. Rather, the court explained, the statute required that "notice be given only when it had already been requested." *Id.* at 9a. That opt-in scheme, the court held, was facially unconstitutional, *id.* at 8a, because it impermissibly "shifted the burden of ensuring adequate notice from the foreclosing homeowners' association to a mortgage lender," *id.* at 10a.[1]

The court then rejected Bourne Valley's counterargument "that there has been no 'state action' for purposes of constitutional due process." *Id.* at 13a. The court acknowledged that a "foreclosure sale itself is a private action," and that "there is no state action here that 'encourages' or 'compels' a homeowners' association to foreclose on a property." *Id.* (quoting *Apao* v. *Bank of New York*, 324 F.3d 1091, 1094 (9th

[1] The Court of Appeals acknowledged that the District Court had not addressed the statute's facial constitutionality. Pet. App. 8a. But the Court of Appeals proceeded to decide the issue after noting that Wells Fargo had raised it on appeal and that Bourne Valley had "not argue[d] that Wells Fargo waived any facial challenge." *Id.* at 8a n.3.

Cir. 2003)). But that was "irrelevant to Wells Fargo's due process argument" because the statute *itself* impaired Wells Fargo's rights. *Id.* at 14a. "Absent operation of the Statute, Wells Fargo would have had a fully secured interest in the Property." *Id.*

The court distinguished cases that had found no state action in a private party's use of statutory self-help procedures. It noted that the homeowners' association had no contractual right to sell the property free and clear of Wells Fargo's interest; indeed, "the mortgage lender and the homeowners' association had no preexisting relationship" whatsoever. *Id.* at 13a. So the homeowners' association's use of the statute was not comparable to "a private creditor enforc[ing] its contractual rights" through state-created procedures. *Id.* at 14a. Rather, "the homeowners' association's ability to extinguish Wells Fargo's interest in the Property arose *directly and exclusively* from the Statute." *Id.* at 15a (emphasis added).

Judge Wallace dissented. Among other things, he argued that there could be no state action because there was "no 'overt official involvement'" in the foreclosure. *Id.* at 21a.

ARGUMENT

I. THERE IS AN ACKNOWLEDGED AND SQUARE SPLIT

The Ninth Circuit and Nevada's highest court have now reached diametrically opposing answers to the same federal constitutional question involving the same Nevada statute. The Ninth Circuit held that "the Nevada Legislature's enactment of the Statute is a 'state action.'" Pet. App. 13a. By contrast, the Nevada Supreme Court held that "Nevada's super-

priority lien statute[] do[es] *not* implicate due process" because "the Legislature's mere enactment" of the statute does not constitute state action. *Saticoy Bay*, 388 P.3d at 973-974 (emphasis added). The Nevada Supreme Court "acknowledge[d]" the Ninth Circuit's contrary ruling, but "decline[d] to follow" it. *Id.* at 974 n.5.

1. *Saticoy Bay* involved the constitutionality of the same super-priority lien statute. *Id.* at 971. Like this case, *Saticoy Bay* originated in a suit to quiet title brought by the new owner of a property sold under the statute. *Id.* at 971-972. As in this case, the property was subject to a note held by Wells Fargo and secured by a first deed of trust. *Id.* As in this case, there was no indication that Wells Fargo had a preexisting relationship with the homeowners' association. And, as in this case, the property sold for a pittance, extinguishing Wells Fargo's security interest. *Id*. at 972.[2]

But the Nevada Supreme Court rejected Wells Fargo's due process defense on the ground that there was no state action. The Nevada Supreme Court agreed that Wells Fargo had alleged a deprivation of due process "caused by the exercise of some right or privilege created by the State." *Id.* (quoting *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 937 (1982)). But it concluded that Wells Fargo had not shown that "the party charged with the deprivation [was] a person who may fairly be said to be a state actor." *Id.* In reaching that conclusion, the court cited the views of other courts that "nonjudicial foreclosure statutes do

[2] *Saticoy Bay* involved respondent's wholly owned subsidiary, Wells Fargo Home Mortgage, N.A.

not involve significant state action." *Id.* at 973 (internal quotation marks omitted). The State's high court also "reject[ed] Wells Fargo's argument that the Legislature may be charged with the deprivation because it enacted" the super-priority lien statute, explaining that Wells Fargo had not made any "additional showing that the state compelled the [homeowners' association] to foreclose on its lien, or that the state was involved with the sale." *Id.*[3]

2. The Nevada Supreme Court's disagreement with the court of appeals for the regional circuit that includes Nevada creates an untenable situation. Unless and until this Court steps in, parties' rights in foreclosed properties will depend on whether their cases are decided, like this one, in the United States District Court for the District of Nevada or instead two blocks west in the Nevada District Court for Clark County. *See* Las Vegas Dev. Grp., LLC *Amicus* Br. 6 (noting that "since the *Bourne Valley* decision, financial institutions have filed exclusively in Federal Court while purchasers have filed exclusively in State Court").

In Nevada's courts, the winners will be speculators who bought homes at cut prices with no notice to the lenders whose first-place liens they extinguished. In federal court, where the super-priority lien statute's notice provisions have now been held unconstitu-

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[3] Wells Fargo elected not to file a certiorari petition in *Saticoy Bay* only because the Nevada Supreme Court's decision did not represent a "[f]inal judgment[]" under 28 U.S.C. § 1257(a)—not because of anything having to do with the cert-worthiness of the state action issue. *See Saticoy Bay*, 388 P.3d at 975 (remanding to permit the state trial court to consider alternative, state-law defenses to the quiet title action).

tional, lienholders' due process rights will prevail. That disparity cannot be allowed to continue. *See Connecticut* v. *Doehr*, 501 U.S. 1, 9 (1991) (granting certiorari to resolve conflict between the Second Circuit and Connecticut Supreme Court over the constitutionality of a Connecticut pre-judgment attachment statute). This Court should grant review.[4]

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING

The implications of the conflict extend far beyond the disputes in this case and *Saticoy Bay*.

1. Over *a thousand cases* involving title disputes arising from homeowners' association foreclosures are now making their way through state and federal courts in Nevada alone. *See, e.g.*, Mortg. Bankers Ass'n, *Homeowners and Condominium Associations Should Not Be Granted "Super Lien" Priority*.[5] Indeed, one *amicus* identifies more than 1,300 state and federal proceedings "believed to contest" the super-priority statute's effect. Las Vegas Dev. Grp.,

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[4] Bourne Valley contends (at 14-17) that the Ninth Circuit's decision implicates a deeper split. Wells Fargo disagrees. Though Bourne Valley identifies a number of decisions in which state and federal courts have considered the constitutionality of *general* nonjudicial foreclosure statutes, which merely provide for a right of sale to enforce private debts, the question here is whether a nonjudicial foreclosure implicates the Due Process Clause when it allows junior lienholders to jump the line and extinguish interests that are senior as a matter of private ordering.

[5] *Available at* https://www.mba.org/issues/residential-issues/hoa-super-lien-priority (last visited May 14, 2017).

LLC *Amicus* Br. 4 n.2; *see also id.* at 1a-71a (listing cases). Those cases are now in limbo.[6]

Nevada was devastated by the mortgage crisis. From January 2007 to February 2012, the State had the highest monthly foreclosure rate in the Nation. *See* Mark Niquette et al., *Nevada Housing Crisis a Test for Sanders' Wall Street Message*, Bloomberg (Feb. 19, 2016).[7] And the effects of the crash are still being felt. *See* Jack Healy, *Underwater in the Las Vegas Desert, Years After the Housing Crash*, N.Y. Times (Aug. 2, 2016).[8]

Although the Nevada legislature has now amended the statute to mandate notice of sale to mortgage lenders, *see* Pet. App. 12a-13a n.4, that change has no effect on the thousands of foreclosure sales carried out under the old law or the thousand-plus quiet-title cases pending in the courts. *See* Las Vegas Dev. Grp., LLC *Amicus* Br. 8 (noting that "[n]early all" foreclosure cases pending in Nevada's courts relate to pre-amendment sales). Nor does the amendment address other aspects of the statute that may present

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[6] *Compare Bank of Am., N.A.* v. *Inspirada Cmty. Ass'n*, No. 2:16-cv-673, 2017 WL 1043281, at *5 (D. Nev. Mar. 16, 2017) (staying quiet title action pending this Court's review of the decision below or *Saticoy Bay* and citing similar orders in other cases), *with Bank of Am., N.A.* v. *Sonrisa Homeowners Ass'n*, No. 216-cv-848, 2017 WL 626362, at *6 (D. Nev. Feb. 15, 2017) (denying motion to stay).

[7] *Available at* https://www.bloomberg.com/politics/articles/2016-02-19/nevada-housing-crisis-a-test-for-sanders-s-wall-street-message (last visited May 14, 2017).

[8] *Available at* https://www.nytimes.com/2016/08/03/us/las-vegas-2008-housing-crash.html?_r=0 (last visited May 14, 2017).

due process problems. *See* Pet. 20. Without this Court's intervention, the resolution of those issues will depend on whether they are heard in federal or state court. That is unacceptable.

2. This Court's review is also warranted because the split involves a uniform statute. *See SFR*, 334 P.3d at 410 (noting that Nevada's statute "is a creature of the Uniform Common Interest Ownership Act of 1982"). The Court granted certiorari in *Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149 (1978), to resolve a similarly fresh split between the Second and Ninth Circuits involving an "important question * * * concerning the meaning of 'state action'" in the context of a uniform statute. *Id.* at 155 (citing *Melara* v. *Kennedy*, 541 F.2d 802 (9th Cir. 1976), and *Brooks* v. *Flagg Bros., Inc.*, 553 F.2d 764 (2d Cir. 1977)); *see also Tulsa Prof'l Collection Servs., Inc.* v. *Pope*, 485 U.S. 478, 483-484 (1988) (granting certiorari to resolve split between Nevada and Oklahoma supreme courts over whether a uniform probate statute violated due process). The Court should do the same in this case.

Twenty-one States and the District of Columbia have adopted some form of super-priority lien statute for homeowners' associations; many of those statutes are modeled on the Uniform Common Interest Ownership Act or its predecessor acts. *See Federal Housing Administration: Strengthening the Home Equity Conversion Mortgage Program*, 82 Fed. Reg. 7,094, 7,109 (Jan. 19, 2017); Report of the Joint Editorial Bd. for Unif. Real Prop. Acts, *The Six-Month "Limited Priority Lien" for Association Fees Under the Uniform Common Interest Ownership Act* 2-3 (June 1, 2013).

At least two of these States and the District of Columbia have recently interpreted their super-priority lien statutes to permit a homeowners' association to extinguish a lender's first-position lien. *See Twenty Eleven, LLC* v. *Botelho*, 127 A.3d 897, 903 (R.I. 2015) (discussing 34 R.I. Gen. Laws § 34-36.1-3.16); *Chase Plaza Condo. Ass'n, Inc.* v. *JPMorgan Chase Bank, N.A.*, 98 A.3d 166, 172, 177 n.7 (D.C. 2014) (discussing D.C. Code § 42-1903.13(a)(2) and noting that the parties had not raised a due process challenge); *Summerhill Vill. Homeowners Ass'n* v. *Roughley*, 289 P.3d 645, 647-648 (Wash. Ct. App. 2012) (discussing Wash. Rev. Code § 64.34.364). Like Nevada, Rhode Island and the District of Columbia apply super-priority even in nonjudicial foreclosure proceedings. *See* 34 R.I. Gen. Laws § 34-36.1-3.21(a); D.C. Code § 42-1903.13(c). The confusion sown by the clashing interpretations of Nevada's statute is thus likely to fuel new challenges in other jurisdictions.

Finally, the super-priority lien schemes in Nevada, Rhode Island, Washington, and the District of Columbia conflict with important federal programs, including the Federal Housing Finance Agency's conservatorship of Fannie Mae and Freddie Mac. *See* FHFA, *Statement on HOA Super-Priority Lien Foreclosures* (Apr. 21, 2015) ("[C]onfirm[ing] that [FHFA] has not consented, and will not consent in the future, to the foreclosure or other extinguishment of any Fannie Mae or Freddie Mac lien or other property interest in connection with HOA foreclosures of super-priority liens.").[9] Indeed, the Depart-

[9] *Available at* https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-on-HOA-Super-Priority-Lien-Foreclosures.aspx (last visited May 14, 2017).

ment of Housing and Urban Development recently considered promulgating a rule that would have made priority over homeowners' association liens a precondition of assignment for federal reverse mortgage loans. *See Federal Housing Administration (FHA): Strengthening the Home Equity Conversion Mortgage Program*, 81 Fed. Reg. 31,770, 31,818 (proposed May 19, 2016). The final rule cautioned borrowers that they could be forced to repurchase assigned mortgages in the event HUD discovered that its first position lien was subject to a super-priority interest. *See Federal Housing Administration: Strengthening the Home Equity Conversion Mortgage Program*, 82 Fed. Reg. at 7,109-7,110.

In short, this case presents a recurring issue with far-reaching implications, warranting this Court's review.

III. THE NINTH CIRCUIT'S DECISION IS CORRECT

The Ninth Circuit correctly concluded that extinguishing Wells Fargo's first deed of trust was state action subject to federal constitutional due process limitations.[10]

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[10] Wells Fargo reads the petition to seek review only of the Ninth Circuit's holding that the state action requirement was satisfied. *See, e.g.*, Pet. 2 (alleging a split "over whether nonjudicial foreclosures constitute a form of state action subject to the notice and other requirements of the Due Process Clause"). If that requirement was satisfied, Wells Fargo does not read the petition to seek review of the Ninth Circuit's further holding that Nevada's super-priority lien statute facially violated the Due Process Clause. In any event, the Ninth Circuit properly held that the statute unconstitutionally "shifted the burden of ensuring adequate notice from the

This Court's precedents establish a two-part test for when "the deprivation of a federal right"—in this case, the right to notice of the foreclosure sale consistent with due process—is "fairly attributable to the State." *Lugar*, 457 U.S. at 937. Bourne Valley does not dispute that extinguishing Wells Fargo's security interest here satisfies the first part of that test because it was "caused by the exercise of some right or privilege created by the State." *Id*. The second part of the state action test requires that "the party charged with the deprivation * * * be a person who may fairly be said to be a state actor." *Id*. That "may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Id.*

The Ninth Circuit correctly held that "the Nevada Legislature's enactment of the Statute" is the relevant "state action" here, Pet. App. 13a, because the statute itself impaired Wells Fargo's rights in the property. As a matter of *private* ordering, the court explained, the foreclosure would have extinguished all liens junior to the homeowners' association lien. *Id.* at 14a. But Wells Fargo's senior deed of trust would have remained intact. *Id.*

That sets this case apart from cases in which private parties have availed themselves of state-created self-help procedures to enforce pre-existing private contractual rights. In *Flagg Brothers*, this Court found no state action when a warehouse threatened to exercise its statutory right to sell stored property

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foreclosing homeowners' association to a mortgage lender." Pet. App. 10a.

to satisfy a debt. The Court concluded that New York "ha[d] merely enacted a statute which provides that a warehouseman conforming to the provisions of the statute may convert his traditional lien into good title." *Flagg Bros.*, 436 U.S. at 161 n.11. "The conduct of private actors in relying on the rights established under these liens to resort to self-help remedies does not permit their conduct to be ascribed to the State." *Id.*

Bourne Valley insists (at 27) that the foreclosure in *Flagg Brothers* was not predicated on contractual rights because one of the respondents in that case "allege[d] that she never authorized the storage of her goods." *Flagg Bros.*, 436 U.S. at 160. (Never mind that the named respondent, Shirley Brooks, did, in fact, "authorize" the storage of her belongings. *Id.*; *see also id.* at 153.) And Bourne Valley points out that the lower courts in *Flagg Brothers* rejected the claim that the warehouse had a contractual right to sell the goods. *See Flagg Bros.*, 553 F.2d at 767 n.3. Bourne Valley misses the point. True, the State authorized the *power of sale* challenged in *Flagg Brothers*. But that power merely enforced the warehouse's undoubted contractual right to be compensated for storing the respondents' belongings. *See Flagg Bros.*, 436 U.S. at 162 n.12 ("New York's statute has done nothing more than authorize (and indeed limit) * * * what Flagg Brothers would tend to do, even in the absence of such authorization."). That is why the Court repeatedly referred to the warehouse as the respondents' "creditor." *See id.* at 161-162 & n.12. And it is why the Court cast the New York statute as "merely announc[ing] the circumstances under which its courts will not interfere with a private sale." *Id.* at 166; *see also Am.*

Mfrs. Mut. Ins. Co. v. *Sullivan*, 526 U.S. 40, 53 (1999) (finding no state action where a statute embodied "a legislative decision not to intervene in a dispute between" private parties).

Nevada's super-priority lien statute is different. It does not merely authorize a particular remedy for a homeowners' association's contractual right to dues from its members. Rather, the statute vests a homeowners' association with new and valuable rights against *third parties*: priority and the power to sell free and clear of interests recorded earlier in time. *See* Pet. App. 14a.

Bourne Valley suggests (at 28-29) that extinguishing Wells Fargo's first deed of trust is no different from extinguishing the respondents' title to their goods in *Flagg Brothers*. That is wrong. A warehouse's ability to extinguish a bailee's title to stored property arises from the *private* creditor-debtor relationship between the warehouse and bailee. By contrast, "Wells Fargo and the *** homeowners' association had no preexisting relationship, contractual or otherwise." Pet. App. 14a-15a. Instead, "the homeowners' association's ability to extinguish Wells Fargo's interest in the Property arose *directly and exclusively* from the Statute." *Id.* at 15a (emphasis added). Put another way, Wells Fargo's interest would have been secured if Nevada had simply "*not* interfere[d] with [the] private sale." *Flagg Bros.*, 436 U.S. at 166 (emphasis added).

Unlike the warehouse in *Flagg Brothers*, then, Bourne Valley invoked the homeowners' association's *substantive* statutory right to jump the line and extinguish a first deed of trust. *Cf. id.* at 161 n.11 (distinguishing self-help procedures from "[t]he

power to order legally binding surrenders of property" (internal quotation marks omitted)). And, like the foreclosure purchaser in *Saticoy Bay*, Bourne Valley harnessed the power of Nevada's courts to enforce that statutory right. So even though they have their origins in nonjudicial proceedings, "[t]hese are cases in which the States have made available to [private] individuals the full coercive power of government" to unconstitutionally deprive mortgage lenders of "the enjoyment of property rights." *Shelley*, 334 U.S. at 19.

That is not to say that every nonjudicial foreclosure statute renders such foreclosures a form of state action. Most nonjudicial foreclosure statutes do little more than permit parties to enforce their contracts out of court. *See supra* note 4. The Ninth Circuit's ruling would not subject such statutes to due process scrutiny. But Nevada's super-priority lien statute does not "merely announce[] the circumstances under which its courts will not interfere with a private sale." *Flagg Bros.*, 436 U.S. at 166; *see Shelley*, 334 U.S. at 19-20; *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1029-1030 (1992) (holding that the Takings Clause is not implicated by legislation that "do[es] no more than duplicate the result that could have been achieved" under "existing rules or understandings" (internal quotation marks omitted)). Rather, as the Ninth Circuit correctly concluded, the statute impairs creditors' security interests that, as a matter of private ordering, would have been senior.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ANDREW M. JACOBS
SNELL & WILMER LLP
One Arizona Center
Suite 1900
Phoenix, AZ 85004

AMY F. SORENSON
KELLY H. DOVE
W. DANNY GREEN
SNELL & WILMER LLP
15 West South Temple
Suite 1200
Salt Lake City, UT 84101

Counsel for Respondent

NEAL KUMAR KATYAL
Counsel of Record
FREDERICK LIU
EUGENE A. SOKOLOFF
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

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