No. 16-1208

In The
Supreme Court of the United States

BOURNE VALLEY COURT TRUST, PETITIONER,

v.

WELLS FARGO BANK, N.A.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE MORTGAGE BANKERS ASSOCIATION, THE AMERICAN BANKERS ASSOCIATION, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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BRIEF FOR THE MORTGAGE BANKERS ASSOCIATION, THE AMERICAN BANKERS ASSOCIATION, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

The Mortgage Bankers Association, the American Bankers Association, and the Chamber of Commerce of the United States of America respectfully submit this brief as amici curiae in support of respondent.[1]

INTEREST OF THE AMICI CURIAE

The Mortgage Bankers Association ("MBA") is a national association representing the real estate finance industry. It has more than 2,200 members comprising real estate finance companies, mortgage companies, mortgage brokers, commercial banks, thrifts, life insurance companies, and others in the mortgage lending field. MBA seeks to strengthen the nation's residential and commercial real estate markets, to support sustainable homeownership, and to extend access to affordable housing to all Americans.

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[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici, their members, or their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days before the due date of the intention of amici to file this brief. All parties have consented to the filing of this brief.

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its million employees. ABA members—located in all fifty states, the District of Columbia, and Puerto Rico—include financial institutions of all sizes and hold a majority of the domestic assets of the U.S. banking industry. The ABA frequently appears in litigation involving issues of widespread importance to the industry.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It directly represents approximately 300,000 members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in this Court in cases raising issues of concern to the nation's business community.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents issues of critical importance to home lenders and the homebuyers and homeowners they serve.

In nearly half of the states, when a homeowner living in a common-interest community falls behind on her association dues, the homeowners association ("HOA") acquires a special statutory lien on her property. Such liens had long been understood to provide only a "payment preference," allowing HOAs to recover a capped amount of unpaid fees through foreclosure before other lienholders are paid, but without otherwise impairing other lienholders' rights. But a number of jurisdictions, like Nevada here, have recently interpreted their statutes to provide "super-priority" liens. Such liens not only allow HOAs to collect before other lienholders but also *extinguish* all other liens—including first mortgage liens. And in Nevada, this deprivation of mortgagees' property could take place without direct notice to the mortgage lienholders. Nev. Rev. Stat. §§ 116.3116 *et seq*. (2012).

In this case, the Ninth Circuit held that the state action requirement was satisfied and that Nevada statute violated mortgage lenders' due process right to notice before deprivation of their property, while the Nevada Supreme Court later came to the opposite conclusion. Amici agree with respondent that the Ninth Circuit's holding is correct. And amici agree with both

parties that certiorari is warranted to resolve the intolerable conflict between a federal court of appeals and state high court as to whether Nevada's regime constitutes a form of state action subject to the notice requirements of the Due Process Clause. Rather than repeat the parties' legal arguments, however, this brief focuses on the deleterious consequences of regimes like Nevada's.

Put simply, super-priority statutes allow HOAs to eviscerate first-in-time mortgages often worth hundreds of thousands of dollars to satisfy later-incurred debts typically amounting to a few thousand dollars. Such schemes contravene bedrock principles of property law and threaten to destabilize the real-estate finance system itself. The ultimate consequence of super-priority regimes is less credit for homebuyers because there is less security for lenders.

This Court should grant the petition and then affirm the court of appeals' decision. Doing so would give lenders a measure of protection from the worst features of state super-priority regimes.[2]

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[2] Nevada has now amended its statute to require improved notice to other lienholders. Pet. App. 12a n.4. But this Court's review is warranted despite the amendment. *See* Pet. 20-21; Las Vegas Dev. Grp., LLC Amicus Br. 8. Approximately 1,300 pending cases are being litigated under the pre-amendment version of Nevada's statute, with different and often outcome-determinative rules of law applying depending on whether the cases are in state or federal court. *See* Pet. 20; Las Vegas Dev. Grp., LLC Amicus Br. 5-8.

ARGUMENT

I. SUPER-PRIORITY REGIMES VIOLATE THE BEDROCK RULE OF "FIRST IN TIME, FIRST IN RIGHT"

The Nevada statute at issue here conflicts with a foundational principle of property law: the rule that first in *time* is first in *right*.

A. The Law Has Long Recognized The First-In-Time Rule

The first-in-time rule is simple and longstanding. The first creditor to acquire a claim of interest in real property may recover its debts from the value of the estate before later creditors may do so. 1 William Houston Brown, *The Law of Debtors and Creditors* § 8:29 (2011) (explaining that once a lien's "priority date" is set, "later encumbrances and other interests" are "subordinate"); *see* 1 Joseph Story, *Commentaries on Equity Jurisprudence* 51 (1873) ("The first in time, all other things being equal, is first in right."). As the Restatement explains, "[g]enerally, the priority of mortgages and other interests in real estate is determined by the chronological order of their creation." Restatement (Third) of Property: Mortgages § 7.1 cmt. a; *see id.* § 8.6 cmt. a (describing this rule as "fundamental").

This Court has recognized that "universal" principle for nearly two centuries. *Rankin v. Scott*, 25 U.S. (12 Wheat.) 177, 179 (1827) (Marshall, C.J.) (holding that a first-in-time lien was superior to a subsequent lien, even if the former was formally executed after the

latter). In "the common case of mortgages," Chief Justice Marshall explained that "[i]t has never been supposed that a subsequent mortgage could, by obtaining and executing a decree for the sale of the mortgaged property, obtain precedence over a prior mortgage in which all the requisites of the law had been observed." *Ibid.*; *see U.S. By & Through I.R.S. v. McDermott*, 507 U.S. 447, 449-51 (1993) (reaffirming "the common-law principle that 'the first in time is the first in right' "); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 720 & n.7 (1979) (noting that this "well-accepted common-law principle for resolving lien priority disputes" "also underlies the Uniform Commercial Code's priority structure"); *United States v. City of New Britain*, 347 U.S. 81, 85-86 (1954) (holding that priority follows the principle that "the first in time is the first in right").

B. The First-In-Time Rule Promotes Affordable Mortgage Credit For Homebuyers And Homeowners

The first-in-time rule is supported by economics as well as history. It is also the foundation of affordable mortgage credit.

In the conventional mortgage transaction, the mortgagee makes a substantial loan to a would-be home buyer, without which her purchase would be impossible. To mitigate the risk inherent in such a sizeable loan, the mortgagee acquires the right to have its loan secured by a lien on the property. Upon default, that security interest guarantees repayment up to the value of the property's sale at foreclosure. Without

that security interest in the property, such lending would rarely occur because the risk to the lender would be too great. It is the secured nature of a mortgage that makes homeownership possible for the vast majority of consumers. *See generally* David A. Schmudde, *A Practical Guide To Mortgages And Liens* §§ 1.01, 1.03, 1.07, 2.01 (2004).

The secured interest tied to a mortgage loan depends on the first-in-time rule. That rule ensures that a mortgage lender's security interest is real, not illusory. If a lien by a later creditor can take priority over that of the mortgage lender, the security supporting the mortgage loan erodes or disappears. The mortgage is no longer a fully secured loan, and the mortgagee no longer a fully secured creditor. It is simply another creditor with an unsecured loan to an individual. *See generally ibid.*

C. HOA Super-Priority Regimes Subvert The First-In-Time Rule

The Nevada statute at issue here is an example of a law that stands the first-in-time rule on its head. It allows HOA liens to jump to the front of the line even though they are later-arising. Nevada's system thus runs contrary to the "universal" principle "that a prior lien gives a prior claim, which is entitled to prior satisfaction." *Rankin*, 25 U.S. at 179.

Nevada is not alone in having undermined the first-in-time rule. More than 20 other states, as well as the District of Columbia and Puerto Rico, have adopted priority statutes for HOA liens. Each of those

laws was based on a model statute drafted by the Uniform Law Commission: Section 3-116(c) of The Uniform Common Interest Ownership Act ("UCIOA"). *See* Report of the Joint Editorial Board for Uniform Real Property Acts, *The Six-Month "Limited Priority Lien" for Association Fees under the Uniform Common Interest Ownership Act* 2-3 (June 1, 2013) ("JEB Report").[3]

Nevada and a dozen other states adopted that model statute in full (albeit with slight differences in phrasing), while nearly ten other jurisdictions enacted laws "comparable in substance to UCIOA § 3-116." *Id.* at 2-3 & n.2 (explaining that some jurisdictions provided a lien for as few as four months of unpaid HOA dues while others provided a lien for as many as twelve months of back dues).

Until recently, these statutes were understood to provide only "payment priority" for HOA liens. Under a payment priority scheme, an HOA has the statutory right to be paid first after a foreclosure, but other liens are not extinguished. They remain in place and pass with the property. *See, e.g.*, *Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC*, 962 F. Supp. 2d 1222, 1227-30 (D. Nev. 2013) (construing Nevada's regime as simply ensuring that "an HOA will be made whole (up to a limited amount), while also ensuring that first mortgagees who record their interest before notice of any delinquencies giving rise to a super-priority lien do

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[3] http://www.uniformlaws.org/shared/docs/jeburpa/2013jun1_JEBURPA_UCIOA%20Lien%20Priority%20Report.pdf.

not lose their security," and stressing that this "position appears to represent the dominant understanding of the actors in the real estate market").

To be sure, such statutes harm the mortgage lending market and the homebuyers who depend on it because they require a foreclosing mortgagee "to cover additional costs that were not its responsibility and which would be, unlike payments for taxes and insurance, which are foreseeable, virtually impossible to escrow." Federal Housing Finance Agency ("FHFA"), Statement of Alfred M. Pollard, General Counsel, FHFA, Before the Nevada State Legislature Judiciary Committee (Apr. 7, 2015) ("FHFA Testimony").[4] But HOA lien statutes interpreted to provide only a payment priority at least leave the mortgage lien intact when the HOA forecloses, thus preserving the lender's opportunity to recover some or all of its debt. *Ibid.* (noting that until recently it "had not been the practice" to "extinguish[] a first mortgage").

But recently, some courts (including the Nevada Supreme Court) have interpreted their HOA lien statutes in a novel and disruptive way. At the urging of HOAs (and investors that purchased HOA liens or properties at HOA foreclosure sales), these courts have construed their jurisdictions' statutes as giving HOA liens "true priority" or "super priority" status. *SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408,

[4] http://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-Alfred-M-Pollard-General-Counsel-FHFA-before-the-Nevada-State-Legislature-Judiciary-Committee.aspx.

412-14 (Nev. 2014). That means that "[a]ny liens that are unsatisfied by the foreclosure-sale proceeds are extinguished, and the foreclosure-sale purchaser acquires free and clear title." *Chase Plaza Condo. Ass'n, Inc. v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166, 172 (D.C. 2014); *see Twenty Eleven, LLC v. Botelho*, 127 A.3d 897 (R.I. 2015); *Summerhill Vill. Homeowners Ass'n v. Roughley*, 289 P.3d 645 (Wash. Ct. App. 2012). This new rule "shocked the lending industry." Aušra Gaigalaitė, Note, *Priority of Condominium Associations' Assessment Liens Vis-à-Vis Mortgages: Navigating in the Super-Priority Lien Jurisdictions*, 40 Seattle U. L. Rev. 841, 855 (2017).

Nonetheless, the drafters of the model statute have endorsed this interpretation as "the proper understanding" of HOA lien laws. JEB Report 9. Although they also suggested revising the model statute to be clearer on this point, the drafters stated that statutes based on their model should be read as granting "a true lien priority and not merely a distributional preference in favor of the association," and that "the association's proper enforcement of its lien would thus extinguish the otherwise senior mortgage lien." *Id.* at 9, 10 n.9.[5]

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[5] Some jurisdictions with statutes based on the model law have resisted this interpretation. Tennessee, for example, amended its statute to make clear that HOA liens in that state provide only payment priority and not a super-priority position that could extinguish a first-lien mortgage. *See* Tenn. Code § 66-27-415(b) (providing that association liens are not prior to "[a] first or other contemporaneous mortgage or deed of trust"), *as amended by* 2016 Pub. Acts, c. 866, §§ 1, 2, eff. June 1, 2016; *see*

While payment priority schemes may be harmful, "true priority" regimes represent a fundamental threat to the first-in-time rule, on which the home lending market has been built. Those regimes do not just diminish the mortgage lender's secured interest in the property; they allow an HOA collecting on a small debt to extinguish the mortgage lender's lien altogether. That "fundamentally alters venerable principles of the law governing secured transactions" in a "radical, if not revolutionary," way. *Botelho*, 127 A.3d at 906-07 (Robinson, J., dissenting). Indeed, even the drafters of the model statute acknowledge that, in allowing an HOA to extinguish a first mortgage, super-priority liens "mark a substantial deviation from prior law." JEB Report 2. And given that more than 20 jurisdictions have regimes "comparable in substance" to the model statute, *id.* at 3, there is a real risk that the "super priority" reading of these statutes will continue to spread throughout the United States.

II. SUPER-PRIORITY REGIMES WEAKEN THE HOME FINANCING SYSTEM AND DIMINISH OPPORTUNITIES FOR HOMEOWNERSHIP

A. Super-Priority Regimes Undermine The Home Lending Market

Super-priority regimes decrease choices and increase costs for homebuyers. As noted, these regimes

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also Tenn. Gen. Assembly, Bill History HB2401 & SB2397, http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB2401&ga=109.

effectively *de*-securitize a lender's interest in its mortgage by subordinating its lien and by allowing HOAs to wipe out the lien entirely. Indeed, even those who favor such regimes admit that they have "created an untenable situation for mortgage lenders." Alexander Philips, *Calculated Risk—The Contrarian Approach to Investing in Real Estate*, 8 Housing News Report 6, 7 (Dec. 2014).[6]

As a result of such regimes, mortgagees must mitigate risk through increasing downpayments or interest rates—or simply by exiting the market entirely. The upshot is less competition, less lending, and fewer home purchases. *See* FHFA Testimony (explaining that super-priority regimes "will give pause to lenders doing business in such jurisdictions").

As particularly relevant here, a super-priority regime paired with an inadequate notice provision can have especially pernicious consequences. The Nevada regime at issue in this case placed no obligation on HOAs to provide mortgagees direct notice of their foreclosure sales.[7] While notice alone does not solve all the

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[6] http://kcmsonline.com/PDFs/foreclosure_report.pdf.

[7] The Nevada statute provided for notice only when lienholders had affirmatively requested it. In practice, that purported "opt-in" system was ineffective. HOAs were often unreachable given that most do not publicly file registered-agent information and few are professionally managed, meaning the membership of their resident-officer boards frequently changes. Sperlonga, LLC, *The Hidden Threat of HOA Liens* 2, 6-7 (White Paper Jan. 2013); *see* American Bankers Ass'n, et al., *Statement of Principles: HOA Super Priority Liens*, Appendix 2 (July 23, 2015). And even when the lender could track down the HOA, the HOA might reject the

problems created by HOA priority regimes, it at least allows lenders to attempt to protect their rights. For example, with notice of an impending HOA foreclosure sale that includes adequate information about how to pay off the HOA debt, a lender can preserve its lien by covering the homeowner's back HOA dues. *Botelho*, 127 A.3d at 903-04. The lender also could purchase the property itself at the foreclosure sale or publicize the sale to maximize the purchase price and the possible recovery for creditors other than the HOA. But without such notice, mortgage lenders are deprived of any meaningful opportunity to protect their interests or to reach cooperative solutions with HOAs.

The result can be outrageously low prices at HOA foreclosure sales. That means mortgagees have their liens wiped out with little or no compensation because all or nearly all the foreclosure proceeds go to satisfy the HOA's lien. *See id.* at 906 (acknowledging the "harsh results" caused by HOA priority liens as well as their "draconian nature"); *see also* FHFA Testimony (explaining that super-priority regimes are "a drastic remedy" that is "disproportionate to the goal" of protecting HOAs). Indeed, "the potential for financial and regulatory damage to lenders and servicers easily runs

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lender's offer to satisfy the lien or decline even to provide a payoff amount. *See, e.g.*, *U.S. Bank, N.A. v. Bacara Ridge Ass'n*, No. 15-542, 2016 WL 5334655, at *1 (D. Nev. Sept. 22, 2016) (noting that HOA rejected bank's offer to pay $416.25 in unpaid dues, and instead bought the property at its own foreclosure sale for $6,156.97); *see also Bank of Am., N.A. v. Sunrise Ridge Master Homeowners Ass'n*, No. 16-381, 2017 WL 1843702, at *1 (D. Nev. May 5, 2017) (similar).

into the billions of dollars." Sperlonga, LLC, *The Hidden Threat of HOA Liens* 11 (White Paper Jan. 2013) ("Sperlonga");[8] *see also* American Bankers Ass'n, et al., *Statement of Principles: HOA Super Priority Liens*, Appendix 2 (July 23, 2015) ("*Statement of Principles*") (noting that, in Nevada alone, first-lien mortgagees stand to "lose hundreds of millions of dollars").[9]

The source of this problem is clear. HOAs typically institute foreclosure to recover unpaid dues amounting to just a few thousand dollars. *See* Sperlonga at 3-4. They therefore have no financial incentive to maximize the sales price of the foreclosed property—anything over the relatively small amount due the HOA would go to someone else. HOAs thus often sell foreclosed properties for a fraction of what they are worth and just enough to cover the HOA's past-due account.[10] Meanwhile, due to the lack of notice, the mortgagee

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[8] http://www.equifax.com/assets/USCIS/the_hidden_threat_of_hoa_liens.pdf.

[9] https://www.aba.com/Advocacy/LetterstoCongress/Documents/StatementofPrinciplesHOASuperLiens.pdf.

[10] Robin E. Perkins, *Can an HOA "Super-Priority" Lien Extinguish a Lender's Deed?*, 28 Corporate Counsel, ABA Section of Litigation 2 (Mar. 18, 2014) ("[A]t the HOA foreclosure sales, the properties are auctioned for little more than the amount of the HOA lien, typically between $3,000 and $10,000."), https://www.swlaw.com/assets/pdf/news/2014/03/18/CanAnHOASuperPriorityLien_Perkins.pdf; *see* Joe Light, *Why Homeowners Associations Want To Foreclose On Homes*, Wall St. J. (Oct. 14, 2014) ("Homes at HOA auctions typically went to investors for very low sums of money."), https://blogs.wsj.com/developments/2014/10/14/why-homeowners-associations-want-to-foreclose-on-homes/.

may have no idea such sale occurred, much less that its first-in-time lien has been extinguished.

That is what happened here. The original loan in this case was $174,000, and, at the time of sale, the property had an assessed value of $90,543. Pet. App. 4a, 30a. Yet based on only $1,298.57 in delinquent association dues, the buyer was able to acquire the property at an HOA foreclosure sale for $4,145. Pet. App. 5a, 30a. To understand the harmful effects of superpriority regimes, the Court need look no further than the facts of this case.

And this case is no outlier. In the D.C. Court of Appeals' *Chase Plaza* decision, a $280,000 mortgage was extinguished by a $10,000 foreclosure sale. 98 A.3d at 168-69. In *Botelho* from Rhode Island, a $21,000 foreclosure sale extinguished a $114,400 mortgage. 127 A.3d at 899. And in Nevada's *SFR Investments*, a mortgage worth $885,000 was extinguished by a $6,000 foreclosure sale—all to satisfy an HOA lien amounting only to $4,542. 334 P.3d at 409, 418. Other examples abound:

- *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg.*, 388 P.3d 970, 971-72 (Nev. 2017) ($6,900 HOA foreclosure sale wiped out $81,370 mortgage).
- *BAC Home Loans Servicing, LP v. Fulbright*, 328 P.3d 895, 896 (Wash. 2014) (en banc) ($277,000 mortgage extinguished "for less than $15,000" at condominium association's foreclosure sale).

- *Morgan Court Owners Ass'n v. Deutsche Bank Nat'l Tr. Co.*, 188 Wash. App. 1033, 2015 WL 4064131, at *1-2 (Wash. Ct. App. 2015) (unpublished) ($240,000 mortgage "extinguished" by HOA foreclosure, where the foreclosing HOA "was the highest bidder at $8,818.17, the amount of its judgment" for unpaid dues).

- *Towne Owners Ass'n v. Beckmann*, 183 Wash. App. 1014, 2014 WL 4347622, at *1 (Wash. Ct. App. 2014) (unpublished) ($357,100 mortgage and $6,200 foreclosure sale).

- *Nationstar Mortg., LLC v. Maplewood Springs Homeowners Ass'n*, ___ F. Supp. 3d ___, No. 15-1683, 2017 WL 843177, at *1-2 (D. Nev. Mar. 1, 2017) ($297,800 mortgage and $16,000 foreclosure sale).

- *JPMorgan Chase Bank, N.A. v. SFR Invs. Pool 1, LLC*, 200 F. Supp. 3d 1141, 1153-54 (D. Nev. 2016) ($406,000 mortgage and $69,000 foreclosure sale).

- *G&P Inv. Enters., LLC v. Wells Fargo Bank, N.A.*, 199 F. Supp. 3d 1266, 1267 (D. Nev. 2016) ($110,000 mortgage and $9,700 foreclosure sale).

- *U.S. Bank, N.A. v. SFR Invs. Pool 1, LLC*, 124 F. Supp. 3d 1063, 1068 (D. Nev. 2015) ($236,000 home sold at HOA foreclosure for $9,000).

- *Freedom Mortg. Corp. v. Las Vegas Dev. Grp., LLC*, 106 F. Supp. 3d 1174, 1177 (D.

Nev. 2015) ($98,188 mortgage and $3,000 HOA foreclosure sale).

- *Pengilly v. Nevada Ass'n Servs.*, No. 14-1463, 2017 WL 1243136, at *3-4 (D. Nev. Mar. 31, 2017) ($414,400 mortgage loan and $17,100 foreclosure sale).
- *U.S. Bank, N.A. v. Bacara Ridge Ass'n*, No. 15-542, 2016 WL 5334655, at *1 (D. Nev. Sept. 22, 2016) ($6,156.97 foreclosure sale, "which was approximately 2.5% of the unpaid principal balance" on what was originally a $239,950 mortgage).
- *Thunder Props., Inc. v. Wood*, No. 14-0068, 2014 WL 6608836, at *1 n.1 (D. Nev. Nov. 19, 2014) ($235,000 mortgage and $4,538 foreclosure sale).
- *Premier One Holdings, Inc. v. BAC Home Loans Servicing LP*, No. 13-895, 2013 WL 4048573, at *1 (D. Nev. Aug. 9, 2013) ($305,992 mortgage and $13,700 HOA foreclosure sale, based on unpaid HOA dues totaling $3,190.47).

Not surprisingly, regimes like Nevada's have caught the attention of real-estate investors, who view them as "creating a financial windfall." Sean Whaley, *Nevada Supreme Court Ruling Upholds Nonjudicial Foreclosure Process*, Las Vegas Review-Journal (Jan. 26, 2017).[11] Because investment firms can acquire foreclosed properties at prices well below market, they

[11] https://www.reviewjournal.com/business/housing/nevada-supreme-court-ruling-upholds-nonjudicial-foreclosure-process/.

have spent millions buying homes at HOA foreclosure sales in super-priority regime jurisdictions. Philips, *supra*, at 6-8; *see* Whaley, *supra* (noting that "an estimated 2,000 to 3,000 properties" were acquired by speculators); *HOA Foreclosures Leave Banks Empty-Handed*, Realtor Magazine: Daily Real Estate News (Oct. 16, 2014) (noting that one firm had "purchased more than 1,000 homes in states such as Nevada and Washington").[12] These lucrative opportunities for investors come at the price of traditional mortgage lending and the homebuyers and homeowners it serves. *See* Keith Jurow, *Are HOA Foreclosures A Necessary Tool Or An Extortion Racket?*, Business Insider (July 28, 2010) (noting criticism that HOAs had been running "foreclosure mills" as a "shakedown racket," including foreclosing on the home of a National Guard member deployed overseas as well as that of a couple who owned their home outright).[13]

B. Super-Priority Regimes Impair Federal Programs Designed To Bolster Homeownership

Super-priority regimes adversely affect the federal government as well. In particular, these regimes impair the administration of important programs like the Federal Housing Administration's mortgage insurance program. That program, and others like it, cannot promote sustainable homeownership opportunities for

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[12] http://realtormag.realtor.org/daily-news/2014/10/16/hoa-foreclosures-leave-banks-empty-handed.

[13] http://www.businessinsider.com/are-hoa-foreclosures-a-necessary-tool-or-an-extortion-racket-2010-7.

first-time and low- to moderate-income homebuyers where super-priority regimes chill mortgage lending and substantially reduce the availability of credit. *See Statement of Principles*, Appendix at 2.

Indeed, because Fannie Mae and Freddie Mac "have significant positions in lending for units in common interest associations," the federal government has challenged super-priority regimes in the courts and state legislatures. FHFA Testimony ("[P]rovisions that purport to extinguish first security interests of lenders are of great concern to FHFA."); *see* Gaigalaitė, *supra*, at 858-60 & n.150 (citing cases where the federal government has challenged super-priority statutes). A number of these challenges have succeeded in district courts, but no court of appeals has yet addressed the issue.[14] As the FHFA has explained, the mere "existence of these super-priority liens increases the risk of losses to taxpayers"—who will ultimately be forced to pay for the destruction of any federally-owned mortgages. FHFA, *Statement of the Federal Housing Finance Agency on Certain Super-Priority Liens* (Dec. 22,

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[14] *See, e.g.*, *Skylights LLC v. Byron*, 112 F. Supp. 3d 1145, 1151-59 (D. Nev. 2015) (finding Nevada's statute preempted because HOA super-priority liens "cannot extinguish a property interest of Fannie Mae or Freddie Mac while those entities are under FHFA's conservatorship"); *see also Opportunity Homes, LLC v. Fed. Home Loan Mortg. Corp.*, 169 F. Supp. 3d 1073, 1075-79 (D. Nev. 2016) (same, citing cases); *Saticoy Bay LLC v. SRMOF II 2012-1 Trust*, No. 13-1199, 2015 WL 1990076 (D. Nev. Apr. 30, 2015) (finding Nevada's statute preempted and a violation of the Constitution's Property Clause); *Washington & Sandhill Homeowners Ass'n v. Bank of Am., N.A.*, No. 13-01845, 2014 WL 4798565 (D. Nev. Sept. 25, 2014) (same).

2014).[15] From that perspective, states with super-priority regimes unfairly force out-of-state federal taxpayers to subsidize their HOAs.

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Affirming the Ninth Circuit's decision will not solve all the problems with HOA super-priority regimes. But that outcome would at least ensure that lenders have a basic tool with which to ameliorate those regimes' most pernicious features. The home lending market, and home purchasers, would be the beneficiaries.

CONCLUSION

For the foregoing reasons, amici support the position of respondent and respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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[15] https://www.fhfa.gov/mobile/Pages/public-affairs-detail.aspx?PageName=Statement-of-the-Federal-Housing-Finance-Agency-on-Certain-Super-Priority-Liens.aspx.