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 OF *AMICUS CURIAE* FOR THE COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF PETITIONER

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The Community Associations Institute ("CAI") is a national, nonprofit research and education organization. CAI is neither a "parent corporation" nor a "publicly held corporation that owns 10% or more of its stock." Thus, there is no such corporation to which Rule 24.1(b) would apply.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICUS CURIAE

With consent of the parties, Community Associations Institute ("CAI") respectfully submits this *amicus curiae* brief[1] in support of Petitioner Bourne Valley Court Trust's Petition for Writ of Certiorari ("Petition") to review the Ninth Circuit's determination that Nevada's non-judicial association foreclosure statute was facially unconstitutional. *Bourne Valley Court Trust v. Wells Fargo Bank, N.A.* No. 15-15233, 832 F.3d 1154, 2016 WL 4254983 (9th Cir. Aug. 12, 2016). Pursuant to the Rules of the Supreme Court of the United States ("Rule") 12.6 and 37, and for the reasons discussed below, CAI urges this Court to grant the Petition.

CAI is a national, nonprofit research and education organization formed in 1973 by the Urban Land Institute and the National Association of Home Builders to provide effective and objective guidance for the creation and operation of condominiums, cooperatives, and homeowner associations.

CAI has more than 60 chapters with 34,000 members including homeowners, associations, volunteer board members, managers, attorneys, accountants, community bankers, insurers, and other professionals and service providers.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Amicus Curiae CAI presents the perspective of homeowners and their community associations, which is unavailable from the parties in this matter. CAI submits this brief in keeping with its longstanding interest in promoting understanding regarding the operation and governance of community associations.

SUMMARY OF ARGUMENT

I. This Case Affects Homeowners Across the Country.

This case is of substantial importance to homeowners throughout the country because it affects the ability of their community associations to maintain common property and deliver essential services. Such services benefit all properties in the community, and protect the value of all parties having an interest in the properties, including all lenders with loans in the community. Homeowners rely on their associations to be financially stable and able to carry out their functions; in turn, associations rely on effective means to recover delinquent assessments to achieve financial stability.

Beyond the parties here, this case may affect millions of homeowners in the country.[2] As of 2015, the

[2] The community association form of homeownership has grown rapidly: in 1970, the nation had 10,000 associations with 700,000 housing units and 2.1 million residents, compared to 2015 estimates of 338,000 associations with 26.2 million housing units and 68 million residents. The estimated number of associations in 2016 may reach 344,000. Of these, homeowner associations (planned communities) account for approximately 51-55%, condominiums for 42-45%, and cooperatives for 3-4%. Foundation for Community Association Research, *National and State Statistical Review For 2015,* Community Association Institute (2015), *available at* http://www.cairf.org/research/factbook/2015_statistical_ review.pdf ("FCAR").

nation contained 68 million residents living in an estimated 338,000 community associations, *i.e. one of every five Americans lives in a community association*.[3] Nevada alone contains an estimated 3,220 associations with 648,000 residents.[4]

II. This Case Presents a Significant Legal Issue Because It Would Expand "State Actor" Under the Due Process Clause of the Fourteenth Amendment.

Nevada's Section 116.3116 *et seq*. grants a limited lien priority for community associations ("Lien Statute").[5] The Petition presents the question of whether the divided three-judge panel of the Ninth Circuit in *Bourne Valley* was correct in holding that the Lien Statute violated the Fourteenth Amendment's Due Process Clause and, thus, was facially unconstitutional.

The decision below in *Bourne Valley* is worthy of certiorari for the following reasons:

(1) Although no "state actor" was involved in the non-judicial foreclosure under the Lien Statute, the Ninth Circuit held that the State of Nevada was a "state actor" simply by virtue of adopting the Lien Statute. This holding not only conflicts with the holding of the Nevada Supreme Court in *Saticoy Bay LLC*

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[3] FCAR estimates that in 2015, $85 billion in assessments were collected from homeowners; associations were responsible for $5.28 trillion in home values (4th quarter), $23 billion were contributed to reserves for repair and replacement of roofs and other components, and a value of $1.76 billion in services provided by volunteer directors and committee members.

[4] *Id.*

[5] The Lien Statute and any other Nevada statutes cited herein are to the statutory version in effect at the time of the 2012 foreclosure sale at issue in this case.

Series 350 Durango 104 v. Wells Fargo Home Mortg., 388 P.3d 970 (Nev. 2017), but also with the commonly accepted meaning of "state actor."

(2) The Ninth Circuit's holding in *Bourne Valley* conflicts with *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978), and other U.S. Supreme Court decisions, and creates a split with other circuits.

If allowed to stand, *Bourne Valley* would broaden this Court's careful jurisprudence characterizing "state actor" under the Due Process Clause of the Fourteenth Amendment. It would override numerous state court decisions and state legislatures in 22 jurisdictions with similar statutes. The circuit splits would result in differential treatment of homeowners and their community associations across the country based solely on their location in a particular circuit.

ARGUMENT

I. Homeowners Would be Significantly Affected if Community Associations Are Unable to Collect Delinquent Assessments Through State Statutes that Establish a Limited Lien Priority.

A. Community Associations Are Self-Governing Entities that Provide Services to Homeowners.

Nationally recognized commentator Wayne S. Hyatt has described condominiums, planned communities and cooperatives – generically known as common-interest communities ("CICs") – as private real estate developments created under state law by a set of recorded documents governed and operated by an owners' association commonly known as a "community association." Wayne S. Hyatt, *Condominium and*

Homeowner Association Practice: Community Association Law, at 19 (ALI-ABA 3d ed., 2000) (hereinafter, "Hyatt").[6]

Associations vary in name and legal structure, but share three common features: (i) all homeowners are automatically members of the association bound by the governing documents by virtue of ownership of a lot or unit within the CIC, (ii) the association provides maintenance of infrastructure and common improvements, insurance and other services for property other than the individual lots or units, and (iii) the owners have a mandatory obligation to pay assessments. *Id*., 7-8.

In the condominium context but applicable to all associations, "Condominium unit owners comprise a little democratic sub-society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization." *Hidden Harbour Estates*, *Inc. v. Norman*, 309 So. 2d 180, 181-82 (Fla. App. 1975).

"[T]he community association is an entity created and operated under state law with powers and responsibilities to operate, preserve, regulate and maintain the property…" Hyatt at 30. "Community associations are housing management organizations that deliver three core services to their residents: governance, community, and business services." Foundation for Community Association Research, *The Community Association Fact Book 2015*, Sec. 5.1 (2016), *available at* http://www.cairf.org/research/factbook/2015introduction.pdf. ("FCAR Fact Book 2015").

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[6] The governing documents for condominiums are typically known as the "declaration" and for planned communities the "covenants, conditions and restrictions" (CC&Rs). Hyatt at 19.

B. Community Associations Provide Essential Services to Homeowners, so Their Limited Lien Priority Should Receive the Senior Status.

The homeowner "looks to the association for collective action to protect its interest in the common elements." *Terre Du Lac Association v. Terre Du Lac, Inc.*, 737 S.W.2d 206 (Mo. App. 1987).

Homeowners in CICs receive many basic functions from their community associations, such as maintenance of infrastructure, including streets, snow and ice removal, storm water management, trash collection, public lighting, green space, and recreation facilities.[7] In return, associations rely on assessments from homeowners to pay for such services. Thus, associations have broad authority to protect the interests of their residents through such functions as architectural control and aesthetic uniformity. Since associations provide many essential services that benefit owners and lenders alike, many state legislatures found that associations should at least have a limited lien priority over the first mortgage or deed of trust.

C. Homeowners Fund Community Associations and Rely on Effective Means to Collect Delinquent Assessments to Achieve Financial Stability.

Homeowners rely on their community association to be financially stable, so it is capable of performing its responsibilities. Similar to paying local property tax,

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[7] Foundation for Community Association Research, *Large-Scale Association Survey Results*, Community Association Institute, (June 2016), *available at* http://www.cairf.org/research/factbook/large_scale_survey.pdf (July 19, 2016) (hereinafter, "FCAR Large-Scale Associations").

each homeowner is obligated to pay assessments to the association, and the association relies on full and prompt payment. 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*, at 1 (June 1, 2013) (hereinafter, "JEB Report").[8]

To provide effective collections, the uniform real property acts prepared by the Uniform Law Commission[9] include a limited lien priority for assessments, which is senior to the first mortgage loan.[10] The limited lien priority has been adopted in twenty-one states and the District of Columbia. FCAR Fact Book 2015, Sec. 12.3.

Thus, community associations rely on assessment revenue from homeowners to pay for services and must have effective collection tools, including lien priority, to ensure that such essential services are not interrupted due to lack of funds.

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[8] The Uniform Law Commission ("ULC," formerly known as the National Conference of Commissioners on Uniform State Laws), established the Joint Editorial Board for Uniform Real Property Acts ("JEB") consisting of members from the ULC, the ABA Section of Real Property, Probate and Trust Law, and the American College of Real Estate Lawyers, responsible for monitoring ULC's uniform real property acts. *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.,* 334 P.2d 408, 413 (Nev. 2014).

[9] Uniform Condominium Act ("UCA"), Uniform Planned Community Act ("UPCA"), and Uniform Common Interest Ownership Act ("UCIOA"), prepared by the ULC. The limited lien priority is also provided for in the Model Real Estate Cooperative Act prepared by the Uniform Law Commission.

[10] See, *e.g.*, UCIOA section 3-116.

II. The Ninth Circuit's Ruling in Bourne Valley Would Broaden the Concept of "State Actor" in Conflict with U.S. Supreme Court Cases and Create a Split with the Nevada Supreme Court and Other Circuits.

Understanding the context of the legal issues presented in *Bourne Valley* begins with the role of the limited lien priority for homeowners and their community associations.

A. The Limited Lien Priority Reflects Public Policy that Services by Community Associations Benefit All Properties in the Community.

Budget shortfalls due to an association's inability to collect assessments fully and promptly would result either in (a) reduced maintenance and/or services (in some cases including utilities, such as electricity, heat, and air conditioning), which would impact property values and compromise the collateral of all lenders in the community or (b) increased assessments for the other owners who already are paying their fair share, thereby impacting the ability of more homeowners to repay loans to lenders in the community. JEB Report at 1.

While either result would affect mortgage lenders with loans in the community, it must be noted that until a lender completes its foreclosure, it is not personally liable to pay assessments. As the association copes with loss of revenue, the lender gets a "free ride" on the backs of homeowners who are paying assessments (at higher amounts), and this benefits lenders by subsidizing the cost of preserving the value of the lender's security while the lenders pay nothing.

Thus, as a matter of public policy, the limited lien priority recognizes that the association provides services to all properties in the community, such as maintenance of infrastructure, insurance, and other essential services. These services protect property values, a significant benefit for the homeowner and lender, and all other lenders in the community. Accordingly, if a homeowner becomes delinquent, his/her lender – benefiting from the association's services – should share the costs of such benefits.

> Indeed, as the Senior Vice President of Brookline Bank notes,
>
> The super lien ensures the uninterrupted cash flow associations need to properly maintain their property and preserve its value. This doesn't just protect individual owners; it also protects the collateral securing the first mortgage loans on their units. First mortgage lenders have as much of an interest as owners in preserving condominium values.

Wesley Blair, *Some Banks Are Siding with Condos in the Battle Over Super Liens*, National Mortgage News, at 2 (June 14 2016).

The Uniform Law Commission's uniform acts provide that the association has a lien with senior status that is limited in duration to six months (or nine months in Nevada) of delinquent assessments, referred to as a "limited lien priority," which is senior to a first mortgage or deed of trust, and any additional amount of delinquent assessment is junior to the first mortgage or deed of trust. UCIOA § 3-116, Comment 1.

Nevada Revised Statute §116.3116 is modeled after UCIOA 3-116 and strikes an equitable balance between the association's ability to collect delinquent

assessments and the lender's interest in securing its asset. UCIOA § 3-116, Comment 1; JEB Report at 1. The UCIOA drafters described the purpose of the lien provisions in the uniform acts (dating back to the UCA in 1977) as follows:

> The 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of mortgage lenders. As a practical matter, mortgage lenders will most likely pay the six months' assessments...rather than having the association foreclose on the unit.

UCIOA § 3-116, Comment 1; JEB Report at 1.

The association is an involuntary creditor, advancing services in return for a promise of future payments. *Id*. Further, the homeowners' default in these payments could impair the association's financial stability and its practical ability to provide services. *Id*.

The Nevada Supreme Court, following the UCIOA comments, recognizes the Lien Statute splits the association's lien priority into a senior position (with a nine-month limited lien priority) and a junior position (balance of delinquent assessments). *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.2d 408 (Nev. 2014) ("SFR"). The Nevada Supreme Court holds that the Lien Statute's portion of the limited lien priority is a "true lien" which, upon foreclosure, extinguishes a first mortgage. *Id.* at 419.

1. Seniority of the Limited Lien Priority Is Vital to Pay for Essential Services.

The courts have noted the rationale behind granting senior lien priority for a limited amount of association assessments is based on the principle that collectability is vital because the revenue supports delivery of essential common services, such as maintenance of infrastructure serving homeowners. *SFR* at 413-14.[11]

Accordingly, mortgagees are on notice of lien priorities in Nevada and may protect their security by paying the modest amount of the limited-priority portion of the association's lien.

2. This Case Is Nationally Important Because Twenty-two Jurisdictions Have Limited Lien Priority Statutes.

Approximately 21 states and the District of Columbia have adopted lien priority statutes similar to Nevada,[12] modeled on the Uniform Law Commission's uniform real property acts.

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[11] In addition, the Massachusetts Appeals Court stated, "[W]e acknowledge the legislative concern for prompt collection of common expense assessments. Failure … to pay … would have a serious financial impact on the stability of a condominium association." *Blood v. Edgar's*, *Inc.*, 632 N.E.2d 419 (Mass App. Ct. 1994) (describing assessments as the "life's blood" of the association).

[12] Alabama, Alaska, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, West Virginia, and Puerto Rico. FCAR, *National and State Statistical Review for 2015*, Community Association Institute (2015), *available at* http://www.cairf.org/research/factbook/2015_statistical_review.pdf.

In upholding the Rhode Island limited lien priority statute as a "true lien," the Supreme Court of Rhode Island noted the numerous opportunities lenders have to preserve the deed of trust's priority. *Twenty Eleven, LLC v. Michael J. Botelho, et al.*, 127 A.3d 897 (R.I. 2015). The Rhode Island court of last resort stated, "Regardless of whether or not lenders choose to employ these safeguards, the bottom line is that 'statutory principles of priority, not the monetary value of the respective liens, control'." *Id.* Thus, the foreclosure of an association's lien extinguishes the otherwise first-mortgage lien. *Id.*

Other state courts have upheld their limited lien priority statutes as a "true" lien. *See, e.g., Drummer Boy Homes Ass'n, Inc. v. Britton*, 474 Mass. 17, 2016 Mass. LEXIS 189 (Mass. 2016); *Chase Plaza Condo. Ass'n Inc. v. J.P. Morgan Chase Bank, N.A.*, 98 A. 3d 166 (D.C. Ct. App. 2014); *Summerhill Vill. Homeowners Ass'n v. Roughley*, 270 P.3d 639 (Wash. Ct. App. 2012).

Commentators, citing these recent state court decisions, reach the same conclusion that the lien priority creates a "true" lien:

> …that the association's lien has not only a payment priority (that is, not merely a right to first payment following a foreclosure by the first mortgage lender) but a 'true lien priority' over an otherwise-first lien mortgage – such that the foreclosure of the association's lien places the otherwise-first mortgage lien at risk of being extinguished. If the association forecloses its lien, and the otherwise-first mortgage lender does not step forward and redeem its interest by paying off the priority

> portion of the association's lien before the sale, the association's sale of the unit or lot will extinguish the first mortgage lien.

R. Wilson Freyermuth and Dale A. Whitman, *Can Associations Have Priority over Fannie or Freddie?*, 29 Prob. & Prop. 26, 27 (July/August 2015).

3. Without a "True Lien," Associations Would Be Left with a Mere "Payment Priority" Dependent upon Lengthy Bank Foreclosures that May Take Years and Have No Equity.

If *Bourne Valley* is allowed to stand, the result would strip the limited-priority lien of its character as a "true" lien, leaving homeowners and their associations with a mere "payment priority" in which they could not recover the amount unless and until the lender conducts a foreclosure sale and sufficient equity exists in the property.

In many states, the timeline for lender foreclosures – the number of days it takes in each state to proceed to the foreclosure sale – is more than two years. All the while, the association's budget deficit would continue to grow.

To make matters more difficult, both Federal Home Loan Mortgage Corporation ("Freddie Mac") and Federal National Mortgage Association ("Fannie Mae") recently issued new and longer foreclosure timelines. On September 3, 2015, Freddie Mac extended its foreclosure timelines in 34 states effective August 1, 2015. Fannie Mae's new foreclosure timelines became effective April 1, 2016.

The following table provides examples of the longer foreclosure timelines of Freddie Mac and Fannie Mae, with respective effective dates:

	Freddie's Old *(Nov. 1, 2014)*	Freddie's New *(Aug. 1, 2015)*	Fannie's New *(Apr. 1, 2016)*
Connecticut	750	810	780
Delaware	780	960	960
Florida	810	930	810
Hawaii	840	1,080	900
Maine	690	990	1,050
Maryland	660	720	570
Nevada	690	900	780
Oregon	600	1,080	1,050
Rhode Island	660	840	900
Vermont	810	900	930
Washington	660	720	630

See, Freddie Mac, Bulletin 2016-5 (March 9, 2016), *available at* http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll1605.pdf.

On September 29, 2016, Fannie Mae issued updated foreclosure timelines for all states at https://www.fanniemae.com/content/guide_exhibit/foreclosure-timeframes-compensatory-fees-allowable-delays.pdf. In addition to Fannie Mae's timelines above, the following jurisdictions take over 1,000 days before the foreclosure sale occurs: District of Columbia (1,230 days), New Jersey (1,140 days), and New York (1,110 days).

States with a limited lien priority statute and a large number of associations, coupled with a high foreclosure rate, would face the greatest impact if *Bourne Valley* is allowed to stand because associations

would be forced to depend on lengthy bank foreclosures to recover. This is because potential buyers would lose their incentive to purchase property at an association foreclosure sale if it remains subject to the first mortgage or deed of trust, even though the lender slept on its rights and failed to pay the modest limited-priority portion of the lien. Thus, *Bourne Valley* enables banks to have a second bailout at the expense of the homeowners in associations.

The following table lists four states with the highest foreclosure rates, the number of community associations in those states, and new Freddie Mac foreclosure timelines. Daren Blomquist, *U.S. Foreclosure Activity Decreases 6 Perccent in August Following Five Consecutive Months of Annual Increases*, RealtyTrac, (Sept. 16, 2016), http://www.realtytrac.com/news/foreclosure-trends/realtytrac-u-s-foreclosure-market-report-august-2015/.

State	Foreclosure Rate	#CAs	Timeline
Nevada	1:507	3,200	900
Maryland	1:534	6,550	720
New Jersey	1:539	6,600	750
Florida	1:596	47,100	930

Exacerbating lengthy bank foreclosures is the condition where homeowners find their properties "under water." If the "true" lien becomes a mere "payment priority" under such conditions, and "the mortgage lien held by banks enjoyed priority over the association lien, the association might never collect on past due assessments, and might be at significant risk with respect to future assessments – especially if, as became increasingly common, banks delayed in foreclosing on their mortgage liens." Stewart E. Sterk,

Maintaining Condominiums and Homeowner Associations: Ending the Free Ride, at 2 (Oct. 10, 2016) Cardozo Law Faculty Research Paper No. 499, *available at* SSRN: https://ssrn.com/abstract=2850689.

If the association lost its ability to foreclose its priority position, it would "threaten the association's finances and its ability to preserve and maintain common elements, diminishing the investment-backed expectations of the association's owner members." R. Wilson Freyermuth and Dale A. Whitman, at 30.

4. Loan Servicers Register with MERS Rather than Record Their Interests in the County Land Records, Making Notification Highly Impractical.

The Ninth Circuit in *Bourne Valley* appears to be of the opinion that Wells Fargo should have been provided actual notice of the association's foreclosure sale and not just the various statutory record notices. However, the reality is community associations in many cases cannot even locate or identify the lender, subsequent lender or loan servicers, or current real party in interest with respect to the security, because the lender fails to record its interest in the public land records. Thus, lenders are in a better position to request notice of association foreclosure on a property than the association is to locate the lender.

Subsequent transfers and assignments of the security, occurring after the original loan, are typically registered on the Mortgage Electronic Registration Systems, Inc. ("MERS"), an opaque private system designed to save lenders the cost of recording such transfers and assignments, resulting in savings of millions of dollars for mortgage companies while

restricting associations' access to land records. Max, Weinstein, et al., *MERS Litigation -- Brief of Amicus Curiae the Legal Services Center of Harvard Law School and Law Professors in Support of the Appellee* (May 5, 2015), Brooklyn Law School, Legal Studies Paper No. 411, *available at* SSRN: http://ssrn.com /abstract=2602929.

The absence of lenders' interests in the public records deprives community associations, investors and other parties of the opportunity to identify the current loan servicer. If statutory notice is given to MERS, the duty of MERS to deliver such notice to the loan servicer is uncertain; and MERS is not being held accountable for its inaction. In short, the choice by the lending industry to use MERS in order to save money has created an impractical, unrealistic, and unreliable system for community associations to identify and notify the current loan servicer at the time of lien foreclosure. Further, the "servicer being asleep at the switch…is no reason the homeowners' association should be punished for the servicer's carelessness." Freyermuth and Whitman, at 32.

The majority in *Bourne Valley* found that the Lien Statute does not contain, but should contain, direct notice. However, lenders are concealed under the veil of the privatized MERS, making it impractical for the associations to identify lenders to provide direct notice. Thus, the extinguishment of lenders' (like Wells Fargo here) first mortgage or deed of trust is self-inflicted because (a) the servicers slept on their rights and (b) lenders chose to register their interests in MERS (and not record in public land records) to save money. It is far easier for the sophisticated loan servicer to locate the association than vice-versa.

B. The Ninth Circuit's Interpretation of "State Actor" in Bourne Valley Conflicts with the Nevada Supreme Court, the U.S. Supreme Court, and Other Circuits.

In *Bourne Valley*, a divided three-judge panel of the Ninth Circuit held the Lien Statute violated the Fourteenth Amendment's Due Process Clause and, thus, was facially unconstitutional.

The decision below in *Bourne Valley* is worthy of certiorari for the following reasons:

(1) Although no "state actor" was involved in the non-judicial foreclosure under the Lien Statute, the Ninth Circuit held that the State of Nevada was a "state actor" simply by virtue of adopting the Lien Statute, and this holding conflicts with the Nevada Supreme Court in *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg.*, 388 P.3d 970 (Nev. 2017).

(2) The Ninth Circuit's *Bourne Valley* conflicts with *Flagg Brothers*, *Inc. v. Brooks*, 436 U.S. 149 (1978), and other U.S. Supreme Court decisions, and creates a split with other circuits.

Supplementing Petitioner's arguments, which are adopted and incorporated herein by reference, CAI offers the following analysis.

1. The Ninth Circuit's Opinion, that a State Legislature's Mere Enactment of a Statute Constitutes "State Action" Subject to the Due Process Clause Without Further Involvement by the State, Is Sufficient Basis for Review by This Court.

The Ninth Circuit's split-panel opinion that the state legislature's mere enactment of a statute regulating private foreclosures constitutes "state action" subject to the Due Process Clause, without any further involvement by the state, is sufficient basis for review by this Court.

If allowed to stand, the Ninth Circuit would significantly expand this Court's thoughtful jurisprudence characterizing "state action." *Flagg Brothers* involved similar facts, specifically a private warehouseman's sale of property held in storage that transferred title by operation of New York state law. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 160 (1978). This Court held that state law serves to determine the manner in which property interests are transferred and to recognize the validity of the sale; thus, without further involvement through "process or state officials" in enforcing the state law, "state action" would not be found. *Id*.

2. The Ninth Circuit's Opinion Directly Conflicts with the Holding of Nevada's Court of Last Resort on Whether the Lien Statute Involved "State Action".

The Ninth Circuit's opinion would create untenable conflicts with the highest court of the State of Nevada

in *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mrtg*., 388 P.3d 970 (Nev. 2017).

A cornerstone of the Due Process Clause is that only a State, or private person acting in a manner that may be treated as that of the State, may deprive a person of a property interest within the protection of the Fourteenth Amendment. *Flagg Bros*. at 157.

Here, with respect to the foreclosure sale, the panel's majority concedes that neither the buyer (Bourne Valley) nor the seller (Parks Homeowners' Association) was a state actor under applicable law. *Bourne Valley*, 832 F.3d at 1160. Nevertheless, the majority turned itself into a philosophical pretzel in its attempt to reach the Due Process issue, stating "the enactment of the [Lien] Statute unconstitutionally degraded [Wells Fargo's] interest in the Property." *Id.*

The majority's finding of "degradation" misconstrues Due Process under U.S. Supreme Court cases. In *Lugar v. Edmondson Oil Co*., this Court held that the conduct allegedly causing the deprivation of a federal right must be fairly attributable to the State. 457 U.S. 922, 937 (1982). Further, in *Apao v. Bank of New York*, the Ninth Circuit held that a non-judicial foreclosure statute lacks any "overt official involvement" and that government regulation of the mortgage market "does not convert the private foreclosure procedures here into state action." 324 F.3d 1091, 1092-93 (9th Cir. 2003).

The dissent in *Bourne Valley* correctly observes that a government actor must be overtly involved in some official action to meet the state action requirement. *Bourne Valley*, 832 F.3d at 1160-61.

Saticoy Bay involved similar facts with respect to an HOA foreclosure sale under Nevada's Lien Statute.

Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mrtg., 388 P.3d 970 (Nev. 2017). Wells Fargo argued that the Lien Statute was facially unconstitutional because it did not require an HOA to give a first security interest holder actual notice of a foreclosure that may extinguish the security interest. *Id* at 972. The Nevada Supreme Court rejected this argument, finding "an HOA acting pursuant to NRS 116.3116 *et seq*., cannot be deemed a state actor." *Id*. at 973. Citing this Court's opinion in *Lugar v. Edmundson Oil Co*., the Nevada Supreme Court stated that action by "a private party pursuant to [a] statute, *without something more*, [is] not sufficient to justify a characterization of that party as a 'state actor.'" *Id*.

In *Saticoy Bay*, Wells Fargo also argued that the "Legislature may be charged with the deprivation because it enacted" the Lien Statute. *Id*. The Nevada Supreme Court rejected this argument, citing *Flagg Brothers*, "although the state had enacted the statute, due process was not implicated because the statute did not compel such a sale, and the state was not otherwise involved in such a sale." *Id.*

3. The Ninth Circuit Creates a Split with Other Circuits on the Question of "State Actor".

The opinion of the Ninth Circuit also directly conflicts with opinions in other circuits. The majority's reliance on the Fifth Circuit's decision in *Small Engine Shop*, *Inc. v. Cascio* is misplaced. 878 F.2d 883 (5th Cir. 1989). *Small Engine* involved a Louisiana sheriff's sale which was clearly state action because a public official was involved. *Id.* It is not analogous to Nevada's Lien Statute which provides for a non-judicial sale by private parties, not a public official.

Where *Small Engine* avoided finding constitutional defects in a statute, the majority in *Bourne Valley* stretches to find a constitutional defect, thus raising a question of exceptional importance by creating a circuit split. Rule 10.

The more pertinent Fifth Circuit precedent is *Barrera*, where the court held that a trustee exercising a power of sale in a non-judicial foreclosure was not performing a governmental function and, thus, no state action exists. *Barrera v. Security Bldg. & Inv. Corp*, 519 F.2d 1166 (5th Cir. 1975). In *Bourne Valley*, the majority's interpretation of "state action" would call into question the facial constitutionality of non-judicial real property foreclosure statutes in numerous states with statutes similar to Nevada.

As this Court observed in *Flagg Brothers*, mere enactment of a state statute, without further involvement through process or a state official enforcing the law, "…would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment…" *Flagg Bros.*, 436 U.S. at 160.

Accordingly, the Nevada Lien Statute is not facially unconstitutional because there was no state action and no government actor involved in conducting the non-judicial foreclosure sale.

CONCLUSION

The Ninth Circuit opinion in *Bourne Valley* misconstrues this Court's jurisprudence characterizing "state action" under the Due Process Clause of the Fourteenth Amendment. It would broaden the notion of state action to include mere enactment of a state statute. This alone is sufficient reason for this Court

to accept the Petition for Writ of Certiorari. Further, it would create a split with Nevada's court of last resort and with the Fifth Circuit in its application of the Due Process Clause of the Fourteenth Amendment.

Not only are these extremely important legal issues for certiorari, but they would also have serious practical implications for homeownership. If unresolved, the conflicts presented by the Ninth Circuit would directly impact millions of homeowners residing in community associations in the United States, yielding financial uncertainty and differential treatment, depending on the arbitrary factor of the circuit and state in which they reside.

Amicus curiae Community Associations Institute respectfully urges this Court to grant Petitioner's Petition for Writ of Certiorari to preserve the rights and expectations of homeowners in Nevada, as well as tens of millions of homeowners across the country.

Respectfully submitted,

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