16-1208

No. 16-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Like most states, Nevada provides that when a senior creditor forecloses on a lien on real property, junior lienholders are entitled to claim any proceeds in excess of the amount necessary to satisfy the foreclosing creditor's claims, but that the sale otherwise extinguishes their liens. Like the majority of states, Nevada allows "nonjudicial foreclosures," which do not require the filing of a lawsuit or any other material government involvement. In numerous states, the statute regulating nonjudicial foreclosures does not require direct notice to junior lienholders whose liens will be extinguished by the private sale.

In this case, the Ninth Circuit held that passage of Nevada's relevant statute rendered the regulated nonjudicial sales a form of state action subject to the Due Process Clause of the Fourteenth Amendment, construed the statute as not requiring notice to junior lienholders, and held the statute facially unconstitutional for failing to require such notice. The Nevada Supreme Court later upheld the same provisions, holding that enactment of the statute did not convert the private sales into state action, expressly disagreeing with the Ninth Circuit decision in this case. The Question Presented is:

Whether the Ninth Circuit erred in holding that Nevada's statute authorizing nonjudicial foreclosure of association liens, NEV. REV. STAT. §§ 116.3116 *et seq.*, was facially unconstitutional under the Due Process Clause for not requiring direct notice to junior lienholders, when the only state action involved was the enactment of the statute regulating the private sale.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bourne Valley Court Trust respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is published at 832 F.3d 1154. The opinion of the district court (Pet. App. 28a-42a) is published at 80 F. Supp. 3d 1131.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2016. Pet. App. 1a. The court of appeals denied petitioner's timely petition for rehearing en banc on November 4, 2016. Pet. App. 43a-44a. On January 30, 2017, the Justice Kennedy extended the time to file this petition through March 6, 2017. No. 16A753. On February 24, 2017, the Justice Kennedy further extended the time to file this petition through April 3, 2017. *Id.* This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant provisions of Nevada Revised Statutes §§ 116.31162, 116.31163, 116.311635, 116.31168 are included in Appendix D of this petition.

STATEMENT OF THE CASE

This petition arises from a conflict most directly between the Ninth Circuit and the Nevada Supreme Court over the constitutionality of a Nevada statute. That conflict has thrown into disarray hundreds of cases pending in state and federal courts in the aftermath of the mass foreclosures during the recent recession. The conflict is so untenable that Wells Fargo, respondent in this case and the losing party in the Nevada Supreme Court, has obtained a stay of the Nevada judgment pending its planned filing of a petition for a writ of certiorari in this Court on the same basic question.

The decision below also created a circuit conflict over a broader, even more important question of constitutional law that affects the real estate foreclosure laws of many other states as well. In particular, the courts are divided over whether nonjudicial foreclosures constitute a form of state action subject to the notice and other requirements of the Due Process Clause. The decision below would condemn as facially unconstitutional the laws of at least ten other states besides Nevada (including the law in at least one other state in the Ninth Circuit), despite multiple decisions by other circuits and state supreme courts holding that those state statutes are not subject to Due Process challenge, for lack of state action.

I. Legal Background

1. State laws pervasively permit lenders, homeowners' associations, taxing authorities, repairmen, and others to secure payment by recording a lien on the debtor's real property. When

the debt is defaulted, the lienholder may foreclose on the property, causing it to be sold. The distribution of the proceeds is determined by the priority of the liens, which is established by state law (often by statute). If the sale produces less money than is needed to satisfy all the creditors, those with liens of lesser priority (often called "junior" lienholders) may not be paid.

State law also determines what happens to the liens after the sale is completed. A foreclosure sale ordinarily extinguishes all liens junior to the lien being foreclosed upon, but leaves intact any senior liens. *See, e.g.*, GRANT S. NELSON ET AL., REAL ESTATE FINANCE LAW § 7:20 (6th ed. 2014) [hereinafter REAL ESTATE FINANCE LAW]; RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 7.1 cmt. a; *see also United States v. Brosnan*, 363 U.S. 237, 250 (1960) (noting that a "private sale of its own force [is] effective under California law to extinguish all junior liens"). This established rule allows the purchaser to take title to the foreclosed property free and clear of the junior liens, thereby removing a practical impediment to the remedy's effectiveness.

2. Many homes (particularly in states like Nevada) are developed as part of a planned community, in which important services are provided by a homeowners' association (HOA) rather than the local government. In order to finance these services, homeowners are required to pay fees to the HOA. If the fees are not paid, many states permit the HOA to put a lien on the home owner's property. *See* Ryan Prsha, Note, *Are Non-Judicial Sales Unconstitutional? The Super-Priority Lien and Its*

Influence on State Foreclosure Statutes, 81 MO. L. REV. 917, 921 (2016).

When homeowners experience financial distress, they may stop paying HOA fees, often in conjunction with ceasing mortgage payments. Particularly during tough economic times, the default can lead to cascading effects throughout the community – the HOA must increase dues for paying members to make up the deficit (thereby risking default by other, similarly distressed homeowners) or reduce services (thereby decreasing home values even further and possibly putting members under water on their mortgages). *Id.* at 920. To be sure, the HOA could file a lien on the property for the unpaid assessments. But so long as the HOA lien was junior to the mortgage, there often would be no point. Particularly in a down market, if the lender foreclosed, the sale often would not cover much more than the mortgage itself, leaving nothing for the HOA as a junior lienholder. And, indeed, if prices were suppressed sufficiently, the lender might prefer to wait to foreclose until market conditions improved. At the same time, if the HOA foreclosed as the junior lienholder, it would be forced to sell the property with the mortgage lien still attached (an unattractive proposition for most potential buyers) or pay off the mortgage before, or as part of, the sale (which might cost more than the sale price).

In response, a number of states enacted statutes to provide HOA's a "super-priority lien" for a portion of back dues. *See id.* at 921 ("Twenty different states have . . . creat[ed] a super-priority lien status for association dues."). Many of the statutes were modeled on provisions of the Uniform Condominium

Act, the Uniform Common Interest Ownership Act, or the Uniform Planned Community Act.[1]

In Nevada, for example, Section 116.3116(2) of the Nevada Revised Statutes gives an HOA's lien priority over even a first mortgage for nine months of unpaid dues (the lien for the rest of the dues having its ordinary priority behind the mortgage and other liens).

The Nevada Supreme Court, consistent with the decisions of other courts construing similar statutes, has held that the HOA super priority lien operates like any other senior lien – when the HOA forecloses on it, all junior lienholders are entitled to any proceeds in excess of the amount of the HOA's lien but the junior liens are extinguished. *See SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408, 411-14 (Nev. 2014).[2] Accordingly, just as a foreclosure initiated by the holder of a first mortgage can extinguish a second mortgage, an HOA foreclosure will extinguishes the lien held by a bank with a first mortgage or deed of trust on the property. *Id.* at 419.

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[1] *See* Note, *Priority of Condominium Associations' Assessment Liens Vis-à-Vis Mortgages: Navigating in the Super-Priority Lien Jurisdictions*, 40 SEATTLE U. L. REV. 841, 843-44 (2017) [hereinafter *Priority of Condominium Associations' Assessment Liens*].

[2] *See also Chase Plaza Condo. Ass'n v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166, 172-78 (D.C. 2014); *Summerhill Village Homeowners Ass'n v. Roughley*, 289 P.3d 645 (Wash. Ct. App. 2012).

3. State law generally authorizes foreclosure on a lien on real property through one or both of two methods.

First, a "judicial foreclosure" is commenced by filing an action in state court, which adjudicates the lienholder's assertion of default and any other relevant issues before authorizing sale of the property. REAL ESTATE FINANCE LAW §§ 7:12, 7:20.

Second, many states have a long history of permitting "nonjudicial foreclosures" that bypass the need for judicial or other state involvement when the process is permitted by the terms of the governing financial agreement. *See, e.g.*, REAL ESTATE FINANCE LAW § 7:20 (process is "available in thirty-five jurisdictions"); *Barrera v. Sec. Bldg. & Inv. Corp.*, 519 F.2d 1166, 1172 (5th Cir. 1975) (tracing practice's roots to colonial times). In a nonjudicial foreclosure, "[a]fter varying types and degrees of notice, the property is sold at a public sale, either by a public official, such as a sheriff, by some other third party, or by the mortgagee." REAL ESTATE FINANCE LAW § 7:20.[3]

Nevada permits nonjudicial foreclosures to collect on HOA liens when authorized under the terms of the HOA declaration. NEV. REV. STAT.

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[3] Nonjudicial foreclosures are sometimes called "power of sale" foreclosures, referring to the "power of sale" afforded the lender or a trustee under the mortgage or deed of trust. *See* REAL ESTATE FINANCE LAW § 7:20.

§ 116.31162(1).[4] Before foreclosing, the HOA must, among other things, provide direct notice to the homeowner,[5] record a notice of default and election to sell the property,[6] and send a copy of such notice to "[e]ach person who has requested notice" in a document recorded in title records.[7]

"Mortgagors and junior lienors have challenged the constitutionality" of nonjudicial foreclosure laws, pointing to the lack of pre-deprivation judicial hearings and allegedly inadequate notice. REAL ESTATE FINANCE LAW § 7:24 & n.738 (collecting decisions). For the most part, courts have held that the Due Process Clause does not apply because nonjudicial foreclosures do not involve the state action required to invoke the protections of the Fourteenth Amendment. *See id.* at § 7:28. As

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[4] Unless otherwise indicated, cites to Nevada statutes are to the version in effect at the time of the 2012 foreclosure sale in this case.

[5] *Id.* § 116.31162(1)(a).

[6] *Id.* § 116.31162(1)(b).

[7] *Id.* § 116.31163(1); *see also id.* § 116.31168(1) (allowing interested persons to record such requests). Petitioner and respondent have disputed whether the statute applicable at the time of the foreclosure in this case also required the HOA to provide notice to all recorded lienholders whether they requested it or not. *See* Pet. App. 11a-12a. The Ninth Circuit construed the statute not to require such notice. *Id.* 10a-12a. Recently, the Nevada legislature amended the statute to remove any ambiguity, expressly requiring direct notice to all recorded lienholders. *See* NEV. REV. STAT. § 116.31163(2); Pet. App. 12a n.4. However, as discussed *infra* at 18-22, the amendment does not diminish the need for review.

discussed next, the Ninth Circuit split from that settled authority in this case.

II. Factual And Procedural History

In 2012, petitioner bought a property at an HOA nonjudicial foreclosure sale authorized by Nevada Revised Statutes Sections 116.3116 *et seq.* Pet. App. 4a-5a. As a matter of Nevada law, the sale extinguished all junior liens, including a first trust held by respondent Wells Fargo. *Id.* 5a-6a.

Petitioner subsequently filed an action to quiet title in Nevada state court, which was removed to federal court. Wells Fargo opposed the quiet title action, alleging that the Nevada statute failed to require constitutionally adequate notice to affected lienholders. Respondent did not dispute that the HOA had given notice to the homeowners and duly recorded its lien and Notice of Default and Election to Sell, as required by statute. Nor did Wells Fargo contend that it had ever recorded a request to receive direct notice of such a sale as permitted by the state law. Indeed, Wells Fargo failed even to "present evidence that it did not receive notice." Pet. App. 8a.

Instead, respondent claimed that even if it *had* received actual notice, the foreclosure was invalid because the statute authorizing it was unconstitutional *on its face* due to its failure to require direct notice to those whose liens might be extinguished by the sale.

The district court rejected that argument and granted petitioner summary judgment, Pet. App. 33a-37a, but a divided Ninth Circuit panel reversed, *id.* 15a. The panel majority first concluded that, assuming the Due Process Clause applied, the

statute's "opt-in" notice regime failed to satisfy it, rendering the statute unconstitutional on its face. *Id.* 6a-12a.

The court then turned to "Bourne Valley's strongest argument[, which] is that there has been no 'state action' for purposes of constitutional due process." *Id.* 13a. The majority acknowledged that under this Court's precedents "state action requires both an alleged constitutional deprivation caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible, and that the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (emphasis omitted) (internal quotation marks and citation omitted)). The court further admitted that "the foreclosure sale itself is a private action." *Id.* And it "acknowledge[d] that there is no state action here that 'encourages' or 'compels' a homeowners' association to foreclose on a property." *Id.* (citation omitted).

Nonetheless, the majority concluded that in "this context, where the mortgage lender and the homeowners' association had no preexisting relationship, the Nevada Legislature's enactment of the Statute is a 'state action.'" *Id.* The court acknowledged this Court's decision in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978), Pet. App. 14a, in which the Court expressly rejected the claim that "the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to 'state action' even though no process or state officials were ever involved in enforcing that

body of law." *Flagg Bros., Inc.*, 436 U.S. at 160 n.10. But the Ninth Circuit distinguished the decision on the ground that "unlike in this case, . . . the parties had a preexisting contractual relationship as creditor and debtor." Pet. App. 14a.[8] In the absence of such a relationship, the court held, a state's enactment of a statute authorizing a nonjudicial foreclosure that can extinguish junior liens constitutes state action subject to the Due Process Clause. Pet. App. 14a-15a

Judge Wallace dissented, rejecting, among other things, the majority's position that mere enactment of a statute regulating private conduct can render the private action state action subject to the Due Process Clause. *Id.* 15a-27a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's holding that an important state statute is facially unconstitutional is reason enough to grant review. The Nevada Supreme Court's subsequent rejection of that holding makes review imperative – the results of hundreds of cases arising from the state's foreclosure crisis during the last recession now turn on whether a quiet title action under Nevada law is decided in state or federal court.

The decision below also conflicts with the decisions of at least six circuits and eight state courts of last resort that have rejected the argument that a

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[8] *But see Flagg Bros., Inc.*, 436 U.S. at 153 (plaintiff's personal property was put into the defendant's storage facility involuntarily, by the city marshal in the course of an eviction); *id.* at 160 (plaintiff "alleges that she never authorized the storage of her goods").

state's enactment of a statute regulating nonjudicial foreclosure renders the foreclosures a form of state action subject to the Due Process Clause. At the same time, the Ninth Circuit's contrary ruling draws into constitutional doubt the nonjudicial foreclosure laws of at least ten other states, including Arizona's in the Ninth Circuit. The decision thus casts a cloud on the title of countless properties sold in compliance with statutes whose constitutionality was reasonably deemed settled decades ago. This Court must intervene.

I. Federal Courts Of Appeals And State Courts Of Last Resort Are Divided Over Whether Nonjudicial Foreclosure Statutes Render Such Foreclosures A Form Of State Action Subject To The Due Process Clause.

The Ninth Circuit's decision conflicts with a recent decision of the Nevada Supreme Court as well as the law of numerous circuits and states.

A. The Ninth Circuit And Supreme Court Of Nevada Have Expressly Disagreed Over The Question Presented In Ruling On The Constitutionality Of The Same State Statute.

The facts of the Nevada case, *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg.*, 388 P.3d 970 (Nev. 2017), largely mirror the facts in this one. As here, a homeowners' association availed itself of Nevada's nonjudicial foreclosure statute to foreclose on a lien for unpaid HOA dues. *Id.* at 971-72. The purchaser then filed suit against the previous holder of the first mortgage on the property, Wells Fargo, who is also the respondent in this case.

The new owner sought a declaration that it had taken the property free and clear of any encumbrances or liens. *Id.* at 972. Wells Fargo argued that "the foreclosure procedures specified in NRS 116.3116 *et seq.* are facially unconstitutional because they do not require an HOA to give a first security interest holder actual notice of a foreclosure that, once conducted, may extinguish the security interest." *Id.*

The Nevada Supreme Court rejected that argument on the ground that "an HOA acting pursuant to NRS 116.3116 *et seq.* cannot be deemed a state actor." *Id.* at 973. Quoting this Court's decision in *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936 (1982), the Nevada Supreme Court explained that "[a]ction 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.* (emphasis and alterations in original). The court noted the decisions of other federal circuits recognizing that nonjudicial foreclosure statutes do not involve state action and therefore do not "implicate due process." *Id.* (citing, *e.g.*, *Levine v. Stein*, 560 F.2d 1175 (4th Cir. 1977); *Northrip v. Fed. Nat'l Mortg. Ass'n*, 527 F.2d 23 (6th Cir. 1975)).

The Court further directly "reject[ed] Wells Fargo's argument," accepted by the Ninth Circuit in this case, "that the Legislature may be charged with the deprivation because it enacted" the governing statute. *Id.* In doing so, the court relied on this Court's decision in *Flagg Brothers*, which it read to hold that "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." *Saticoy Bay*, 388 P.3d at 932 (citing *Flagg Bros.*, 436 U.S. at 157, 166). "Given this federal precedent, the Legislature's mere enactment of [the statute] does not implicate due process absent some additional showing that the state compelled the HOA to foreclose on its lien, or that the state was involved with the sale." *Id.* Finding that "[n]either has been demonstrated here," the court rejected Wells Fargo's due process claim. *Id.* at 973-74.[9]

In so holding, the Nevada Supreme Court expressly "acknowledge[d] that the Ninth Circuit has recently held that the Legislature's enactment of NRS 116.3116 *et seq.* does constitution state action," citing this case. *Id.* at 974 n.5. "However, for the aforementioned reasons, we decline to follow its holding." *Id.*

Wells Fargo subsequently applied for, and was granted, a stay of the judgment to permit it to file a petition for a writ of certiorari challenging the Nevada Supreme Court's state action holding. *See* Motion to Stay Remittur, *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg.*, 388 P.3d 970 (Nev. 2017) (No. 68630); Order Granting Motion to Stay Remittur, *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg.*, (No. 68630) (Nev. Feb. 8, 2017).

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[9] Having found no state action, the court decided it "need not determine" whether the statute in fact required direct notice to Wells Fargo. *Id.* at 974.

B. The Ninth Circuit's Decision Is In Conflict With The Law Of Other Circuits And States.

The Ninth Circuit held that enactment of a statute regulating nonjudicial foreclosure renders the otherwise private foreclosures a form of state action so long as the private sale can affect the property rights of lienholders who have no pre-existing contractual relationship with the foreclosing party. Pet. App. 14a-15a. Because nonjudicial foreclosure has the potential of affecting junior lienholders under the settled property law of nearly every state,[10] that holding effectively subjects all (or substantially all) states' nonjudicial foreclosure statutes to Due Process scrutiny, in contravention of the decisions of the majority of circuits and many state courts of last resort.

The D.C., First, Fourth, Fifth, Sixth, and Eighth Circuits have all held that nonjudicial foreclosure statutes involve no state action even when authorized by state statute. *See Bryant v. Jefferson Fed. Sav. & Loan Ass'n*, 509 F.2d 511, 514 (D.C. Cir. 1974) (agreeing with decisions "rejecting the argument that the mere enactment of the statute constituted government action"); *Grapetine v. Pawtucket Credit Union*, 755 F.3d 29, 33 (1st Cir. 2014) (same for Rhode Island statute); *Levine v. Stein*, 560 F.2d 1175 (4th Cir. 1977) (same for Virginia statute); *Barrera v. Sec. Bldg. & Inv. Corp.*, 519 F.2d 1166, 1170-72 (5th

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[10] *See supra* at 3.

Cir. 1975) (same for Texas statute);[11] *Northrip v. Fed. Nat'l Mortg. Ass'n*, 527 F.2d 23, 26-28 (6th Cir. 1975) (same for Michigan statute); *Staley Farms, Inc. v. Rueter*, 662 F.2d 520, 520-22 (8th Cir. 1981) (same for Iowa statute);[12]

At least eight state supreme courts have held the same. *See, e.g., Pappas v. Eastern Sav. Bank, FSB*, 911 A.2d 1230, 1237 (D.C. 2006) (finding no state action in District of Columbia's nonjudicial foreclosure statute); *Putensen v. Hawkeye Bank of Clay County*, 564 N.W.2d 404, 409-10 (Iowa 1997) (same for Iowa statute); *Cramer v. Metro. Sav. & Loan Ass'n*, 258 N.W.2d 20, 259-60 (Mich. 1977) (same for Michigan statute); *Leininger v. Merchants & Farmers Bank, Macon*, 481 So.2d 1086, 1090 (Miss. 1986) (same for Mississippi statute); *Fed. Nat'l Mortg. Ass'n v. Howlett*, 521 S.W. 2d 428, 432 (Mo. 1975) (same for Missouri statute); *Saticoy Bay*, 388 P.3d at 972-74 (same for Nevada statute); *Kennebec, Inc. v. Bank of the West*, 565 P.2d 812, 814-16 (Wash.

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[11] *Compare Davis Oil Co. v. Mills*, 873 F.2d 774, 779-81 & n.12 (5th Cir. 1989) (finding state action in Louisiana foreclosure regime where "the sheriff seizes the property and advertises and conducts the sale," such that "the state not only provides the legal framework whereby other interests in the subject property are terminated, it is also 'intimately involved' with the execution of the procedures which accomplish the termination of such interests").

[12] *See also, e.g., Warren v. Government Nat'l Mortg. Ass'n*, 611 F.2d 1229, 1233-35 (8th Cir. 1980) (no federal government action when federally owned private corporation availed itself of Missouri's nonjudicial foreclosure process, even though power of sale provisions in trust required government approval).

1977) (same for Washington statute); *Kottcamp v. Fleet Real Estate Funding Corp.*, 783 P.2d 170, 171-72 (Wyo. 1989) (same for Wyoming statute).

Notably, in a number of these cases, the courts confronted statutes that did not require the individual direct notice the Ninth Circuit held due process requires. *See, e.g.*, *Barrera*, 519 F.2d at 1167 n.2, 1169 (Texas statute requiring only that notice be posted in three public places); *Northrip*, 527 F.2d at 25 (Michigan statute requiring only notice by advertisement and posting on property); *Cramer*, 258 N.W.2d at 22 (same); *Leininger*, 481 So.2d at 1087-88 (Mississippi statute requiring only notice by publication); *Howlett*, 521 S.W.2d at 430 (same for Missouri statute).[13]

To be sure, many of these cases did not directly discuss the fact that the foreclosure would extinguish junior liens. But that fact was obvious, a well-known feature of settled state property law. *See, e.g.*, REAL ESTATE FINANCE LAW § 7:20; RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 7.1 cmt. a ("A power of sale (nonjudicial) foreclosure that complies with applicable statutory notice and related requirements accomplishes" the extinguishment of all junior liens); *Barrera*, 519 F.2d at 1170 (explaining that a "sale under a deed of trust, to be an effective creditor remedy, must of course pass good title," and that the

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[13] *But cf. Island Fin., Inc. v. Ballman*, 607 A.2d 76 (Md. Ct. Spec. App. 1992) (finding due process violation when second mortgage extinguished without direct notice after nonjudicial foreclosure instituted by senior lienholder, where parties did not dispute state action was involved).

remedy thus depends "on the state's acknowledgement of the legal effect of the involuntary change in ownership brought about by the exercise of the power of sale"); *Putensen*, 564 N.W.2d at 406 (noting that consequence of nonjudicial foreclosure is that "[a]ll liens which are inferior to the lien of the foreclosed mortgage are extinguished").

The Ninth Circuit's reasoning is so contrary to this Court's clear holding and rationale in *Flagg Brothers*, *see infra* § III, it is not surprising that few courts have directly confronted it. But those courts that have addressed versions of the argument have resoundingly rejected it. For example, in *Pappas v. Eastern Savings Bank, FSB*, the District of Columbia Court of Appeals rejected a due process claim by junior lienholders who received no notice of a sale that extinguished their liens. *See* 911 A.2d at 1233, 1237. The court concluded that under *Flagg Brothers* a foreclosing party's availment of a nonjudicial foreclosure process "is not conduct that can be ascribed to a state." *Id.* (citing *Flagg Brothers*, 436 U.S. at 166).

Michigan's Court of Appeals has likewise applied its state supreme court's decision finding no state action in nonjudicial foreclosures to reject a plaintiff's request for "a declaratory ruling that he, as a junior mortgagor, was entitled to personal notice rather than notice by publication when defendant foreclosed by advertisement her senior mortgage." *Cheff v. Edwards*, 513 N.W.2d 439, 440-41 (Mich. Ct. App. 1994) (relying on *Cramer*, 258 N.W.2d at 20).

Accordingly, had this case been brought in nearly any other circuit, Wells Fargo's Due Process claim

would have been rejected out of hand on the basis of settled circuit precedent. That kind of disparate treatment of similarly situated parties on the basis of nothing more than geographical happenstance should not persist.

II. The Question Presented Is Of Enormous Practical And Doctrinal Significance.

The Question Presented warrants review as well because the conflict – both between state and federal courts in Nevada, and between state and federal courts generally – is completely untenable.

A. The Conflict Between The Ninth Circuit And Nevada Supreme Court Has Left Hundreds Of Cases In Limbo.

1. Nevada was particularly hard hit in the Great Recession, triggering one of the highest rates of foreclosure in the country and a dramatic fall in real estate prices.[14] During this time, HOAs foreclosed on a great many homes. *See generally* Kylee Gloeckner, Note, *Nevada's Foreclosure Epidemic: Homeowner Associations' Super-Priority Liens Not So "Super" for Some*, 15 NEV. L.J. 326 (2014).

There are presently *hundreds* of cases in the Nevada state and federal courts questioning the title

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[14] *See, e.g.*, Jack Healy, *Underwater in the Las Vegas Desert, Years After the Housing Crash*, New York Times (Aug. 2, 2016), *available at* https://www.nytimes.com/2016/08/03/us/las-vegas-2008-housing-crash.html; Jan Hogan, *Strip left reeling: Picking up the pieces after the Great Recession*, Las Vegas Review-Journal (Mar. 27, 2016), *available at* http://www.reviewjournal.com/business/neon-rebirth/strip-left-reeling-picking-the-pieces-after-the-great-recession.

of properties sold at HOA nonjudicial foreclosures under the statute the Ninth Circuit declared facially unconstitutional but the Nevada Supreme Court sustained. *See, e.g.*, Mortgage Bankers Assoc., *Homeowners and Condominium Associations Should Not Be Granted "Super Lien" Priority*, https://www.mba.org/issues/residential-issues/hoa-super-lien-priority ("Over 1,000 Nevada cases continue to be litigated to determine whether clear title existed for property purchasers at HOA foreclosure sales, and subsequently whether proper notice was given by HOAs to first lien mortgagees before these sales were executed."). Presently, resolution of those cases, worth hundreds of millions of dollars, will depend on nothing more than the happenstance of whether they are decided in state or federal court.

As a result, the split between Nevada's state and federal courts has triggered forum shopping on a massive scale, with parties seeking to remove (or prevent the removal) of hundreds of cases from state to federal courts. For example, Bank of America recently attempted to remove more than 150 quiet title cases from state court to federal bankruptcy court (putatively on the ground that a law firm involved in the sales has gone bankrupt), telling the bankruptcy court it intends to seek summary judgment on the basis of the decision in this case.[15]

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[15] *See* Emergency Motion to Set Hearing on Shortened Time Bank of America, N.A's Motion to Set Case Management Conference In Removed Matters and Set Interim Procedures, *In re: Aleissi & Koenig, LLC*, Docket Entry 329, No. 16-16593-abl, at 1 (D. Nev.)

2. To be sure, the Nevada legislature has now amended state law to unambiguously require HOAs to provide direct notice to junior lienholders in future foreclosures. *See* Pet. App. 12a-13a n.4. But that change has no effect on the validity of the sales that have already taken place under the prior version of the statute or on the hundreds of pending cases challenging the title obtained in those sales.

Moreover, the Ninth Circuit's decision subjects every aspect of the state's revised nonjudicial foreclosure regime to Due Process challenge. Litigants are now free, for example, to argue that the details of the notice requirements fail to provide adequate notice. *See, e.g.*, NEV. REV. STAT. § 116.31162(1)(a)-(b), 116.311635 (2017) (requiring notice only of election to sell, not initial notice of delinquency); *id.* § 116.311635(1)(d)(2) (2017) (requiring notice only to lienholders who have recorded their interests, only if the lien was recorded before the notice of sale, and only to the address recorded in a state database); *id.* § 116.31162(1)(b) (2017) (describing content of required notice to homeowners and lienholders); *id.* § 116.31162(1)(a)-(c) (2017) (prescribing timing of notice relative to sale).

The prospect of future Due Process challenges is more than mere hypothesis. Such challenges have been brought against even states that require notice to junior lienholders, alleging deficiencies in other aspects of their statutory procedures. *See, e.g.*, *First Sec. Bank N.A. v. Chase Manhattan Mortg. Corp.*, No. E033880, 2004 WL 1234104, at *3 (Cal. Ct. App. June 4, 2004) (rejecting Due Process claim by junior lienholder who was not entitled to notice under state

statute due to failure to record a judgment lien, finding lack of state action); *Homestead Sav. v. Darmiento*, 281 Cal. Rptr. 367, 368-69 (Ct. App. 1991) (rejecting junior lienholder's claim that state statute "violated its due process rights" insofar as it provided "that a bona fide purchaser for value at a trustee's sale conducted as part of a nonjudicial foreclosure under a trust deed is entitled to a conclusive presumption as to a trustee's compliance with statutory notice requirements").

B. The Circuit Conflict Has Important Ramifications Outside Of Nevada As Well.

The circuit conflict also draws into question the constitutionality of many other state foreclosure regimes, casting a cloud on the title of countless properties sold through nonjudicial foreclosures.

1. The decision below establishes a principle of law that would render nonjudicial foreclosures a form of state action in most states and would render unconstitutional the nonjudicial foreclosure statutes in at least ten of them.

a. The Ninth Circuit held in this case that a nonjudicial foreclosure sale is a form of state action if: (a) a state statute provides that the sale will extinguish a lien; and (b) the affected lienholder is not in contractual privity with the foreclosing party; *See* Pet. App. 14a-15a. That describes virtually every nonjudicial foreclosure regime in existence.

Certainly, the holding below applies to the more than twenty states that give HOA or condominium

liens super-priority over mortgages, including five within the Ninth Circuit.[16] Given the settled principle that a foreclosure extinguishes junior liens, *see supra* at 3, the creation of a super-priority lien inevitably subjects lenders' liens to extinction when an HOA forecloses. And, as the Ninth Circuit noted below, the lenders generally are not parties to the agreement between the homeowner and the HOA that authorizes nonjudicial foreclosure on an HOA lien.

But the rule also applies more generally to the far more common circumstance in which a first mortgage holder forecloses on a home securing a second mortgage to a different lender. In that circumstance, the nonjudicial foreclosure by the senior lienholder also extinguishes the junior lienholder's second mortgage. And the holder of the second mortgage generally is not a party to the agreement between the homeowner and the provider of the first mortgage.[17]

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[16] *See Priority of Condominium Associations' Assessment Liens*, *supra*, at 846 ("Currently, twenty-one states, the District of Columbia, and Puerto Rico have assessment priority lien statutes . . . ."); *id.* at 846 n.37 (listing Alaska, Nevada, Hawaii, Washington, and Oregon as having super-priority liens).

[17] The Ninth Circuit's rule would also apply to other self-help procedures available to creditors in a range of contexts. *See, e.g.*, *Jarvis v. Vill. Gun Shop, Inc.*, 805 F.3d 1 (1st Cir. 2015) (rejecting due process challenge to private sale of property by warehouse for lack of state action); *Wittstock v. Mark A. Van Sile, Inc.*, 330 F.3d 899, 901 (6th Cir. 2003) (same for private sale by tax sale purchaser); *Shirley v. State Nat'l Bank of Conn.*, 493 F.2d 739 (2d Cir. 1974) (same for self-help auto repossession statute).

2. Ruling that virtually every nonjudicial foreclosure statute is subject to Due Process scrutiny might not be so consequential if it were clear that every state's statutes (except Nevada's) complied with every possible Due Process requirement. But the opposite is true. As one treatise has observed, "[i]f the requisite state action is present, the notice provisions of many state power of sale statutes do violate the requirements of procedural due process." REAL ESTATE FINANCE LAW § 7:25.

Indeed, on petitioner's count, the nonjudicial foreclosure statutes of at least ten states and the District of Columbia would be facially unconstitutional under the Ninth Circuit's decision. Two jurisdictions that separately regulate HOA super-priority liens fail to require direct notice to all junior lienholders whose rights will be affected by an HOA foreclosure. *See* D.C. CODE § 42-1903.13(c)(4)-(5) (requiring only notice to homeowner and mayor's office); MICH. COMP. LAWS § 559.208(9) (notice required only for homeowner and first mortgagee, not other junior lienholders). Other states' general nonjudicial foreclosure provisions would also not pass muster. Missouri requires direct notice to the homeowner, but otherwise has the same opt-in notice system the Ninth Circuit declared unconstitutional in this case.[18] Eight other states require direct notice to the homeowner but provide junior lienholders notice only by advertisement or publication.[19] Finally, the

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[18] *See* MO. REV. STAT. §§ 443.320, 443.325; Prsha, *supra* at 922.

[19] *See* ALA. CODE § 35-10-13; GA. CODE ANN., § 44-14-162.2; MICH. COMP. LAWS § 600.3208; MINN. STAT. § 580.03; MISS.

only notice required in Arizona (located within the Ninth Circuit) and the District of Columbia is recording the notice of sale in the jurisdiction's land records.[20]

Even more importantly, the decision below lays the groundwork for challenges to the lack of a pre-deprivation hearing, which is ordinarily required to satisfy minimum due process standards. *See, e.g.*, REAL ESTATE FINANCE LAW § 7:26 ("Power of sale statutes frequently have been challenged on the ground that the Fourteenth Amendment Due Process Clause requires the opportunity for a hearing before a person may be deprived of a significant property interest." (citing *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337 (1969) and *Fuentes v. Shevin*, 407 U.S. 67 (1972)); *see* also REAL ESTATE FINANCE LAW § 7:26 ("Several courts have cited *Fuentes* to invalidate power of sale provisions" when state action found); *id.* n.772 (collecting cases); *Charmicor, Inc. v. Deaner*, 572 F.2d 694, 695 (9th Cir. 1978) (rejecting earlier due process challenge to Nevada's general nonjudicial foreclosure statute based on lack of pre-sale hearing, finding no state action).

In short, in addition to throwing hundreds of cases into disarray and ensuring massively disparate treatment of identically situated Nevada property owners, the decision below draws into question the validity of the entire concept of nonjudicial foreclosures.

CODE ANN. § 89-1-57; R.I. GEN. LAWS § 34-27-4; TENN. CODE ANN. § 35-5-101; TEX. PROP. CODE ANN. § 51.002-51.

[20] *See* ARIZ. REV. STAT. ANN. § 33-807; D.C. CODE § 42-815.

A decision calling into constitutional question the settled law of so many states warrants this Court's review. *See* ROBERT L. STERN, ET. AL., SUPREME COURT PRACTICE § 4.12 (8th ed. 2002); *see also Flagg Bros.*, 436 U.S. at 155 (noting Court granted certiorari "to resolve the conflict over this provision of the Uniform Commercial Code, in effect in 49 States and the District of Columbia, and to address the important question it presents concerning the meaning of 'state action' as the term is associated with the Fourteenth Amendment"). This Court regularly grants certiorari to resolve circuit conflicts have far less significant and immediate effect on far fewer cases.

3. The constitutionality of nonjudicial foreclosure statutes has been recognized as an important issue not only by the courts, but by commentators and practioners many times over the years. *See, e.g.*, REAL ESTATE FINANCE LAW § 7:28; Henry L. Judy and Robert A. Witte, *Uniform Condominium Act: Selected Key Issues*, 13 REAL PROP. PROB. & TR. J. 437, 515-516 (1978); Kenneth M. Krock, *The Constitutionality of Texas Nonjudicial Foreclosure: Protecting Subordinate Property Interests from Deprivation Without Notice*, 32 HOUS. L. REV. 815 (1995); Prsha, *supra*. The state action question is thus thoroughly percolated and ready for this Court's review.

III. The Ninth Circuit's Decision Is Wrong.

The Ninth Circuit's decision also warrants review because it is plainly wrong.

The panel majority recognized that this case stands virtually on all fours with this Court's decision in *Flagg Brothers*. *See* Pet. App. 14a-15a. In both cases, the plaintiff complained of a sale conducted by

a private party with no material involvement of the state. *See Flagg Bros.*, 436 U.S. at 157; Pet. App. 13a (acknowledging that "the 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"). In both cases, the details of the sale were subject to regulation by a state statute. *See Flagg Bros.*, 436 U.S. at 151-52; Pet. App. 14a. And in both cases, the private sale effected a change in property rights only because state law so provided. *Flagg Bros.*, 436 U.S. at 160 n.10; Pet. App. 14a.

The only basis the court of appeals gave for distinguishing *Flagg Brothers* was that "unlike in this case, . . . the parties had a preexisting contractual relationship as creditor and debtor." Pet. App. 14a (citing *Flagg Bros.*, 436 U.S. at 153). As a consequence, the court claimed, the "creditors' authority to extinguish the debtors' property rights arose out of the parties' contractual relationship." *Id.* In this case, by contrast, because Wells Fargo had no contractual relationship with the HOA. *Id.* 14a-15a. As a result, "the homeowners' association's ability to extinguish Wells Fargo's interest in the Property arose directly and exclusively from the statute." Id. 15a. In that circumstance, the Ninth Circuit held, enactment of a statute permitting private conduct to affect a unconsenting third-party's property rights renders that private conduct state action under the Fourteenth Amendment. *Id.* This reasoning fails at two basic levels.

First, it relies on a misdescription of *Flagg Brothers*. The plaintiff in that case had been evicted from her apartment by the city marshal. 436 U.S. at

153. Contrary to the Ninth Circuit's description, the plaintiff did not then contract with the defendant warehouse to store her goods. Instead, the "*city marshal* arranged for Brooks' possessions to be stored by petitioner Flagg Brothers, Inc., in its warehouse." *Id.* (emphasis added). The plaintiff thus "allege[d] that she never authorized the storage of her goods." *Id.* at 160.

Accordingly, it was "clear that, whatever power of sale the warehouseman has, it does not derive from the consent of the [plaintiff]." *Id.* at 169 (Stevens, J., dissenting); *see also id.* at 169 n.2 (noting that the lower courts had rejected the claim that there had been "an 'implied contract' between the warehouseman and respondents providing for the sale of respondents' possessions in satisfaction of a lien"). Instead, the "claimed power derives solely from the State, and specifically from § 7-210 of the New York Uniform Commercial Code." *Id.* 169 (Stevens, J., dissenting); *see also id.* at 151 & n.1 (majority opinion) (same).

Accordingly, this Court's decision in *Flagg Brothers* was not based on the premise that the plaintiff had consented to the sale, or that state law simply enforced an agreement between the seller and the person whose property rights were extinguished by the sale. Indeed, the Court specifically distinguished *Fuentes v. Shevin*, 407 U.S. 67 (1972), explaining that "[t]he 'consent' inquiry in *Fuentes* occurred only after the Court had concluded that state action for the purposes of the Fourteenth Amendment was supplied by the participation in the seizure on the part of the sheriff." *Id.* at 160 n.10 And it rejected the dissent's position that the

plaintiff's "lack of consent to the deprivations triggers affirmative constitutional protections which the State is bound to provide." *Id.*[21]

Instead, the Court relied on the facts that no state actors were involved in the sale, *see id.* at 157 (majority opinion), that the sale involved no exercise of exclusively sovereign powers, *id.* at 157-64, and that the state neither encouraged nor compelled the sale, *id.* at 164-66. The Ninth Circuit acknowledged that each of these factors was present in this case as well. Pet. App. 13a.

Second, the court of appeals reasoned that even if the sale was strictly private, the extinguishment of Wells Fargo's property right was accomplished only by virtue of a state statute, rendering the sale state action. Pet. App. 14a-15a.[22] But the same was true in *Flagg Brothers* – the warehouseman's sale resulted

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[21] It was the *dissent* in *Flagg Brothers* that insisted that "a state statute which authorizes a private party to deprive a person of his property without his consent must meet the requirements of the Due Process Clause of the Fourteenth Amendment." 436 U.S. at 169 (Stevens, J., dissenting).

[22] There is language in the opinion that could be read as suggesting that the *passage* of the statute constituted the state action subject to due process constraints. *See* Pet. App. 14a. But the court obviously did not mean that the enactment of the statute was the event that deprived Wells Fargo of its property interest, as opposed to the private sale the statute authorized. Otherwise, it would follow that the State was compelled to provide respondent prior notice of the statute's *enactment* rather than prior notice of the *foreclosure*. The panel clearly held that only the latter was required. *Id.* 4a ("We hold that the Statute's 'opt-in' notice scheme . . . facially violated the lender's constitutional due process rights. . . .").

in a transfer of title to the goods in storage from the plaintiff to the purchaser only by operation of state law, which recognized the sale's validity. This Court expressly noted as much, explaining that

> [t]he validity of the property interests in these possessions which respondents previously acquired from some other private person depends on New York law, and the manner in which that same property interest in these same possessions may be lost or transferred to still another person likewise depends on New York law.

Id. at 160 n.10. But this Court unambiguously rejected the proposition that state law's role in defining who owned the goods sold upon foreclosure converted the private sale into state action:

> It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to "state action" even though no process or state officials were ever involved in enforcing that body of law.

Id.

The same can be said of the decision in this case. The only state action identified by the Ninth Circuit was a "body of property law" that dictated that the buyer (like the buyer in *Flagg Brothers*) took title to the purchased property free and clear or certain

competing claims (claims of the evicted tenant in *Flagg Brothers*, claims of junior lienholders here).[23]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[23] For the reasons given in Judge Wallace's dissent, Pet. App. 21a-27a, to the extent the Due Process Clause did apply to Nevada's statute, it was satisfied.