No. 99236-3

SUPREME COURT
OF THE STATE OF WASHINGTON

NOCHE VISTA, LLC,
a Washington limited liability company,

Petitioner,

v.

BANDERA AT BEAR MOUNTAIN RANCH
HOMEOWNERS ASSOCIATION, a Washington
Nonprofit Corporation,

Respondent.

ANSWER TO *AMICI* MEMORANDUM OF NORTH CENTRAL WASHINGTON ASSOCIATION OF REALTORS AND BUILDING NORTH CENTRAL WASHINGTON

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A. INTRODUCTION

Amici curiae North Central Washington Association of REALTORS® ("NCWAR") and Building North Central Washington ("BNCW") base their memorandum on their real-world experience. In their discussion about the instability that flows from Division III's opinion—a decision which now allows developers to exercise "dead hand" control over subdivision owners' land use, while giving buyers, sellers, and current owners no clear system for determining who may amend or add restrictive covenants—*amici* confirm that the petition "involves an issue of substantial interest." RAP 13.4(b)(4). Of course, the respondent homeowners' association ("HOA") rejects NCWAR/BNCW's legal arguments and their conclusions about the significance of Division III's decision. But the HOA's criticisms of *amici* only underscore that these critical issues "should be determined by the Supreme Court." RAP 13.4(b)(4). Only a Supreme Court decision can bring the clarity and certainty that the buyers, sellers, owners, and developers of real property need from Washington property law.

B. ARGUMENT IN ANSWER

NCWAR/BNCW show that they are well qualified to highlight the practical implications of Division III's decision. NCWAR's purpose, as *amici* explain, is "to provide a variety of real estate services to its members

and to the property ownership and development community as a whole." Mot. at 1. And BNCW "promot[es] and protect[s] the building industry." *Id.* at 2. But the HOA, on the other hand, has only one interest here—to win. NCWAR/BNCW have much broader concerns than the HOA, as they tend to the interests of a diverse range of actors in the real-estate industry—buyers, sellers, developers, builders, and brokers. Thus, in evaluating the significance of the petition here, NCWAR/BNCW are a more reliable guide than the HOA on whether the petition meets the criteria of RAP 13.4(b).

With *amici*'s real-world perspectives, their memorandum confirms that Division III's opinion, if it stands unreviewed, would allow the original grantor of a subdivision's covenants to "affect the subdivision even if it is sold or individual lots are sold." *Amici* Memo. at 1. This "'dead hand' control through an alleged 'personal' right," if left intact as Washington law, would be hard to discover (because personal rights do not have to be recorded) when buyers and sellers consider a property. *Id.* at 3. Buyers and sellers, together with NCWAR's members who serve them, would be left guessing about key questions—whether such a personal right persists over a subdivision, what that right allows a "dead hand" grantor to do, and how long it might last. *See id.* Not only that, but interested parties could no longer look at the face of a deed in lieu of foreclosure to determine whether the grantor relinquished their development rights over the subdivision. *See id.*

at 3–4. As *amici*'s memorandum points out, "How can NCWAR's members market properties with any confidence or BNCW's members build on such properties with any confidence unless the rules are clear?" *Id.* at 5. *Amici* warn that their members may have to reconsider how they "structure and conduct their practices" if Division III's ruling stands. *Amici* Memo. at 2. In short, Division III's opinion introduces uncertainty and may chill the real-estate market and private development. Review is warranted. RAP 13.4(b)(4).

The sharp legal disagreement between *amici* and the HOA shows that the Supreme Court should intervene. The HOA argues that *amici*'s memorandum adopts a "mistaken" argument that conflicts with the "bundle of sticks" approach to property law. Obj. at 5. The HOA cites several cases in support of that argument. *Id.* at 5–6 (citing *W. Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 50, 720 P.2d 782 (1986); *Manufactured Hous. Communities of Wash. v. State*, 142 Wn.2d 347, 367, 13 P.3d 183 (2000), *abrogated by Chong Yim v. City of Seattle*, 194 Wn.2d 651, 451 P.3d 675 (2019)). But whichever view is right (petitioner believes *amici*'s is correct), the dispute underscores a central problem with Division III's opinion: it has deeply unsettled Washington property law. While one group—the HOA—insists that all is well, two trade groups representing people and businesses who ply in property law are telling this Court otherwise.

One need look no further than the face of the Division III's opinion to conclude that *amici* are right to see new uncertainty in Washington law. The court did not explain how its expansive view of developer rights dovetails with the "bundle of sticks" theory of property rights. *See* Op. at 17–18. In fact, the court said nothing about Washington law. *See id.* Instead, the court cited cases from Missouri, Illinois, South Carolina, and Mississippi, divining a "general rule" from those foreign opinions about developer rights. *See id.* at 17. If the HOA is right that Division III's decision can somehow contort itself to be consistent with Washington property law, Division III never said how that could be accomplished. By steamrolling over Washington law and the practical fallout of its decision, Division III left NCWAR/BNCW—and undoubtedly others across the state—deeply confused and concerned. Unless the Supreme Court accepts review to bring clarity, groups like NCWAR/BNCW, and other actors that play direct, significant roles in land development (banks, title companies, etc.), will act reasonably by managing the significant risks that they perceive to be the result of Division III's opinion.

C. CONCLUSION

Amici's memorandum confirms that this Court should accept review.

DATED this 10th day of February, 2021.

Respectfully submitted,

/s/ Philip A. Talmadge

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DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Answer to Amici Memorandum of North Central Washington Association of Realtors and Building North Central Washington*** in Supreme Court Cause No. 99236-3 to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: February 10, 2021, at Seattle, Washington.

/s/ Matt J. Albers
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