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No. 90652-1

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**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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DARLENE BROWN,  
Petitioner-Appellant,

v.

WASHINGTON STATE DEPARTMENT OF COMMERCE,  
Respondent-Appellee.

---

**BRIEF OF APPELLANT  
WITH CORRECTED TABLE OF AUTHORITIES**

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## I. INTRODUCTION AND SUMMARY

The Legislature enacted the Foreclosure Fairness Act (FFA) in response to the foreclosure crisis. The purpose of the FFA is to avoid preventable foreclosures by creating “a framework for homeowners and beneficiaries to communicate with each other to reach a resolution and avoid foreclosure whenever possible.”<sup>1</sup> If an attorney or housing counselor refers to mediation a homeowner who has received a Notice of Default (NOD), the FFA requires the homeowner and the owner of the obligation to engage in mediation to try to prevent foreclosure. RCW 61.24.163(5).

The Legislature created one exception: Federally insured depository institutions<sup>2</sup> that have been the “beneficiaries of deeds of trust” in 250 or fewer foreclosures in the preceding year are not subject to FFA mediation requirements. RCW 61.24.166 (full text below at page 14). At issue in this case is the scope of this exemption and the legal standard for determining a homeowner’s eligibility for FFA mediation.

Appellant Darlene Brown’s loan is owned by the very large Federal Home Loan Mortgage Corporation (Freddie).<sup>3</sup> Freddie is not

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<sup>1</sup> Laws 2011, ch. 58, § 1, set forth at RCW 61.24.005, Reviser’s Note.

<sup>2</sup> As defined in 12 U.S.C. Sec. 461(b)(1)(A).

<sup>3</sup> Freddie is a Government Sponsored Enterprise (GSE) as is the Federal National Mortgage Association (Fannie). The promissory notes of two additional parties below, Brian Longworth and John Michael Lewis, were owned by Fannie and serviced by SunTrust Bank and HomeStreet Bank, respectively. Mr. Longworth and Mr. Lewis were also denied mediation because both SunTrust and HomeStreet are on the exempt list even though the owner of their loans, Fannie, is not exempt. As with Ms. Brown’s loan, if the Longworth and Lewis loans had been serviced by Bank of America, both would have gotten mediation.

exempt from FFA mediation because it is not a federally insured depository institution. After Ms. Brown received a NOD, she was referred by a lawyer to the Department of Commerce (Commerce) for mediation as specified in the FFA. However, Commerce denied Ms. Brown's referral, even though it regularly approves other referrals where Freddie owns the promissory note.

The FFA exemption was designed to exclude small financial institutions whose impact on the foreclosure crisis has been minimal. Commerce denied Ms. Brown's referral to mediation based on its determination that the "beneficiary" for FFA exemption purposes was not Freddie, the *owner* of her note (and thus the party that would have to be represented at FFA mediation) but rather the depository institution that was the *holder* of the note. In Ms. Brown's case this non-owner holder was the very large bank, M&T Bank. M&T was on Commerce's 2013 exemption list because it had not conducted more than 250 foreclosures in Washington during the preceding calendar year. When a Freddie-owned note is serviced by a *non-exempt* bank, like Bank of America, Commerce allows mediation.

Commerce thus grants or denies mediation based on the identity of the third-party loan servicer instead of the owner of the note. Homeowners have no control over who services their loan because servicing rights are bought and sold by the trillions of dollars by banks, nonbanks, and, more

recently, by private equity firms and hedge funds.<sup>4</sup> Under Commerce's interpretation of the FFA, a homeowner who may be eligible for mediation one day may be ineligible the next, depending on who happens to be servicing the loan at the moment of mediation referral.

Ms. Brown shows that pursuant to the language of RCW 61.24.166, RCW 61.24.163(5)(c) and RCW 61.24.030(7)(a), and based on the Legislature's intent, the entity required to participate in mediation must be both the holder *and* owner of the promissory note. The entity that must be assessed for FFA exemption is the one that *owns* the promissory note. The superior court instead agreed with Commerce that ownership of the loan is irrelevant to the exemption, and that as long as a claimed beneficiary shows it is the holder of a borrower's note and is on the exemption list at the moment of referral, it is exempt from mediation.

Commerce's disparate treatment of similarly situated borrowers -- all borrowers whose notes are owned by Fannie or Freddie -- raises constitutional concerns. Commerce allows mediation based on which

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<sup>4</sup> See Kate Berry and Robert Barba, *SunTrust Shows Some Banks Still Willing, Able to Buy MSRs*, Mortgage Servicing News (July 3, 2014), available at <http://www.nationalmortgagenews.com/news/servicing/suntrust-shows-some-banks-still-willing-able-to-buy-msrs-1042082-1.html> (bank-to-bank sale); Michael Corkery, *Wells Fargo Sells Servicing Rights on \$39 Billion in Mortgages*, New York Times (January 22, 2014) available at [http://dealbook.nytimes.com/2014/01/22/wells-fargo-sells-servicing-rights-on-39-billion-in-mortgages/?\\_php=true&\\_type=blogs&\\_r=0](http://dealbook.nytimes.com/2014/01/22/wells-fargo-sells-servicing-rights-on-39-billion-in-mortgages/?_php=true&_type=blogs&_r=0) (bank-to-nonbank sale); Kathleen M. Howley and John Gittelsohn, *GSO Drawn to Mortgage Servicing as Banks Retreating*, Bloomberg (September 17, 2013), available at <http://www.bloomberg.com/news/2013-09-17/gso-drawn-to-mortgage-servicing-as-banks-retreating.html> (sale to private equity and hedge funds); and Pamela Lee, *Nonbank Specialty Servicers, What's the Big Deal?* Urban Institute (August 2014), available at <http://s3.documentcloud.org/documents/1264380/nonbank-specialty-servicers-whats-the-big-deal.pdf> (growing market for nonbank servicers).

servicer happens to be associated with the loan, even though Fannie and Freddie are never exempt from FFA mediation. The record shows that hundreds of homeowners with Fannie or Freddie loans who went to mediation were able to negotiate modification agreements or other workout options that prevented foreclosure. Yet Ms. Brown has been denied mediation on her Freddie-owned loan solely due to Commerce's interpretation of the exemption.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. The superior court erred in its Finding of Fact (FF) 1.14 that for purposes of FFA mediation M&T Bank was the correct beneficiary and was exempt from mediation.
2. The superior court erred by refusing to adopt Ms. Brown's proposed FF 1.12 that the beneficiary of a deed of trust must also be the owner of the promissory note secured by the deed of trust.
3. The superior court erred by refusing to adopt Ms. Brown's proposed FF 1.13 that she was aggrieved by Commerce's refusal to refer her to FFA mediation.
4. The superior court erred by refusing to adopt Ms. Brown's proposed Conclusion of Law (CL) 2.1 that the legislature intended that owners of loans must mediate with the homeowner when mediation occurs.
5. The superior court erred by refusing to adopt Ms. Brown's proposed CL 2.2 that whether the FFA exemption provision, RCW

61.24.166, applies must be determined based on whether the owner of the loan is exempt.

6. The superior court erred by refusing to adopt Ms. Brown's proposed CL 2.3 that Commerce failed to perform a duty required by law under RCW 34.05.570(4)(b) and that its failure to perform that duty was a violation of RCW 34.05.570(4)(c)(ii).

7. The superior court erred in its CL 2.12 that the owner of a loan is a beneficiary for purposes of FFA mediation is in conflict with the *Bain* and *Trujillo* decisions.

8. The superior court erred in its CL 2.13 that Ms. Brown's argument that Commerce could not rely upon the beneficiary declaration was in conflict with principles of statutory interpretation and the holding in *Trujillo*.

9. The superior court erred in its CL 2.15 that Commerce was entitled to rely on the beneficiary declaration from M&T Bank when Commerce determined M&T Bank was exempt from mediation under RCW 61.24.166.

10. The superior court erred in its CL 2.16 that Ms. Brown's claim in an as-applied challenged requires a showing of unconstitutionality beyond a reasonable doubt.

11. The superior court erred in its CL 2.17, 2.18 and 2.19 that Ms. Brown had to prove beyond a reasonable doubt that Commerce was applying the exemption provision unconstitutionally, *i.e.*, that

Commerce's actions to deny Ms. Brown FFA mediation were unconstitutional under RCW 34.05570(4)(c)(i).

12. The superior court erred in its CL 2.20 that Ms. Brown failed to prove that Commerce acted outside its statutory authority in violation of RCW 34.05.570(4)(c)(ii).

13. The superior court erred in its CL 2.21 that Ms. Brown failed to prove Commerce's actions were arbitrary and capricious under RCW 34.05.570(4)(c)(iii).

**B. Issues Pertaining to Assignments of Error**

1. Does the FFA require the beneficiary of the deed of trust to also be the owner of the promissory note for purposes of determining the correct counter-party at mediation with the homeowner/borrower? *See* Assignment of Error (A/E) 1 – 5, 7-9, and Part V. A. below.

2. Did Commerce's actions violate RCW 34.05.570(4)(b) and RCW 34.05.570(4)(c)(i)-(iii) because Commerce failed to perform its duty to refer Ms. Brown to FFA mediation and because its failure to perform that duty was outside its statutory authority, arbitrary and capricious, and unconstitutional? *See* A/E 6, 10-14 and Part V. B. below.

### III. STATEMENT OF THE CASE

Darlene Brown lives in the Kennewick home she inherited from her father and stepmother. AR 000036-37.<sup>5</sup> Countrywide Bank originated Ms. Brown's loan in 2008. AR 000156-57. The loan was later sold to Freddie. CP 00036. When Ms. Brown had difficulty paying, a Notice of Default (NOD) was issued on May 21, 2013, identifying Freddie as the owner and M&T Bank as the servicer. AR 000037.

Ms. Brown was referred to FFA mediation on July 10, 2013. AR 000035-37. The referral form listed Freddie as the beneficiary and Bayview Loan Servicing as the servicer.<sup>6</sup> *Id.* About two hours after Commerce received the referral, it sent an email to Northwest Trustee Services (NWTS) about it. AR 000038. NWTS emailed Commerce a beneficiary declaration about twenty minutes later. AR 000039, AR 000041. NWTS told Commerce it believed Ms. Brown was ineligible for mediation. AR 000039. The beneficiary declaration indicated that M&T was the holder of the note. AR 000041. Commerce denied the referral less than three hours after getting it. AR 000042.

Ms. Brown disputed the denial and asked if there was an appeal process. AR 000043. Commerce said that Ms. Brown could submit an

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<sup>5</sup> The agency record is not assigned Clerk's Papers numbers. Commerce affixed Bates numbers when it prepared the agency record. For the combined Brown and Longworth agency records, Commerce used: 000001-000215; for the Lewis agency record it used: AGO 001-AGO 0082. References herein to the Brown-Longworth agency records are preceded by "AR." References to the Lewis agency record use AGO.

<sup>6</sup> Bayview Loan Servicing was acting as M&T's Attorney in Fact.

appeal to Commerce by email for review. *Id.* Commerce later said there was no appeal procedure. AR 000062.

After Ms. Brown was denied mediation, emails show Commerce staff discussed the matter internally. AR 000045, 000048. The upshot of this discussion was a July 16, 2013 email from Commerce to NWTS asking for a “complete, accurate Beneficiary Declaration.” AR 000094. Susana Davila, an attorney with RCO Legal, responded for NWTS, disagreeing with Commerce that the earlier-provided declaration was insufficient, and asked Commerce to “provide the statutory guidance” justifying its position. AR 000105. Two days later, Commerce sent NWTS an email asking whether NWTS had “located the document” Commerce had requested on July 16, 2013. AR 000115. On July 23, 2013, Commerce sent NWTS another email threatening to accept the referral for mediation unless Commerce received “a Beneficiary Declaration as indicated” in its July 16, 2013 email to NWTS. AR 000137-38. On July 23, 2013, NWTS provided Commerce a new beneficiary declaration dated July 23, 2013. AR 000142-43. The new declaration said M&T was the actual holder of the note. AR 000142.

Later on July 23, 2013, Commerce emailed the referring attorney explaining that because M&T is exempt and had provided a declaration that said it was the “actual holder” of the note, Commerce “cannot assign a mediator to this case.” AR 000165. Ms. Brown filed her petition for judicial review in Thurston County Superior Court on August 9, 2013. CP 0006-28.

Joining Ms. Brown as a petitioner below was Brian Longworth. *Id.* Mr. Longworth, who is not participating in this appeal, was also denied FFA mediation. AR 000013. Commerce acknowledged his promissory note was owned by Fannie. *Id.* The loan was serviced by SunTrust Bank. AR 000003. Commerce questioned Mr. Longworth's eligibility because SunTrust "is exempt from FFA." AR 000004. Mr. Longworth's housing counselor at Parkview Services, sent a copy of the NOD listing Fannie as the owner of the note and SunTrust as the loan servicer. AR 000006-11. Commerce denied mediation on May 29, 2013. It told Parkview: "[I]t looks like the beneficiary (holder of note) is SunTrust. (The owner is Fannie Mae, but the definition of beneficiary for FFA purposes is "holder of note.") Unfortunately, SunTrust is exempt from mediation. ... This means that this referral is ineligible and will not be processed." AR 000013 (emphasis in original).

Parkview Services challenged the denial. AR 000027. Commerce then asked NWTs for the "bene declaration" for Mr. Longworth. AR 000019. Commerce then exchanged email with NWTs about the first beneficiary declaration NWTs supplied because it did not contain the "actual holder" language. AR 000206-000203. Fresh from its dustup with Commerce in Ms. Brown's referral, NWTs supplied a second declaration containing the "actual holder" language. AR 000204, 000215. Commerce sent the declaration to Parkview on July 29, 2014. AR 000211.

John Michael Lewis was also a petitioner below. CP 999-1016. He is not participating in this appeal. Mr. Lewis's promissory note was also

owned by Fannie. AGO 0041. His loan was serviced by HomeStreet Bank. AGO 006. HomeStreet is on the exempt list. AGO 0055. As it did with NWTs, Commerce sent notice of the referral to Regional Trustee Services (RTS). AGO 007. There is nothing in the record indicating RTS responded to this email. Two days after sending RTS notice of the referral, Commerce appointed a mediator and sent notice to Mr. Lewis, his lawyer, the trustee, and Fannie, announcing that “this action has been referred for foreclosure mediation in accordance with RCW 61.24.” AGO 0011-15. At that point, RTS objected and said HomeStreet would not be participating in mediation because it was exempt. AGO 0031. Commerce then asked RTS to provide a beneficiary declaration. AGO 0037. RTS did so.<sup>7</sup> AGO 0037, 0041. Commerce then denied Mr. Lewis mediation. AGO 0055. Mr. Lewis filed his petition for judicial review separately from the Brown-Longworth petition. CP 999-1016. Mr. Lewis’s case was consolidated with the Brown and Longworth case. CP 82-84.

Commerce prepared and filed agency records. The petitioners successfully moved to supplement the agency records over Commerce’s objections. CP 85-702, CP 703-23, CP 724-34; 735-76.<sup>8</sup> The superior court held oral argument on the merits on June 11, 2014. CP 1069-75.

Findings of Fact, Conclusions of Law, and an Order were entered on July 22, 2104. CP 965-71. The superior court entered Corrected

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<sup>7</sup> The Lewis beneficiary declaration said Fannie Mae was the owner and HomeStreet was the actual holder of the note. AGO 0041.

<sup>8</sup> The Supplemental Record was assigned Clerk’s Papers numbers.

Findings of Fact, Conclusions of Law, and an Order on October 17, 2014.  
CP 1069-75.

#### IV. STANDARD OF REVIEW

This Court's review of the superior court's decision is *de novo*. When reviewing agency action an appellate court sits in the same position as the superior court, applying the standards of the Administrative Procedure Act (APA) directly to the record. *Washington Independent Telephone Ass'n v. Washington Utilities and Transportation Comm'n*, 149 Wn.2d 17, 24, 65 P.3d 319 (2003) (citation omitted).

Because Commerce's denial of mediation constitutes "other agency action" under the APA, the Court must review and determine whether in denying mediation to Ms. Brown, Commerce failed to perform a duty required by law, acted outside its statutory authority, was arbitrary and capricious, or violated Ms. Brown's constitutional rights. RCW 34.05.570(4)(c)(i)-(iii) & RCW 34.05.570(4)(b); *see also Rios v. Dept. of Labor and Industries*, 145 Wn.2d 483, 491-92; 505-508, 39 P.3d 961 (2002). Commerce's denial of mediation violated the APA and was unlawful on all of these grounds.

#### V. ARGUMENT

Commerce's actions violated RCW 34.05.570(4). When a state agency engages in actions based on its interpretation of a statute, judging whether the agency's actions violate the APA requires the reviewing court to consider the plain language of the statute, legislative intent, the statutory scheme, and the ramifications of interpreting the statute as the

agency has done. *See, e.g., Rios*, 145 Wn.2d 483, 493-500, 39 P.3d 961 (2002) (holding agency's "other agency action" unlawful under RCW 34.05.570(4) based in part on agency's incorrect interpretation of language and intent of the governing statute); *Children's Hospital v. Dept. of Health*, 95 Wn. App. 858, 873-74, 975 P.2d 567 (1999) (same). Here, as discussed below, Ms. Brown's rights were violated by Commerce's failure to perform its duty to refer her to FFA mediation, in violation of RCW 34.05.570(4)(b). Ms. Brown's rights were also violated because Commerce's denial of mediation was outside the agency's statutory authority, arbitrary and capricious, and unconstitutional, in violation of RCW 34.05.570(4)(c)(i)-(iii).

**A. Commerce's interpretation of the FFA exemption is at odds with the plain language and statutory scheme of the FFA, thwarts legislative intent, and creates constitutional problems.**

In interpreting the FFA's exemption provision, this Court's "primary obligation is to give effect to the legislature's intent." *Restaurant Development, Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 681-82, 80 P.3d 598 (2003). In determining the legislative intent behind the FFA, the Court looks to the "the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009). The FFA's provisions "should be harmonized whenever possible," *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007), and the Court should interpret the statute to avoid "absurd results." *State v. Eaton*, 168 Wn.2d 476, 480, 229 P.3d 704

(2010). Moreover, legislative declarations are ordinarily deemed conclusive as to the circumstances asserted in the Legislature's declaration of the basis and necessity for enactment. *McGowan v. State*, 148 Wn.2d 278, 296, 60 P.3d 67 (2002); *see also* FFA Findings-Intent-2011, ch. 58, set forth at RCW 61.24.005, Reviser's Note, discussed *infra* at 22-23 & 45.

Importantly, as a remedial statute, the FFA should be liberally construed in favor of homeowners to achieve the FFA's overarching goal of avoiding foreclosure. *Jametsky v. Rodney A.*, 179 Wn.2d 756, 764, 317 P.3d 1003, (2014). And, because the nonjudicial foreclosure process under the Deeds of Trust Act (DTA) lacks many of the protections enjoyed by borrowers under judicial foreclosures, courts "must strictly construe the statutes in the borrower's favor." *Albice v. Premier Mortg. Services of Washington*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012). The superior court erred when it failed to apply these principles.

- 1. The FFA's plain language, formal statement of legislative intent, statutory scheme, and legislative history all establish that the intended parties to mediation are homeowners and the owners of their loans.**
  - a. The plain language of the FFA makes clear that the exemption provision applies to the owner of the promissory note.**

Commerce is allowing loan servicers to be treated as the "beneficiary" by relying on the definition of "beneficiary" in RCW 61.24.005 while also purporting to comply with a provision in the FFA that expressly requires that the "beneficiary" in FFA mediation must prove

it is the “owner” – RCW 61.24.163(5)(c). The plain language of the FFA establishes that the identity of the owner of the promissory note is the determining factor that controls the mediation exemption question.<sup>9</sup> By focusing instead on the identity of the loan servicer, Commerce erroneously interpreted the statute.

Two key FFA provisions are RCW 61.24.166 (the exempt-from-mediation provision) and RCW 61.24.163 (the mediation provision), the heart of the FFA.<sup>10</sup> RCW 61.24.166, provides:

The provisions of RCW 61.24.163 do not apply to any federally insured depository institution, as defined in 12 U.S.C. Sec. 461(b)(1)(A), that certifies to the department under penalty of perjury that it was not a *beneficiary of deeds of trust* in more than two hundred fifty trustee sales of owner-occupied residential real property that occurred in this state during the preceding calendar year. A federally insured depository institution certifying that RCW 61.24.163 does not apply must do so annually, beginning no later than thirty days after July 22, 2011, and no later than January 31st of each year thereafter.

(Emphasis added).

RCW 61.24.166 thus exempts certain financial institutions that are small players in the foreclosure market and that are *beneficiaries of deeds of trust*. It does not exempt a *beneficiary* of a promissory note from

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<sup>9</sup> The FFA was codified in the DTA, RCW 61.24. See FFA Session Law <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Session%20Laws/House/1362-S2.SL.pdf> CP 0788-815.

<sup>10</sup> This brief discusses provisions of the FFA and DTA provisions *not* part of the FFA. FFA provisions are: RCW 61.24.005; Reviser’s Note, Laws 2011, C. 58, Findings-Intent 2011, RCW 61.24.033(2), RCW 61.24.163, RCW 61.24.166, and RCW 61.24.172. DTA provisions are: RCW 61.24.005(2); RCW 61.24.010(4), RCW 61.24.030, and RCW 61.24.040.

mediation. “Beneficiary” was not defined separately in the FFA. The DTA defines beneficiary as the “holder of the instrument or document evidencing the obligations secured by the deed of trust.” RCW 61.24.005(2). The distinction between “beneficiary” and “beneficiary of deed of trust” is significant. A “beneficiary of deed of trust” is expressly linked to note ownership status in the DTA and the FFA, and this Court’s *Bain* decision, as discussed below. *See* RCW 61.24.040(2) (requiring notice of foreclosure and equating “the Beneficiary of your Deed of Trust and owner of the obligation secured thereby”), and *infra* at 17-18.

The heart of the FFA is RCW 61.24.163.<sup>11</sup> To achieve the FFA’s goal of ensuring that mediation takes place between homeowners and the owners of their loan, RCW 61.24.163(5)(c) requires the beneficiary to prove to the mediator that it is the *owner* of the promissory note:

Within twenty days of the beneficiary's receipt of the borrower's documents, the beneficiary shall transmit the documents required for mediation to the mediator and the borrower. The required documents include:

...

(c) Proof that the entity claiming to be the beneficiary is the *owner of any promissory note or obligation secured by the deed of trust*. Sufficient proof may be a copy of the declaration described in RCW 61.24.030(7)(a).

*Id.* (emphasis added).

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<sup>11</sup> The mediation program is described there, procedures are set out, participants’ duties are described, as are the consequences for not mediating in good faith.

The second sentence of RCW 61.24.163(5)(c) refers to RCW 61.24.030(7). That referenced provision, entitled *Requisites to Trustee's Sale*, provides:

(a) That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the *owner of any promissory note or other obligation secured by the deed of trust*. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.

(b) Unless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection.

(c) This subsection (7) does not apply to association beneficiaries subject to chapter 64.32, 64.34, or 64.38 RCW.<sup>12</sup>

*Id.* (emphasis added).

Under RCW 61.24.030(7), which has to do with the process of *foreclosure*, a trustee is entitled to rely on the beneficiary's declaration as proof of ownership, provided that it meets the requirements of RCW 61.24.030(7)(a) and does not violate its duty of good faith owed to the homeowner under RCW 61.24.030(7)(b). The FFA provision, which has to do with *avoiding foreclosure*, says something different. Under RCW 61.24.163(5)(c), a beneficiary declaration supplied in an FFA mediation

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<sup>12</sup> Association beneficiaries are homeowners' associations and condominium associations.

“*may*” be sufficient to establish the required proof that the beneficiary is the owner of the promissory note. *Id.* (emphasis added). There are two important points here. First is that RCW 61.24.163(5)(c) – a provision at the heart of the FFA – explicitly requires the beneficiary to be the *owner* of the promissory note. Second, because “*may*” is different from “*shall*,” logic dictates there must be circumstances, with respect to FFA mediation, where the beneficiary declaration is *insufficient* proof of ownership of the note.

Here, Commerce ignores the first sentence in RCW 61.24.163(5)(c) which could not be more plain: a beneficiary must transmit to the mediator “Proof that the entity claiming to be the beneficiary *is the owner* of any promissory note or other obligation secured by the deed of trust.” RCW 61.24.163(5)(c) (emphasis added). Applying the plain language of the first sentence of RCW 61.24.163(5)(c) here, it is clear M&T Bank is not the owner of Ms. Brown’s promissory note.

RCW 61.24.040(2) likewise expressly equates the “beneficiary of the deed of trust,” – the operative term used in the FFA exemption provision, RCW 61.24.166 – with the *owner* of the obligation secured by the deed of trust. Thus, at the same time the trustee transmits and records a Notice of Trustee’s Sale, it must also send a Notice of Foreclosure to the borrower that includes the following language:

The attached Notice of Trustee's Sale is a consequence of default(s) in the obligation to . . . . ., the *Beneficiary of your Deed of Trust and owner of the obligation secured*

*thereby*. Unless the default(s) is/are cured, your property will be sold at auction on the . . . . day of . . . . , . . .

RCW 61.24.040(2) (emphasis added).

This Court has also recognized that the statutory deed of trust is a three-party transaction in which the “beneficiary of the deed of trust” is the lender who owns the loan and to whom the loan proceeds secured by the deed of trust are owed:

In Washington, “[a] mortgage creates nothing more than a lien in support of the debt which it is given to secure.” *Pratt v. Pratt*, 121 Wash. 298, 300, 209 P. 535 (1922) (citing *Gleason v. Hawkins*, 32 Wash. 464, 73 P. 533 (1903)); *see also* 18 STOEBUCK & WEAVER, *supra*, § 18.2, at 305. Mortgages come in different forms, but we are only concerned here with mortgages secured by a deed of trust on the mortgaged property. These deeds do not convey the property when executed; instead, “[t]he statutory deed of trust is a form of a mortgage.” 18 STOEBUCK & WEAVER, *supra*, § 17.3, at 260. “More precisely, it is a three-party transaction in which land is conveyed by a borrower, the ‘grantor,’ to a ‘trustee,’ *who holds title in trust for a lender, the ‘beneficiary,’ as security for credit or a loan the lender has given the borrower.*” *Id.* Title in the property pledged as security for the debt is not conveyed by these deeds, even if “on its face the deed conveys title to the trustee, because it shows that it is given as security for an obligation, it is an equitable mortgage.” *Id.* (citing GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 1.6 (4th ed. 2001)).

*Bain v. Metropolitan Mort. Group*, 175 Wn.2d 83, 92-93, 285 P.3d 34 (2012) (emphasis added); *see also id.* at 88 & 111, n. 15 (reiterating that the “beneficiary of deed of trust” is the “lender”).

Commerce erroneously denied Ms. Brown's request because it believes the identity of the owner of the promissory note is irrelevant. AR 00165-66. Commerce relied exclusively on and misinterpreted RCW 61.24.163(5)(c)'s provision that a beneficiary declaration *may* be sufficient proof of ownership while ignoring every other statutory provision that, for FFA mediation purposes, equates beneficiary with owner of the promissory note. Commerce focuses exclusively on the last sentence in RCW 61.24.030(7)(a), which is not the FFA exemption provision but a different section of the DTA:

A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.

Commerce's focus on this one sentence merely cross-referenced (with the qualifying "may") in the FFA, stripped of the surrounding context of the FFA, is faulty in many key respects. First, Commerce erroneously relies on the definition of "beneficiary" in RCW 61.24.005(2),<sup>13</sup> *see* AR 000062 (July 11, 2012 email from Commerce to Ms. Bruch, Ms. Brown's referring lawyer), despite the fact that the operative term used in the exemption provision, RCW 61.24.166, is "beneficiary of deed of trust," a term that both the statute and *Bain* equate

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<sup>13</sup> "Beneficiary" means the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons hold the same as security for a different obligation. RCW 61.24.005(2).

with *ownership* of the note. Second, Commerce ignores the first sentence of RCW 61.24.030(7)(a) (requiring proof that beneficiary is the “owner” of the promissory note) and all of RCW 61.24.030(7)(b) (providing that trustee may not rely on beneficiary declaration as proof of ownership if it would violate trustee’s duty of good faith under RCW 61.24.010(4)). The superior court repeated these errors.

Commerce’s focus on the DTA definition of “beneficiary” is also internally contradictory and ignores the introductory sentence to RCW 61.24.005, which states that the DTA definitions apply “*unless the context clearly requires otherwise.*” RCW 61.24.005 (emphasis added). On one hand, Commerce says it relies on the DTA definition of “beneficiary” which “means the holder of the instrument,” while on the other, it requires servicers to provide beneficiary declarations swearing that the servicer is the “actual holder” because the second sentence of RCW 61.24.030(7)(a) states that a declaration containing this language may constitute proof of *ownership*. AR 000207-08.

Even if Commerce’s exclusive reliance on the DTA’s term “beneficiary,” instead of the term “beneficiary of deed of trust” were correct, Commerce’s interpretation of the FFA also ignores the expanding phrase in the DTA’s definitions section, “*unless the context clearly requires otherwise.*” RCW 61.24.005 (emphasis added).<sup>14</sup> Here, as Ms.

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<sup>14</sup> See *State v. Sweat*, 180 Wn.2d 156, 160, 322 P.3d 1213 (2014) (rejecting party’s reliance on general definition because it failed “to take into account the definitional statute’s statement that its definitions apply ‘[u]nless the context clearly requires otherwise,’” and holding that under the circumstances “the context . . . clearly requires us to use a broader definition”).

Brown has shown, the exemption provision expressly focuses on the “beneficiary of deed of trust,” which the DTA and *Bain* equate with the “owner” of the promissory note. The relevant context, *i.e.*, the plain language of the FFA expressly states in RCW 61.24.163(5)(c) that the “beneficiary” for FFA mediation must be the “owner” of the note.

**b. The Legislature’s formal declaration of purpose makes clear that it intended FFA mediation to occur between homeowners and lenders.**

Whether by design or incompetence, banks and other servicers have done a dismal job, on their own, of working with homeowners facing foreclosure.<sup>15</sup> The FFA mediation process forces the beneficiary to “play ball” by holding it and the homeowner to a good faith standard. The FFA is the tool the Legislature offered homeowners at risk of foreclosure to level the playing field.<sup>16</sup> However, many borrowers like Ms. Brown cannot participate because Commerce misinterpreted the exemption statute, hence padlocking the gate.

The Legislature intended to “create a framework for homeowners and beneficiaries to communicate with each other to reach a resolution and

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<sup>15</sup> The New York Attorney General’s description of Wells Fargo’s conduct is representative of the conduct of many banks and other servicers and their treatment of homeowners. See <http://www.ag.ny.gov/pdfs/NMS%20MOL.pdf> at pp. 10-15.

<sup>16</sup> See, e.g., *Wheeler v. Wells Fargo Home Mortgage*, 2014 WL 442575, \*3 (W.D. Wash. Feb. 4, 2014) As noted in fn. 2, a not-in-good-faith certification by the FFA mediator constitutes a basis to enjoin a trustee’s sale. In *Wheeler*, the homeowner sought to enjoin a trustee’s sale based on the mediator’s finding that Wells Fargo had not participated in mediation in good faith. The district court found that “it would not be in the public interest to allow a trustee sale to go forward where there are serious questions regarding whether Wells Fargo acted in good faith in its attempt to modify the loan to avoid foreclosure as required under the FFA”).

avoid foreclosure whenever possible.” Findings-Intent-2011 c. 58, set forth at RCW 61.24.005, Reviser’s Note. The FFA Statement of Findings-Intent provides:

(1) The legislature finds and declares that:

(a) The rate of home foreclosures continues to rise to unprecedented levels, both for prime and subprime loans, and a new wave of foreclosures has occurred due to rising unemployment, job loss, and higher adjustable loan payments;

(b) Prolonged foreclosures contribute to the decline in the state's housing market, loss of property values, and other loss of revenue to the state;

(c) In recent years, the legislature has enacted procedures to help encourage and strengthen the communication between homeowners and lenders and to assist homeowners in navigating through the foreclosure process; however, Washington's nonjudicial foreclosure process does not have a mechanism for homeowners to readily access a neutral third party to assist them in a fair and timely way; and

(d) Several jurisdictions across the nation have foreclosure mediation programs that provide a cost-effective process for the homeowner and lender, with the assistance of a trained mediator, to reach a mutually acceptable resolution that avoids foreclosure.

(2) Therefore, the legislature intends to:

(a) Encourage homeowners to utilize the skills and professional judgment of housing counselors as early as possible in the foreclosure process;

(b) Create a framework for homeowners and beneficiaries to communicate with each other to reach a resolution and avoid foreclosure whenever possible; and

(c) Provide a process for foreclosure mediation when a housing counselor or attorney determines that mediation is appropriate. For mediation to be effective, the parties should attend the mediation (in

person, telephonically, through an agent, or otherwise), provide the necessary documentation in a timely manner, willingly share information, actively present, discuss, and explore options to avoid foreclosure, negotiate willingly and cooperatively, maintain professional and cooperative demeanor, cooperate with the mediator, and keep any agreements made in mediation.

*Id.* CP 0789-90.

In (1)(c) of this formal statement of legislative purpose, the Legislature acknowledged it had made an effort with past legislation to “help encourage and strengthen the communication between homeowners and *lenders*,” but that Washington did not have a “mechanism for homeowners to readily access a neutral third party to assist them in a fair and timely way.” *Id.* (emphasis added). The Legislature further acknowledged in (1)(d) that other states’ mediation programs provided a “cost-effective process for the homeowner and *lender*, with the assistance of a trained mediator, to reach a mutually acceptable resolution that avoids foreclosure.” *Id.* (emphasis added). In (2)(b) the Legislature also declared that it intended to “Create a framework for homeowners and beneficiaries to communicate with each other to reach a resolution and avoid foreclosure whenever possible.” *Id.*

Through all of these statements, the Legislature expressly stated its intent that homeowners communicate with the owners of their loans in order to prevent foreclosure. The lender is the original owner of the promissory note. A subsequent *owner* of the promissory note steps into the original lender’s shoes. “Lender” is synonymous with “owner.” Thus, the

Legislature intended that in FFA mediations homeowners would negotiate with the promissory note owners, not with loan servicers.<sup>17 18</sup>

**c. Commerce fails to interpret the FFA in context, and ignores related provisions and the logic of the statutory scheme as a whole.**

Commerce's interpretation ignores what the FFA and the DTA say, what logic requires, and the legislative scheme as a whole. Issuance of an NOD is the trigger for FFA mediation referral. A homeowner may not be referred for mediation until *after* the NOD is issued. RCW 61.24.163(1) (housing counselors and attorneys may make referrals any time *after* NOD is issued, but no later than twenty days after the date the notice of trustee's sale has been recorded). At this point, the homeowner has not seen a beneficiary declaration – neither the DTA nor the FFA requires that it be recorded or provided to the homeowner.

It is the NOD that the homeowner receives. The NOD *must* tell the homeowner is the *promissory note owner's name and any party acting as a servicer* of the obligation secured by the deed of trust. RCW 61.24.030(8)(1).<sup>19</sup> The DTA does not require the NOD to disclose the name of the “beneficiary.”

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<sup>17</sup> Legislative findings are entitled to “great deference” which courts “ordinarily will not controvert or even question ...” *Washington Off Highway Vehicle Alliance v. State*, 176 Wn.2d 225, 236, 290 P.3d 954 (2012).

<sup>18</sup> Note owner,” “promissory note owner,” “owner of the note,” “owner of the loan,” and “loan owner” are used interchangeably.

<sup>19</sup> The legislature is presumed to know what the NOD does and does not say. The Legislature provided that issuance of the NOD is the mediation trigger. *See* RCW 61.24.163(1).

Commerce's interpretation of the FFA creates an illogical system where the information it asks for on the referral form, namely the identity of the beneficiary, cannot be obtained by a referrer from the NOD – the issuance of which triggers the right to ask for FFA mediation. Only Ms. Brown's interpretation, which is that the owner is the beneficiary for purposes of FFA mediation, is workable and logical.<sup>20</sup> See *Eaton*, 168 Wn.2d at 480 (“In construing a statute, we presume the legislature did not intend absurd results.”).

Neither Commerce nor the homeowner's referring lawyer or housing counselor knows the identity of the purported beneficiary/holder until after Commerce asks the trustee for and receives the beneficiary declaration. The Legislature did not intend to make it impossible for Commerce, housing counselors and lawyers to know who may be appropriately referred to mediation, or to give trustees the first bite as to whether or not mediation is allowed. It is the identity of the owner that matters and the *owner's* presence on the exemption list.

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<sup>20</sup> Commerce unfortunately does not understand that neither the beneficiary nor the “holder” of the note is listed on the NOD. CP 0449 (Commerce email telling referring housing counselor that mediation is denied because HSBC Bank is exempt and suggesting review of NOD to determine if HSBC is correct beneficiary or Holder of this loan.) Only the “owner” and “servicer” are listed on an NOD. AR 000009-11 (Longworth NOD where Fannie listed as owner on lower left hand corner of 00010 and SunTrust listed as servicer at top of 000011). See also CP 0188-89 (Cutshall NOD listing Freddie as owner and M&T Mortgage as servicer at bottom of CP 0189). See also CP 0270-72 (Barbee NOD listing Fannie as owner and BOA as servicer at top of CP 0272). See also CP 0407-09 (Sidzinski NOD listing Fannie as owner at bottom of CP 0408 and Central Mortgage Company as the servicer at top of CP 0409). The legislature required NODs to disclose the owner and the servicer, not the holder. RCW 61.24.030(8)(l).

The primary goal of statutory construction is to carry out legislative intent as derived primarily from the statute's language. *City of Bellevue v. E. Bellevue Cmty. Council*, 138 Wn.2d 937, 944, 983 P.2d 602 (1999). The meaning of a "particular word in a statute is not gleaned from that word alone, because our purpose is to ascertain legislative intent of the statute as a whole." *Dept. of Labor and Industries v. Granger*, 159 Wn.2d 752, 762, 153 P.3d 839 (2007) (provisions of Title 51 to be construed liberally in favor of workers). The FFA must be interpreted in context, considering "related provisions and the statutory scheme as a whole." *In re Marriage of Chandola*, 180 Wn.2d 632, 648, 327 P.3d 644 (2014) (other citations omitted) (statute to be interpreted must be read in light of statutory policy statement contained in the chapter). On the issue before the Court, the context and purpose of the statute show that the FFA exemption is unavailable to a servicer who is not the owner. Considering the statutory scheme as a whole, the Legislature intended the homeowner and the *owner* of the promissory note to participate in FFA mediation.

**d. The FFA's legislative history confirms that the Legislature intended that FFA mediation take place between note owners and homeowners.**

Based on the plain language of the FFA and the DTA, the Legislature's findings, legislative intent, and the statutory scheme as a whole, it is unnecessary for the Court to consider the FFA's legislative history. Should the Court find, however, that the FFA exemption is susceptible to more than one reasonable interpretation, the Court should interpret the FFA consistent with its legislative history.

The FFA was originally introduced on January 19, 2011 as House Bill (HB) 1362. It provided that “community banks and credit unions organized under the laws of this state” would be exempt from FFA mediation.<sup>21</sup> CP 0820-53. A hearing on the bill was held on January 26, 2011.<sup>22</sup> At the 1:45:00 point in the hearing, Al Ralston of BECU began testifying. Mr. Ralston said BECU was concerned that exempting state banks and credit unions would violate the dormant Commerce Clause.<sup>23</sup>

Three weeks later, Substitute HB 1362 (SHB) was introduced.<sup>24</sup> CP 0855-80. Section 9 of HB 1362 was changed in SHB 1362 to the exemption provision now found in RCW 61.24.166. Nothing in the legislative history indicates any reason for the change from the language in the original bill to the current language other than BECU’s constitutional concern. The language in the original bill indicated the Legislature’s desire to allow smaller financial institutions organized under

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<sup>21</sup> <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/House%20Bills/1362.pdf> See Section 9 of HB 1362.

<sup>22</sup> [http://www.tvw.org/index.php?option=com\\_tvwplayer&eventID=2011011189](http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2011011189) Only the audio of this hearing is available on TVW by hovering over the DOWNLOADS button on the lower right of the screen that appears when clicking on the link above. A button labelled AUDIO MP3 appears. Clicking the AUDIO MP3 button offers the option of opening the audio part of the hearing.

<sup>23</sup> The Commerce Clause grants Congress the authority to regulate commerce among the states. If Congress has not granted states authority to regulate interstate commerce, the dormant Commerce Clause applies and a court must determine whether the language of the statute openly discriminates against out-of-state entities in favor of in-state ones or whether the direct effect of the statute evenhandedly applies to in-state and out-of-state entities. *Rouso v. State*, 170 Wn.2d 70, 75-76, 239 P.3d 1084 (2010).

<sup>24</sup> <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/House%20Bills/1362-S.pdf>

Washington law to continue their own foreclosure prevention programs. The only explanation for changing the exemption provision exempting state banks and credit unions was the dormant Commerce Clause. The Legislature never intended that big banks like M&T, acting as servicers for Fannie and Freddie-owned loans, be exempt from mediation.<sup>25</sup>

**2. Commerce’s interpretation violates the settled rule that statutes should be interpreted to sustain their constitutionality.**

The law is well-settled that courts should adopt a construction that sustains a statute’s constitutionality if such construction is also consistent with the statute’s purposes. *In re Estate of Duxbury*, 175 Wn. App. 151, 170, 304 P.3d 480 (2013) (citing *Matter of Williams*, 121 Wn.2d 655, 665, 853 P.2d 444 (1993)), interpreting statute to “avoid the important equal protection problems the Department’s interpretation could raise” where “such construction [was] consistent *with the purpose of the statute.*” (emphasis added).<sup>26 27</sup>

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<sup>25</sup> The FFA was passed as Second Substitute House Bill 1362. CP 0788-0815. No changes pertinent to this case were made between SHB 1362 and the final bill.

<sup>26</sup> *Matter of Williams* involved the Department of Corrections’ interpretation of the good-time statute. This Court held that Corrections’ interpretation could raise equal protection problems because of the:

... differential treatment that may be accorded the indigent as a result of his inability to post bail before superior. Of course, the very fact of bail and presentence incarceration raises the possibility of disparate treatment based upon wealth. In general, however, the needs of the justice system in assuring the presence of defendants at superior are deemed sufficient to validate such a system. Nevertheless, we should endeavor to minimize this disparate treatment when possible. Allowing the Department to give legal force to a [good-time] certification [from a county jail] which is based on an error of law would magnify rather than alleviate disparities in treatment.”

Commerce's interpretation calls into question the constitutionality of the FFA's exemption provision. Commerce has never contested that its interpretation creates an unfair classification between similarly situated homeowners nor does it try to justify that unfair treatment. Not only does Ms. Brown's interpretation solve the statutory construction question, it is also consistent with the statute's purposes.<sup>28</sup>

3. **This Court's decisions discussing the DTA's requirement that the foreclosing beneficiary must be both the owner and holder of the note further establish that the exemption provision applies only to financial institutions that own promissory notes securing residential deeds of trust.**

Several appellate courts have interpreted or discussed RCW 61.24.030(7)(a), which provides:

That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.

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*Id.* at 666.

<sup>27</sup> This Court held in *Parentage of J.M.K.*, 155 Wn.2d 374, 389-90, 119 P.3d 840 (2005) that a former artificial insemination statute should not be interpreted to create the constitutional problems associated with treating children born out of wedlock differently than marital children. While *J.M.K.* did not use the words "equal protection", the Court's discussion leaves no doubt that the Court was concerned that interpreting the statute as the child's father urged would violate the child's right to equal protection. *Id.* at 390; see also *Armijo v. Wesselius*, 73 Wn.2d 716, 721-22, 440 P.2d 471 (1968) where this Court said that Washington statutes will not be interpreted to distinguish between children born in or out of wedlock to the detriment of nonmarital children because to do so would violate the latter's right to equal protection of the laws.

<sup>28</sup> See also discussion of unconstitutionality of Commerce's actions, *infra* at 40-46.

In *Bain*, this Court held that the “legislature meant to define “beneficiary” as the actual holder of the promissory note or other debt instrument” rather than simply an entity such as MERS which was a “holder” on paper only and which never had the note in its possession. *Bain*, 175 Wn.2d at 98-110. In reaching that conclusion, the Court stated that “a beneficiary must either actually possess the promissory note or be the payee.” *Id.* at 104. The Court also emphasized, however, that there must be proof that the beneficiary is the *owner* of the loan. Before a trustee may proceed with a foreclosure, it “shall have proof that the beneficiary is the *owner* of any promissory note or other obligation secured by the deed of trust,” *id.* at 93-94 (emphasis added), and “[i]f the original lender had sold the loan, that purchaser would need to establish ownership of that loan ...” *Id.* at 111 (emphasis added).

This Court very recently reiterated this requirement that the foreclosing beneficiary must be the owner of the promissory note in *Lyons v. U.S. National Bank Ass’n*, \_\_\_ Wn.2d \_\_\_, 336 P.3d 1142 (2014). In *Lyons*, the Court held that “RCW 61.24.030(7)(a) . . . instructs that a trustee must have proof the beneficiary is the *owner* prior to initiating a trustee’s sale.” *Lyons* at 1148 (emphasis added). The Court found that the beneficiary failed to prove to the trustee that it was the owner of the note, and accordingly, reversed and remanded to the superior court for determination of ownership as required under the DTA. *Id.* 1151

(concluding there was a “material issue of fact as to whether Wells Fargo was the *owner*”) (emphasis added).

Contrary to the holding in *Lyons*, the superior court in this case relied on the Court of Appeals’ decision in *Trujillo v. Northwest Trustee Services, Inc.*, 181 Wn. App. 484, 326 P.3d 768 (2014), which states that a beneficiary need not be the note owner in order to foreclose nonjudicially. *Id.* at 502; *see* Corrected Findings of Fact, Conclusions of Law, and Order Denying Amended Petition for Declaratory and Injunctive Relief at CP 1073. That ruling in *Trujillo*, however, is now suspect, if not impliedly abrogated, as a result of this Court’s decision in *Lyons* as explained above.<sup>29</sup>

Further, the question presented in this case, namely who should be mediating with homeowners, was not before the *Trujillo* court, nor was it addressed in *Bain*. While M&T Bank may be the holder of the note as it claimed in the beneficiary declaration, it is undisputed that it is *not* the owner of the promissory note securing the deed of trust on Ms. Brown’s home. It is the servicer.<sup>30</sup>

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<sup>29</sup> The plaintiff in *Trujillo* filed a Petition for Review on July 2, 2014, asking this Court to accept review of the Court of Appeals’ decision. *See Trujillo* Petition for Review Supreme Court Case No. 90509-6. On November 5, 2014, the Court issued an order stating that its decision on the *Trujillo* Petition for Review would be deferred pending issuance of the mandate in *Lyons*.

<sup>30</sup>As servicer, Freddie has instructed M&T Bank to declare itself the holder of the note, with the intent of authorizing the bank to foreclose. Holding a note was historically indicia of ownership. That is no longer the case. The contracts and manuals governing the servicing of Fannie and Freddie loans specifically direct servicers to claim holder status for purposes of foreclosure despite the fact that Fannie and/or Freddie authorize the foreclosure process and continue to own the note and the rights to collect payments under the note. *See, e.g.*, Freddie Mac Single Family Seller/Servicer Guide Vol. 1, Ch. 18.6 e

Ms. Brown asks this Court to hold that the proper party for determining the exemption from FFA mediation is the promissory note owner. None of the appellate courts, when interpreting or discussing RCW 61.24.030(7)(a), have considered whether the use of the word “owner” in RCW 61.24.163(5)(c) means that the beneficiary, for purposes of FFA mediation, need not be the promissory note owner. RCW 61.24.163(5)(c) says:

Within twenty days of the beneficiary's receipt of the borrower's documents, the beneficiary shall transmit the documents required for mediation to the mediator and the borrower. The required documents include: Proof that the entity claiming to be the beneficiary is the owner of any promissory note or obligation secured by the deed of trust. Sufficient proof may be a copy of the declaration described in RCW 61.24.030(7)(a).

Ms. Brown has explained above why the Legislature could not have intended non-owner beneficiaries to be the party at mediation. This observation in *Bain* drives that home:

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(2014). <http://www.freddiemac.com/singlefamily/guide/> Click on the AllRegs link for access to the Guide. *See also Johnson v. Federal Home Loan Mort. Corp.*, 2013 WL 308957, \*6 (W.D. Wash. Jan. 25, 2013) (taking judicial notice of Freddie Mac Single-Family Sellers and Servicers Guide, noting that “the Guide is a publicly available document”).

While Freddie and Fannie’s servicers typically handle foreclosures, the fact that a GSE is the *owner of the notes* a legal verity. In Florida, for example, it is Fannie, as the owner of the note, that is pursuing deficiency judgments against borrowers. *See* Gretchen Morgenson, *Borrowers Beware: the Robosigners Aren’t Finished Yet*, N.Y. Times, Nov. 16, 2014, at BU1, available at <http://www.nytimes.com/2014/11/16/business/borrowers-beware-the-robosigners-arent-finished-yet.html?mabReward=RI%3A18&action=click&pgtype=Homepage&region=CCColumn&module=Recommendation&src=rechp&WT.nav=RecEngine&r=0>.

[T]here is considerable reason to believe that servicers will not or are not in a position to negotiate loan modifications or respond to similar requests.

*Bain*, 175 Wn.2d at 98 fn.7 (citing Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755 (2011)).

Beneficiaries who service loans they do not own may not have incentives to modify loans because “[t]he complex incentive structure for servicers means that servicers can sometimes make more money from foreclosing than from modifying ...” *Foreclosing Modifications*, 86 WASH. L. REV. at 761. It would be naïve to conclude that financial institutions that service mortgages have anything other than their own pecuniary interests in mind. The securitization of residential mortgages is well-known. *See Bain*, 175 Wn.2d at 94-96 (MERS was established to reduce costs, increase efficiency, and facilitate securitization of mortgages. Many loans are pooled into securitized trusts). Professor Thompson states:

Although servicers are nominally accountable to investors, investors exercise little control or oversight of modifications. The result is that servicers may, when they choose, evade modifications, even when doing so would serve investors’ interests.

*Foreclosing Modifications*, 86 WASH. L. REV. at 770. The Legislature recognized this dynamic and intended to prevent foreclosure by requiring note owners and homeowners, the parties with “skin-in-the-game,” to be the ones engaged in FFA mediation.

**B. When Commerce denied Ms. Brown mediation, it failed to perform a duty required by law, acted outside its statutory authority, acted arbitrarily or capriciously, and violated her constitutional rights.**

Commerce has a duty to refer eligible homeowners to mediation, but by but denying Ms. Brown, it failed to perform that duty. In addition, because Commerce's denial was based on erroneous interpretation of the law, it acted outside of its statutory authority. Commerce's actions were also arbitrary and capricious because those actions were willful and unreasoning and failed to consider all the facts and circumstances. Finally, Commerce's refusal to refer Ms. Brown to FFA mediation was unconstitutional agency action based on its erroneous interpretation of the FFA.

**1. Commerce failed to perform a duty required by law when it denied mediation to Ms. Brown, and that failure was arbitrary and capricious.**

In *Rios*, this Court held that an agency fails to perform a duty as required by RCW 34.04.570(4)(b) when a statute mandates that the agency perform the duty and the agency refuses to do so. *Rios*, 145 Wn.2d at 487. *Rios* also held that Labor and Industries' (L&I) failure to perform that duty was arbitrary and capricious. In the present case, Commerce likewise failed to perform a required statutory duty – to refer Ms. Brown to FFA mediation – and that failure was arbitrary and capricious.

The *Rios* petitioners successfully challenged L&I's refusal to adopt mandatory pesticide handling monitoring rules in 1997. This Court described the case:

At issue in this case is whether the Court of Appeals properly concluded that the Washington Department of Labor and Industries (the Department) had violated a statutory duty to promulgate a rule requiring mandatory blood testing for agricultural pesticide handlers.

*Rios*, 145 Wn.2d at 486.

*Rios* held that L&I's refusal to adopt a mandatory monitoring rule was a failure to perform a duty required by Washington's Industrial Safety and Health Act (WISHA), RCW 49.17.050(4), which imposed on L&I a duty to adopt rules setting a standard that most adequately assured no worker would suffer material impairment of health to the extent feasible and on the basis of the best available evidence. *Id.* at 496. L&I's refusal to do so violated that duty and thus, violated pesticide handlers' rights. *See* RCW 34.05.570(4)(b). This Court also held that its failure to adopt rules was arbitrary and capricious because:

[T]he pesticide handlers were not asking the Department to embark on a new enterprise—they had not simply pulled from a hat the name of one dangerous workplace chemical among the hundreds. In fact, the Department had already made cholinesterase monitoring enough of a priority to draft the nonmandatory guidelines and to convene a team of experts “to identify the essential components of a successful monitoring program.” And that report announced in its introductory summary that “[t]he TAG recommends cholinesterase monitoring for all occupations handling Class I or II organophosphate or carbamate pesticides.” Because the Department had already invested its resources in studying cholinesterase-inhibiting pesticides and because the report of its own team of technical experts had, in light of the most current research, deemed a monitoring program both necessary and doable, the Department's 1997 denial of the pesticide handlers'

request was “unreasonable and taken without regard to the attending facts or circumstances.”

*Id.* at 507-08 (citations omitted); *see also* RCW 34.05.570(c)(iii).

Here, Commerce is required to refer eligible homeowners to FFA mediation. RCW 61.24.163(3)(a). Commerce must exercise that authority in accordance with the FFA so that eligible homeowners get FFA mediation. Commerce does not dispute that it *must* refer *eligible* homeowners to mediation. RCW 61.24.163(3) (emphasis added). Commerce’s refusal to carry out its duty is arbitrary and capricious because its refusal is willful and unreasonable and taken without regard to the attending facts or circumstances. *Rios*, 145 Wn.2d at 501.

In *Children’s*, the Court of Appeals reviewed the Department of Health’s interpretation of the Certificate of Need (CN) statute and its own rules to determine whether the agency was required to engage in a CN review process or could dispense with that process when Tacoma General applied for permission to begin offering certain pediatric open heart services. *Children’s*, 95 Wn. App. at 873-74.<sup>31</sup> The Department of Health (DOH) decided to forego the CN process, which prompted Children’s Hospital to file suit arguing that CN review was required. The court

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<sup>31</sup> “The legislature created the CN program to control costs by ensuring better utilization of existing institutional health services and major medical equipment. Those health care providers wishing to establish or expand facilities or acquire certain types of equipment are required to obtain a CN, which is a nonexclusive license.” *Id.* at 865.

“The department is authorized and directed to implement the certificate of need program in this state pursuant to the provisions of this chapter.” RCW 70.38.105(1).

agreed with Children's, holding that the CN statute imposed a duty on DOH to engage in a CN review process in this instance and that its failure to do so was arbitrary and capricious. *Id.* The court noted that DOH was required to enforce the law in accordance with the statute. *Id.* at 871. Statutes must be given a "rational, sensible construction." *Id.* at 864. To determine whether CN review was "necessary", the court examined "whether the Department acted arbitrarily or capriciously in light of the relevant facts and statutory provisions." *Id.* at 871.

[The Department's] determination appears to have been based on an erroneous interpretation of the statutes and its own regulations applied to the facts. Given the undisputed medical evidence, the language of the CN law, and the regulations interpreting it, we hold that the Department's conclusion, that CN review of Tacoma General's plan was not required by statute, was arbitrary and capricious.

*Id.* at 873-74.

Just as the CN statute imposes duties on the Department of Health to carry out legislative intent with respect to the CN law, the FFA imposes duties on Commerce to carry out the FFA's central intent which is to avoid foreclosure whenever possible.<sup>32</sup>

The Legislature intended the NOD to have all the information housing counselors and lawyers need to know for referral purposes – including the name of the promissory note owner. Commerce's

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<sup>32</sup> In addition to its other duties set forth in the FFA, Commerce "may create rules to implement the mediation program under RCW 61.24.163 and to administer the funds as required under RCW 61.24.172." RCW 61.24.033 (2). However, Commerce has chosen to not do any rulemaking for these programs.

interpretation disregards this in favor of its approach where the note owner is irrelevant and where Commerce bars the mediation gate based on information not available to homeowners or housing counselors, but available *only* to trustees. Nothing in the FFA authorizes this – explicitly or implicitly. Commerce should not be allowed to interpret the FFA to bar mediation when the homeowner is actually *eligible* for mediation. Because loan owner Freddie is not on the exemption list, Ms. Brown is eligible for mediation. Commerce’s failure to refer Ms. Brown violated its statutory duty to do so, violated her rights under the FFA, and was arbitrary and capricious because Commerce’s determination was based on an “erroneous interpretation” of the FFA “applied to the facts.” *Children’s*, 95 Wn. App. at 873-74. Given the language of the FFA and the express statement of legislative intent, Commerce’s conclusion that it was not required to refer Ms. Brown to FFA mediation by the FFA was arbitrary and capricious. *Id.*

**2. Commerce’s denial of Ms. Brown’s request for mediation was outside its statutory authority.**

Commerce’s denial of FFA mediation was based on its erroneous interpretation of the FFA. A state agency exceeds its statutory authority and violates RCW 34.05.570(4)(c)(ii) when its actions are based on an erroneous interpretation of the law. In *Rios*, the Court examined L&I’s 1993 rulemaking decision to adopt *voluntary* pesticide handler blood testing *and* its 1997 decision *not* to adopt *mandatory* pesticide handler blood testing. *Rios*, 145 Wn.2d at 491-92. Although the Court held that the

1993 rulemaking decision was not arbitrary and capricious under 570(2), the Court observed that if L&I had assessed the feasibility of a mandatory monitoring rule in 1993 arbitrarily and capriciously, the “resulting rule would arguably meet another basis for judicial review (“exceed[ing] the statutory authority of the agency”).” *Id.* at 501 n.11.

In *Pierce County v. State*, 144 Wn. App. 783, 812, 185 P.3d 594 (2008), the Court of Appeals affirmed the superior court’s ruling that the Department of Social and Health Services’ (DSHS) refusal to timely accept 90 or 180 day long-term involuntarily committed mental health patients for admission to Western State Hospital violated RCW 71.05.320 because DSHS failed to perform a duty required by law and acted outside its statutory authority.<sup>33</sup> As in *Rios*, Pierce County’s claims were reviewed under RCW 34.05.570(4). *Id.* at 804.

The *Pierce County* decision turns on the meaning of the phrase “shall remand him or her to the custody of the department.”<sup>34</sup> DSHS

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<sup>33</sup> The superior court in that case entered Conclusion of Law 3 which said:

When WSH declines to timely accept Pierce County RSN or PSBH 90 or 180 day long-term patients committed to the custody of DSHS for reasons related to WSH census or staffing and not related to the safety of the patient, and thereby requires that these patients remain at PSBH or under Pierce County RSN’s responsibility, DSHS fails to perform a duty required by law and acts outside its statutory authority.

*Pierce County*, 144 Wn. App. at 805. This is the only Conclusion of Law cited in *Pierce County* that discusses the superior court’s decision to find that DSHS had failed to perform a duty and acted outside its statutory authority. The Court of Appeals affirmed this Conclusion. *Id.* at 812.

<sup>34</sup> RCW 71.05.320(1) provides:

argued that RCW 71.05.320(1) did not create a legal duty. *Id.* at 806. The court, in interpreting the statute, noted the word “shall” is mandatory except under very limited circumstances. *Id.* at 807. The use of the word “shall” in a statute is “imperative and operates to create a duty rather than to confer discretion.” *Id.* at 808 (citation omitted). *Pierce County* held that the superior court did not err when it interpreted RCW 71.05.320(1) to impose a mandatory duty on DSHS requiring it to assume the immediate and sole responsibility for patients committed for long-term treatment. *Id.* at 812.

Commerce’s actions are outside its statutory authority because those actions are based on an erroneous interpretation of the FFA.

**3. Commerce’s denial of mediation to Ms. Brown was unconstitutional agency action.**

Because Commerce’s actions are unconstitutional, this Court should find they violate RCW 34.05.570(4)(c)(i). Commerce mischaracterized Ms. Brown’s argument below. While Commerce accurately stated in its Response Brief before the superior court that statutes are presumed constitutional and the burden of proof to

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If the court or jury finds that grounds set forth in RCW 71.05.280 have been proven and that the best interests of the person or others will not be served by a less restrictive treatment which is an alternative to detention, the court shall remand him or her to the custody of the department or to a facility certified for ninety day treatment by the department for a further period of intensive treatment not to exceed ninety days from the date of judgment. If the grounds set forth in RCW 71.05.280 (3) are the basis of commitment, then the period of treatment may be up to but not exceed one hundred eighty days from the date of judgment in a facility certified for one hundred eighty day treatment by the department.

demonstrate unconstitutionality is beyond a reasonable doubt, citing *School Districts' Alliance for Adequate Funding of Special Education v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010), *see* CP 900-904, Ms. Brown has *not* mounted a facial challenge to the FFA. She did not argue that any part of the FFA is unconstitutional. Rather, Ms. Brown argued that the FFA should be interpreted to avoid constitutional problems. She said it was Commerce's interpretation of the statute – how it applied the statute – that created the constitutional problems and that it was Commerce's actions that were unconstitutional and violated her constitutional rights.

While the Legislature has “wide discretion” in designating classifications, these classifications may not be “manifestly arbitrary, unreasonable, inequitable, and unjust, and reasonable grounds must exist for making a distinction between those within and those without the class.” *Johnson v. Tradewell Stores, Inc.*, 95 Wn.2d 739, 744, 630 P.2d 441 (1981) (citations omitted). In *Johnson*, this Court interpreted former RCW 51.52.130 which provided for an award of reasonable attorney fees and witness costs to eligible injured workers payable from L&I's administrative fund. *Johnson* resolved a split between two divisions of the Court of Appeals.<sup>35</sup> The workers' compensation statute this Court

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<sup>35</sup> Division I had allowed an award of attorney's fees and costs from the administrative fund to Johnson, an injured worker of a self-insured employer. *Johnson v. Tradewell Stores, Inc.*, 24 Wn. App. 53, 57-58, 600 P.2d 583 (1979). Division II had denied an award of attorney's fees and costs from the administrative fund to Maxwell, who, like Johnson, was an injured worker of a self-insured employer. *Maxwell v. Department of Labor and Industries*, 25 Wn. App. 202, 209-10, 607 P.2d 310 (1980).

interpreted in *Johnson* did not itself include the impermissible classification, just as the FFA, properly interpreted, does not contain an impermissible classification. This Court held in *Johnson* that it could not reasonably be claimed that the “object, purpose and spirit of the industrial insurance act is to exclude workers whose only deficiency is the *chance* that their employers choose to be self-insured.” *Johnson*, 95 Wn.2d 743 (emphasis added; citation omitted). *Johnson* interpreted the statute, without striking it down, so that the two classes of injured workers were treated the same. *Id.*

Beyond the aggregate data, the most graphic evidence of Commerce’s unequal treatment of Fannie and Freddie borrowers, and the lack of a rational connection between Commerce’s interpretation of the exemption and the stated purpose of the FFA, lies in the specific homeowner examples.<sup>36</sup> The Barbees and Roberta Starne, discussed below, received loan modifications following mediation.<sup>37</sup> Because their

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<sup>36</sup> The aggregate data in the record shows at least 208 referrals listing Fannie or Freddie as the beneficiary that participated in FFA mediation. CP 0687-99. Many of these referrals resulted in mediated agreements where the borrower retained their home. CP 0701-02. According to RCW 61.24.163(8)(a), the borrower, the beneficiary or authorized agent, and the mediator must meet in person for the mediation session. In practice, Fannie and Freddie have their authorized agents appear at mediation on their behalf, when they are listed as the beneficiary of the deed of trust on the referral form.

<sup>37</sup> The record shows Commerce has treated Freddie and Fannie, the loan owners, as beneficiaries for FFA mediation in some cases – facts that Commerce could not explain even under its erroneous interpretation of the statute. Ms. Brown called two documents to the superior court’s attention. CP 0277-281; CP 0330-334; RP 27. Commerce wrote these letters to Fannie and Freddie naming them as beneficiaries for FFA mediation, advising Fannie and Freddie that FFA mediation would proceed, and demanding payment of the \$200 mediation fee. The homeowners in these two cases were Joe and Carla Barbee and Roberta Starne. The record shows that the loan servicer, Bank of America, represented Fannie and Freddie at these mediations, both of which resulted in loan modifications

Fannie- and Freddie-owned loans were serviced by BOA, who was not on the exempt list, Commerce allowed mediation. Ms. Brown and the other homeowners who participated below also had loans owned by Freddie and Fannie, just as the Barbees and Ms. Starne did, but were arbitrarily denied mediation.

Where there is no connection between the challenged statutory classification and the plain purpose of the statute, Washington courts have held that the challenged interpretation is unconstitutional under Article I, § 12, even under the rational basis test. *See, e.g., Johnson*, 95 Wn.2d at 745. (“[W]e hold it to be a violation of . . . Art. I, § 12 to classify one group of employees so they receive fewer benefits than similarly situated employees simply because the employer chooses to be self-insured.”); *see also State v. Marintorres*, 93 Wn. App. 442, 450-52, 969 P.2d 501 (1999) (observing that under Article I, § 12, “persons similarly situated with respect to the legitimate purpose of the law must receive like treatment,” and holding that there was “no reasonable rationale for treating hearing-impaired convicts differently from non-English speaking convicts in deciding who should reimburse the State for the cost of interpreters.”)

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memorialized on Fannie and Freddie approved forms. CP 0313-17; CP 0353-58. The mediation referrals in each case named Bank of America as the loan servicer and Freddie or Fannie as the beneficiary. CP 0268-69; CP 0320-21. The superior court asked Commerce why it had decided to call Fannie and Freddie the beneficiaries, instead of Bank of America, the loan servicer, the beneficiary and why it sent the FFA mediation letters to Fannie and Freddie instead of Bank of America. RP 40-41. Counsel for Commerce said he did not know. RP 42.

(citations omitted).<sup>38</sup> Here, there is similarly no logical reason consistent with the purposes of the FFA for Commerce to distinguish between these two classes of homeowners.

The Washington Constitution also guarantees that “[n]o person shall be deprived of life, liberty, or property, without due process of law.” Wash. Const. Art. I, § 3. This includes the requirement that a challenged statutory classification must be “fundamentally fair” and, similar to the equal protection guarantee, that it be “rationally related” to a legitimate governmental interest. *Nielsen v. Washington Dept. of Licensing*, 177 Wn. App. 45, 57 n. 8, 309 P.3d 1221 (2013) (citation omitted).

Because the right to FFA mediation is not a fundamental right, but a right created by statute, Commerce’s interpretation of the exemption provision and its actions are reviewed under this “fundamental fairness” and “rational relationship” standard. *Nielsen*, 177 Wn. App. at 53.

Commerce’s disparate treatment of different homeowners with Fannie and Freddie loans, based solely on the identity of the loan servicer, violates this constitutional due process standard as well, based on the same facts and evidence set forth above. The Court of Appeals’ recent decision in the *Nielsen* case is instructive. The statute at issue there, RCW 46.20.385, provided for the issuance of an ignition interlock driver’s

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<sup>38</sup> See also *State v. Anderson*, 132 Wn.2d 203, 211-12, 937 P.2d 581 (1997) (rejecting State’s interpretation of RCW 71.06.020 on equal protection grounds, stating: “Both groups are sent to the hospital for ‘treatment’ and not ‘punishment’ yet the former group receives full sentence credit for their hospital time while the latter group, under the State’s analysis, would be denied the same credit. There is no logical reason for distinguishing between [the two groups].”).

license (IIDL) to drivers whose regular licenses had been revoked for violating drunk driving laws. *Nielsen*, 177 Wn. App. at 50. The Department of Licensing (DOL) argued that when a driver applies for and receives an IIDL, he or she waives the right to challenge the underlying license revocation. *Id.* at 51-52. The court held that if the statute worked that way, it would violate due process, because “[d]enying to licensees who obtain IIDLs the right to access to the courts in order to challenge a Department revocation ruling does not further the state’s interest in maintaining the deterrent effect of its drunk driving laws” because drivers forced to choose between the appeal waiver provision and an IIDL might forego an IIDL which greatly reduces drunk driving. *Id.* at 60. There was “no rational basis” supporting the statute as applied by DOL. *Id.* at 60-61. Again, the statute was not struck down. It was interpreted to *avoid* having the constitutional problem that the state’s interpretation had caused.

Commerce’s interpretation of the FFA similarly fails the fundamental fairness test because there is no rational basis for denying mediation to some homeowners with Fannie or Freddie loans, while allowing mediation to others, when the underlying goal of the FFA program is achieved by allowing all of them to have mediation. *See* Laws 2011, c. 58, Findings-Intent-2011, set forth at RCW 61.24.005, Reviser’s Note. Commerce’s interpretation and the actions it takes based on that interpretation irrationally narrow the pool of homeowners eligible for mediation based on an irrelevant factor, the identity of the servicer.

Homeowners have no control over who services their Fannie or Freddie loans, and those servicers can change frequently.<sup>39</sup> The Legislature did not intend the decision about whether a homeowner gets mediation to be a random lottery. Commerce has acted unconstitutionally based on its interpretation of the FFA. That interpretation has thwarted the Legislature's stated goal of getting lenders and homeowners together in mediation to avoid foreclosure whenever possible; it is fundamentally unfair, and it bears no rational connection to the stated goals of the FFA.

Commerce offers no rational basis for distinguishing between Ms. Brown and other homeowners with Freddie-or Fannie-owned notes who got mediation. Compare M&T Bank, Ms. Brown's loan servicer, with loan servicer Bank of America. Both are huge companies with billions in assets.<sup>40</sup> There is no rational basis to distinguish between homeowners whose loans are serviced by M&T Bank and those whose loans are serviced by Bank of America. In denying Ms. Brown her right to mediation under the FFA, Commerce violated her right to equal protection and due process.

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<sup>39</sup> "[I]n today's market mortgage servicing rights often are bought and sold." *See* [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/housing/rmra/res/rightsmtgsrver](http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/rmra/res/rightsmtgsrver)

<sup>40</sup> Both banks are on the S&P 500 list. *See* [http://www.stockmarketsreview.com/companies\\_sp500/](http://www.stockmarketsreview.com/companies_sp500/)

**C. The Court should award attorney fees and costs to Ms. Brown pursuant to RCW 4.84.350.**

Ms. Brown is entitled to an award of reasonable attorneys' fees and costs under RCW 4.84.350 unless Commerce can demonstrate that its actions were substantially justified or other circumstances make an award unjust. An agency must prove substantial justification as an affirmative defense. *Hunter v. University of Washington*, 101 Wn. App. 283, 294, 2 P.3d 1022 (2000). Agency action that is arbitrary and capricious is not substantially justified. *Raven v. Department of Social and Health Services*, 177 Wn.2d 804, 832, 306 P.3d. 920 (2013).<sup>41</sup>

**VI. CONCLUSION**

For all of the foregoing reasons, Ms. Brown respectfully requests the Court to find that because the plain language, legislative intent, and overall statutory scheme of the FFA all make clear that it is the *owner* of the loan that is required to mediate with a homeowner when mediation occurs, the entity to which the FFA exemption applies under RCW 61.24.166 must also be determined based on who owns the loan. Accordingly, because the owner of Ms. Brown's loan, Freddie Mac, was not exempt, and Commerce knew that, the Court should hold that by

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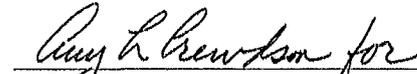
<sup>41</sup> Ms. Brown can demonstrate that she is a "qualified party" as defined in RCW 4.84.340 to recover under RCW 4.84.350. She is a qualified party because her net worth at the time she filed the petition for judicial review did not exceed one million dollars. She will file a declaration attesting to that fact if she prevails.

refusing to allow mediation to Ms. Brown, Commerce failed to perform a duty required by law, was arbitrary and capricious, acted outside its statutory authority, and engaged in unconstitutional agency action.

Brief of Appellant with Corrected Table of Authorities respectfully submitted this 2<sup>nd</sup> day of December, 2014.

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**DECLARATION OF SERVICE**

I, Carla Sevenster, certify under penalty of perjury under the laws of the State of Washington that on this day I caused a copy of the foregoing Brief of Appellant With Corrected Table of Authorities to be served, by email in accordance with an e-service agreement, upon the following counsel of record:

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DATED this 2<sup>nd</sup> day of December, 2014.

  
Carla Sevenster

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Dear Clerk,

Attached for filing with the Court is a corrected brief in the case Brown v. Department of Commerce, Case No. 90652-1:

- Brief of Appellant with Corrected Table of Authorities

The only changes in the corrected brief from the original brief are page reference numbers in the Table of Authorities.

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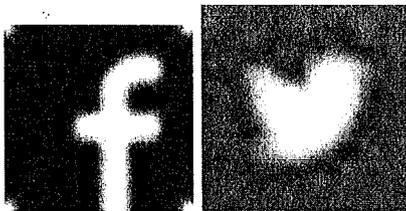
Darlene Brown v. Washington State Department of Commerce  
Case No. 90652-1

Filed by: Amy L. Crewdson, WSBA # 9468, phone (360) 943-6260 ext. 214, email: [amy.crewdson@columbialegal.org](mailto:amy.crewdson@columbialegal.org)

Thank you.

**Carla Sevenster, Legal Assistant**  
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