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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.

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**REPLY BRIEF OF APPELLANT**

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COLUMBIA LEGAL SERVICES

Amy L. Crewdson,  
WSBA #9468  
711 Capitol Way S., #304  
Olympia, WA 98501  
(360) 943-6585

Matthew Geyman,  
WSBA #17544  
101 Yesler Way, Suite 300  
Seattle, WA 98104  
(206) 287-9661

NORTHWEST JUSTICE PROJECT

Meredith O. Bruch,  
WSBA #24405  
311 N 4th Street, #201  
Yakima, WA 98901  
(509) 574-4234

Ariel Speser,  
WSBA #44125  
408 E. 5th Street  
Port Angeles, WA 98362  
(360) 452-9137

Attorneys for Petitioner-Appellant  
Darlene Brown



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## I. INTRODUCTION

Darlene Brown is a homeowner facing foreclosure. The Legislature intended that homeowners in Ms. Brown's shoes be referred to mediation. Ms. Brown, and homeowners like her, are entitled to Foreclosure Fairness Act (FFA) mediation because their lender—in her case the Federal Home Loan Mortgage Corporation (Freddie)—owns the promissory note secured by the deed of trust on their homes and that lender and note owner is not exempt from FFA mediation. Commerce's denial of mediation under these circumstances violates RCW 34.05.570(4).

Ms. Brown is entitled to mediation notwithstanding Commerce's new argument, made for the first time in its Response Brief, that she is not an eligible "borrower" under the FFA and thus lacks standing. This untimely argument is not jurisdictional and has been waived, but even if Commerce had timely raised the argument instead of waiving it, it is without merit. Ms. Brown is entitled to judicial review, and Commerce's unlawful denial of mediation should be reversed.

## II. ARGUMENT

- A. The plain language of RCW 61.24.163(5)(c) requires the beneficiary to prove to the FFA mediator that the beneficiary is the owner of the promissory note, making the note owner the relevant entity for exemption.**

Commerce does not address the FFA's explicit requirement, in RCW 61.24.163(5)(c), that the beneficiary must prove to the mediator that it is the *owner* of the note. *See* Opening Brief at 13-19. Commerce does say

that sufficient proof of ownership “may” be a copy of the beneficiary declaration described in RCW 61.24.030(7)(a), as cross-referenced in RCW 61.24.163(5)(c). Response at 16. But otherwise, Commerce’s entire statutory interpretation argument—indeed, its entire basis for denying mediation to Ms. Brown and others like her—rests on its position that *ownership* of the note is irrelevant for purposes of determining eligibility for FFA mediation. It is the holder status of the beneficiary, according to Commerce, and only holder status, that matters. *Id.* at 16-17. Commerce’s interpretation cannot be reconciled with the FFA’s requirement that the claimed beneficiary must prove it is the “owner of the promissory note or obligation secured by the deed of trust.” RCW 61.24.163(5)(c) (emphasis added). Where, as here, Commerce knows that the owner of the note is not exempt from mediation,<sup>1</sup> the FFA requires Commerce to allow mediation.

Proof of the claimed beneficiary’s holder status is not what RCW 61.24.163(5)(c) requires. For mediation, the claimed beneficiary must prove it is the note “owner.” RCW 61.24.163(5)(c). The beneficiary “may” prove its ownership of the note to the mediator in some cases via a beneficiary declaration, *Id.* But when, as in this case, there is undisputed evidence that the claimed beneficiary is not the note owner, *see* AR 00037, and the party known to be the owner is not exempt from mediation, Commerce’s denial of mediation is incorrect.

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<sup>1</sup> *See* AR 00037 (informing Commerce that Notice of Default listed Freddie as owner of Ms. Brown’s note); *see also* RCW 61.24.166 (FFA exemption provision under which Freddie, by definition, is not exempt from mediation).

Commerce does not consider whether the beneficiary is the *owner* of the note under RCW 61.24.163(5)(c) or whether the note owner is exempt from mediation under RCW 61.24.166. For Commerce, it is all about claimed holder status. Response at 18 (relying on July 23, 2013 declaration attesting to M&T Bank's claimed holder status). But, Commerce does not explain how the Legislature's requirement that the beneficiary must prove it is the *owner* of the note as required in RCW 61.24.163(5)(c) does not mean what it says. Unlike Commerce's position, which ignores the plain statutory language, Ms. Brown's reading does not require acting as if the explicitly-stated note ownership requirement in RCW 61.24.163(5)(c) does not exist.<sup>2</sup>

Commerce's analysis of RCW 61.24.163(5)(c) thus violates the Court's decisions requiring that statutes be interpreted to avoid making any language superfluous and to harmonize all provisions.<sup>3</sup> By focusing exclusively on holder status, Commerce reads the second sentence of RCW 61.24.163(5)(c) in isolation and ignores its first sentence which expressly requires the beneficiary to prove that it is the *owner* of the note for purposes of FFA mediation. *See* Response at 16-18. Because the first

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<sup>2</sup> Commerce never responds to Ms. Brown's arguments that the statutory scheme as a whole means she is entitled to FFA mediation. *See* Opening Brief at 24-26; *see also infra* at 3-5 (further discussion of overall statutory scheme).

<sup>3</sup> *See State v. Johnson*, 179 Wn.2d 534, 546-47, 315 P.3d 1090 (2014) ("We do not interpret statutes in a way that would render any statutory language superfluous or nonsensical"); *see also Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 762, 912 P.2d 472 (1996) (courts must "construe statutes so as to give effect to all words, clauses and sentences").

sentence requires the beneficiary to prove it is the *owner*, the declaration by the beneficiary required in the second sentence must be made by a beneficiary that owns the note as required in the first sentence.<sup>4</sup> Any other conclusion creates an irreconcilable inconsistency between the two sentences of RCW 61.24.163(5)(c).

Commerce also ignores that the operative term in the FFA exemption provision is not “beneficiary,” but rather, “beneficiary of deeds of trust.” *See* RCW 61.24.166; *see also* Opening Brief at 17-18. The statutory scheme demonstrates that under the FFA, mediation is between the homeowner and the *owner* of the note. This is so because the beneficiary of the deed of trust is the lender, *i.e.*, the *owner* of the note,<sup>5</sup> and the statute equates the “beneficiary of deed of trust” with the “owner of the obligation secured thereby.” *See* RCW 61.24.040(2).

Nor does Commerce ever address the problem that under its interpretation, the homeowner’s referring attorney or housing counselor would be unable to determine whether the FFA exemption applied. *See* Opening Brief at 24-25. Because the statute requires all notices of default (NOD), which are served on the homeowner, to identify the *owner* of the note, *see* RCW 61.24.030(8)(1), referring attorneys and housing counselors

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<sup>4</sup> *See Timberline Air Service, Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wn.2d 305, 313-14, 884 P.2d 920 (1994) (“The meaning given the same language in the first sentence of the provision should accord with that given this language in the second sentence”).

<sup>5</sup> *See Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 88, 92-93 & 111 n.15, 285 P.3d 34 (2012) (stating and reiterating that the “beneficiary of the deed of trust” is the lender, *i.e.*, the owner).

know the identity of the note owner and can determine exemption status from the NOD, making Ms. Brown's reading of the FFA logical and workable.<sup>6</sup> In contrast, nothing in the statute requires that homeowners be told who *holds* their note,<sup>7</sup> which may have changed hands multiple times as a result of resales, securitization, and servicing agreements.

Commerce's interpretation renders the statute unworkable. *See State v. Eaton*, 168 Wn.2d 476, 480, 229 P.3d 704 (2010) ("In construing a statute, we presume the legislature did not intend absurd results.").

Finally, Commerce's interpretation of the FFA and its exemption provision ignores the rule that the FFA, as a remedial statute, should be construed in favor of Ms. Brown and other Washington homeowners to achieve the remedial goals of the FFA. *See* Opening Brief at 13 (citing cases). Despite Commerce's statutory mandate to implement the FFA mediation program to benefit homeowners, and contrary to this basic rule of interpretation, Commerce aggressively advances an interpretation of the FFA that would *maximize* the scope of the FFA's exemption provision and *minimize* the benefits of the FFA.<sup>8</sup>

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<sup>6</sup> It is the issuance of the NOD that triggers the right to FFA mediation. The referral to mediation may be made any time after a notice of default has been issued, but no later than twenty days after a notice of sale has been recorded. RCW 61.24.163(1).

<sup>7</sup> The declaration regarding holder status discussed in RCW 61.24.030(7)(a) and cross-referenced in RCW 61.24.163(5)(e) is only provided to the foreclosure trustee, and then may only be provided to Commerce at Commerce's request *after* a mediation referral. RCW 61.24.030(7)(a); *see also* AR 00038-00041 (Commerce's emails with trustee, which did not cc: Ms. Brown's counsel, *after* the referral to mediation).

<sup>8</sup> Under Ms. Brown's interpretation, requiring the note owner to be the beneficiary for FFA mediation makes sense because it is the owner that has something to gain from

**B. The Legislature's formal statement of purpose and the FFA's legislative history demonstrate the Legislature's intent that mediation occur unless the *owner* of the note is exempt.**

As Ms. Brown demonstrated, the Legislature's formal declaration of purpose makes clear that it intended FFA mediation to occur between homeowners and lenders. *See* Opening Brief at 21-23 (citing and discussing FFA's Legislative Findings-Intent). Commerce does not even respond to this argument. Nor does Commerce ever address Ms. Brown's corollary argument that the "lender" the Legislature intended to mediate with homeowners is synonymous with the "owner" of the promissory note, because subsequent owners step into the shoes of the original lender. *See id.* at 18 & 21. Commerce is also silent about the FFA's legislative history which evidences no intent to exempt big banks acting as loan servicers, such as M&T Bank here, from mediation when Freddie owns the note and is not exempt. *See id.* at 26-28.

Instead, Commerce contends that the Legislature's reason for adopting RCW 61.24.166 had to do with focusing "limited resources" on "trying to avoid foreclosures" by "problematic" banks that most frequently foreclosed in the prior year. Response at 1. Yet there is nothing in the record, the legislative history, or the Findings-Intent section of the FFA

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FFA mediation. Under Commerce's interpretation, note ownership is irrelevant. This interpretation has the perverse effect of allowing foreclosure, the outcome the Legislature intended to prevent, while enhancing the servicer's financial interests which are best served by *foreclosing*. *See Bain*, 175 Wn.2d at 98 n. 7 (citing Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755 (2011)).

that supports Commerce's assertions. Later, Commerce attempts to clarify what it meant by "limited resources" by saying the Legislature was focused on "limited mediation resources." Response at 29. But, Commerce does not say what "limited mediation resources" means and there is nothing in the record indicating there are too few lawyers, housing counselors, or mediators to handle the work generated by the FFA or, more importantly, that the Legislature was concerned about resources when it passed the FFA. Nor is there anything in the record or legislative history supporting Commerce's assertion that RCW 61.24.166<sup>9</sup> was intended to solve the "most egregious lack of negotiation first." *Id.*

Commerce does not address what the Legislature actually said about why it was adopting the FFA, namely that foreclosures contribute to the decline in the state's housing market, loss of property values, and other loss of revenue to the state. Findings-Intent-2011 c. 58, set forth at RCW 61.24.005, Reviser's Note. Because home foreclosures were rising to "unprecedented levels," the Legislature said foreclosures should be avoided "whenever possible" and created the right to FFA mediation to accomplish that goal. *Id.*; *see also* Opening Brief at 26-28. Nothing in that history supports what Commerce says about why the Legislature adopted the exemption provision, nor does Commerce address this legislative history, which shows the Legislature favored FFA mediations, the

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<sup>9</sup> The legislative history underlying RCW 61.24.166 is discussed in Ms. Brown's Opening Brief at 26-28.

opposite of Commerce's unfounded claim about the statute.

**C. The Supreme Court's decisions in *Lyons* and *Bain* further establish that note ownership is what matters when applying the FFA exemption.**

In her Opening Brief, Ms. Brown discussed *Lyons* and *Bain* and explained why those decisions, as well as, or in conjunction with RCW 61.24.163(5)(c)'s ownership requirement and the corresponding requirement in RCW 61.24.030(7)(a), further demonstrate that the FFA exemption should be based on *ownership* of the note. Opening Brief at 29-33. In *Lyons*, the Court reaffirmed that the beneficiary must be the owner of the note. *See Lyons v. U.S. Nat'l Bank Ass'n*, \_\_\_ Wn.2d \_\_\_, 336 P.3d 1142, 1148 (2014) (holding that "RCW 61.24.030(7)(a) . . . instructs that a trustee must have proof that the beneficiary is the *owner*") (emphasis added). This echoes the Court's prior statements in *Bain* that a foreclosing beneficiary must be "the *owner* of any promissory note or other obligation secured by the deed of trust," *Bain*, 175 Wn.2d at 93-94 (emphasis added), and if the original lender sold the loan, the purchaser must "establish *ownership* of the loan" in order to foreclose. *Id.* at 111 (emphasis added).

In response, notwithstanding the ownership requirement in the first sentences of RCW 61.24.163(5)(c) and RCW 61.24.030(7)(a), Commerce contends that whether the FFA exemption applies depends on whether the holder of the note is on the exemption list, regardless of Commerce's knowledge that the owner of the note—the party that the Legislature intended to mediate with the homeowner—is not exempt. In making this

argument, Commerce relies on the Court of Appeals' decision in *Trujillo v. Northwest Trustee Serv.*, 181 Wn. App. 484, 326 P.3d 768 (2014). See Response at 21-25.

The Court of Appeals' interpretation of RCW 61.24.030(7)(a) in *Trujillo* is erroneous for the same reason that Commerce's interpretation of RCW 61.24.163(5)(c) is erroneous. Just as Commerce has done with respect to the latter provision, the *Trujillo* court focused on the second sentence of RCW 61.24.030(7)(a) in isolation and ignored the first sentence of that provision which expressly requires a beneficiary to prove it is the *owner* of the note. See *Trujillo*, 181 Wn. App. at 492-502. As Ms. Brown shows above with respect to RCW 61.24.163(5)(c), *see supra* at 3-4, this analysis of RCW 61.24.030(7)(a) by the *Trujillo* court is unsound and should be rejected because it renders the first sentence of RCW 61.24.030(7)(a) superfluous and fails to harmonize the statutory language.<sup>10</sup>

In any event, *Trujillo* should not govern here in the very different context of the FFA and FFA exemption provision, given all of the many distinguishing factors that Ms. Brown has shown, including: (1) the Legislature's formal declaration of purpose stating that it intended FFA mediation to occur between homeowners and lenders, *i.e.*, the owners, of

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<sup>10</sup> Commerce also ignores that *Trujillo* is the subject of a petition for review that is presently pending before this Court and that the logic of the *Trujillo* holding is also the subject of a motion for reconsideration now before the Court in *Lyons*. See Opening Brief at 31 n. 29.

their loans, *see supra* at 6-7; (2) the language of the FFA exemption provision, RCW 61.24.166, that focuses on “beneficiaries of deeds of trust” which the statute identifies and equates with the “owner” of the note in RCW 61.24.040(2), *see supra* at 4; (3) the need to interpret the FFA in a workable way that allows referring attorneys and housing counselors to determine whether a case is eligible and can be referred to mediation, *see supra* at 4-5; and (4) the Supreme Court’s observation in *Bain*, supported by academic literature, that loan servicers are not in the best position to negotiate loan modifications, and to be meaningful, mediation should take place between homeowners and the owners of their loans, making note ownership the appropriate factor in determining the exemption. *See* Opening Brief at 32-33 (citing *Bain*, 175 Wn.2d at 98 n. 7; other citations omitted).

**D. Commerce’s failure to perform its statutory duty to refer Ms. Brown to FFA mediation which resulted from its erroneous interpretation of the FFA was arbitrary and capricious.**

Commerce cites no authority for its position that a state agency may avoid judicial scrutiny when the agency has failed to perform a statutory duty because the agency erroneously interpreted the law that imposes the duty. Instead, it continues to argue that Ms. Brown did not perfect a claim under RCW 34.05.570(4)(b). *See* Response at 12-14. This technical argument challenging the adequacy of the pleadings—which is plainly designed to avoid the merits of Ms. Brown’s claim—is unfounded.

First, Commerce made this same argument in the Superior Court, where it was twice rejected.<sup>11</sup> Because Commerce did not cross-appeal the Superior Court's rulings that Petitioners adequately alleged Commerce's failure under RCW 34.05.570(4)(b) to meet its duty to refer Ms. Brown to FFA mediation, those Superior Court rulings are law of the case. *See, e.g., State v. Greve*, 67 Wn. App. 166, 171 n.3, 834 P.2d 656 (1992) (holding that where State failed to cross-appeal on issue on which State lost in Superior Court, Superior Court ruling on that issue was law of the case).

Second, under notice pleading standards and the judicial review standards of the APA, Ms. Brown has adequately pled her claim against Commerce under RCW 34.05.570(4)(b). Ms. Brown's allegations that Commerce failed to meet its duty to allow her to engage in FFA mediation are set forth, for example, in paragraphs 108 and 109 of her Amended Petition, and paragraph 7 of her Prayer for Relief, among other places,<sup>12</sup>

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<sup>11</sup> *See* CP 735-36 (Order Granting Petitioners' Motion to Supplement Record in which Superior Court supplemented record "[p]ursuant to . . . RCW 34.05.570(4)(b)"); CP 742 (Commerce's Motion for Reconsideration asking for reconsideration of Superior Court's supplementation of record pursuant to RCW 34.05.570(4)(b)); CP 751-753 (Commerce's Reply in Support of Motion for Reconsideration continuing to argue that Petitioners did not plead claim under RCW 34.05.570(4)(b)); CP 757 (Superior Court's April 4, 2014 order denying Commerce's Motion for Reconsideration on RCW 34.05.570(4)(b) issue); *see also* CP 926-27 (Order Granting Petitioners' Second Motion to Supplement Record in which Superior Court again supplemented the agency record "[p]ursuant to . . . RCW 34.05.570(4)(b))."

<sup>12</sup> *See* CP 64 (Amended Petition, ¶¶ 108-109, alleging that under RCW 34.05.570(4), Commerce is affirmatively required—*i.e.*, has a duty—to allow Ms. Brown to engage in FFA mediation, and requesting a declaration requiring Commerce to comply with that duty by basing the FFA exemption decision on whether the owner of the note is on the exemption list) and CP 66 (Prayer for Relief, ¶ 7, requesting that pursuant to RCW 34.05.570(4) Commerce be ordered to allow Ms. Brown to engage in mediation as required under the FFA).

where she expressly alleged that Commerce violated the FFA and failed to meet its statutory duty by not allowing her to engage in mediation.

Ms. Brown alleged that Commerce breached its duty by not allowing her to have FFA mediation under the judicial review sub-provision, RCW 34.05.570(4). She was not required to cite the “sub-sub-provision,” RCW 34.05.570(4)(b), in pleading that claim. Moreover, in her allegations that Commerce failed to meet its duty to refer her to FFA mediation, she also requested relief under RCW 34.05.570(4)(c), which expressly incorporates RCW 34.05.570(4)(b). *See* RCW 34.05.570(4)(c).<sup>13</sup> Commerce’s response to the Amended Petition also showed it understood her allegations encompassed all of RCW 34.05.570(4). *See* CP 79-80 (Commerce’s affirmative defense that judicial review should be limited to RCW 34.05.570(4)).

Ms. Brown’s allegations that Commerce failed to perform its duty to refer her to FFA mediation in violation of RCW 34.05.570(4), including RCW 34.05.570(4)(b), thus easily met the liberal requirements of notice pleading. *See Champagne v. Thurston County*, 163 Wn.2d 69, 85-87, 178 P.3d 936 (2008). The APA’s requirements for petitions for judicial review are relaxed, and, if anything, are less strict than pleading requirements under general civil rules, not more so. *See* RCW 34.05.546 (pleading

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<sup>13</sup> *See* CP 64 (Amended Petition, ¶¶ 108-109, alleging that Commerce’s duty to allow FFA mediation also rests on RCW 34.05.570(4)(c), which in turn cross-references RCW 34.05.570(4)(b)); & CP 66 (Prayer for Relief, ¶ 7) (same).

requirements for petition for review). Ms. Brown's allegations were more than sufficient to state her claims, and nothing more was required.

Accordingly, because Ms. Brown has alleged that Commerce failed under RCW 34.05.570(4) to comply with its duty to refer her to FFA mediation, she should prevail if the Court concludes that Commerce's interpretation of the FFA was erroneous.<sup>14</sup> *See, e.g., Children's Hospital v. Dept. of Health*, 95 Wn. App. 858, 873-74, 975 P.2d 567 (1999) (Department of Health's determination not to conduct Certificate of Need review was based on erroneous interpretation of statutes and rules so its failure to conduct CN review as required was arbitrary and capricious); *see also* Opening Brief at 36-38.

Commerce's argument that its denial of mediation to Ms. Brown was not erroneous under the arbitrary and capricious standard responds to an argument Ms. Brown does not make. *See* Response Brief at 35-38. Ms. Brown does not argue that Commerce's denial of mediation was arbitrary and capricious based on RCW 34.05.570(4)(c)(iii) alone, separate and apart from Commerce's erroneous interpretation of the FFA and its failure to perform its statutory duty to allow mediation in this case. Rather, she contends that Commerce's erroneous interpretation of the FFA and its exemption provision, combined with its unlawful failure to allow Ms.

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<sup>14</sup> Commerce has conceded that its "actions were based on Commerce's interpretation of the FFA requirements, including its determination that the identified beneficiary of each petitioner's deed of trust was exempt from mediation under RCW 61.24.166." CP 706.

Brown to have mediation, was arbitrary and capricious under RCW 34.05.570(4)(c)(iii) and RCW 34.05.570(4)(b), consistent with the analysis in *Children's* and other cases.<sup>15</sup>

In *Children's*, for example, Children's brought an APA claim challenging the Department of Health's interpretation of a statute under RCW 34.05.570(4)(b) and (c). The .570(4)(b) claim was based on DOH's failure to perform a statutory duty, *i.e.*, conduct a Certificate of Need (CN) review process. *Id.* at 862 n.7. Children's also argued that DOH's interpretation was "contrary to law" and "arbitrary and capricious" under RCW 34.05.570(4)(c)(ii) & (iii). *Id.* at 864. The Court of Appeals agreed with Children's. *Id.* at 873-74. DOH's decision not to perform CN review violated its statutory duty and was based on an erroneous interpretation of the statutes and regulations as applied to the facts. *Id.* That decision was arbitrary and capricious. *Id.* at 874. Other than arguing Ms. Brown's failure to properly allege a claim under RCW 34.05.570(4)(b), Commerce failed to respond to the argument Ms. Brown actually made.

**E. In refusing to allow Ms. Brown to engage in FFA mediation, Commerce acted outside its statutory authority.**

In her Opening Brief, Ms. Brown explained why Commerce's refusal to refer her to mediation was based on its erroneous interpretation of the

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<sup>15</sup> See Opening Brief at 34-38 (citing and discussing *Children's* and *Rios v. Dept. of Labor and Industries*, 145 Wn.2d 483, 39 P.3d 961 (2002)).

FFA and outside its statutory authority.<sup>16</sup> In its Response, Commerce concedes that the meaning of the FFA is a question of law reviewed *de novo* and that the Court's fundamental objective is to ascertain and carry out the intent of the Legislature. *See* Response at 34. Ms. Brown agrees. Commerce's next assertion, however, does not follow. Instead of explaining how the FFA's legislative intent shows Ms. Brown is not entitled to FFA mediation, Commerce says the Court should interpret the applicable provisions of the FFA to ascertain the scope of Commerce's "express and necessarily implied authority in relation to Brown referral." *Id.* But, Commerce does not say what those applicable provisions are or explain what relationship those unspecified provisions have to the Brown referral.

The language of the FFA and its exemption provision, the Legislature's statement of intent, and established rules of statutory interpretation all compel the conclusion that Commerce was required under the statute to allow her to engage in FFA mediation. Here, as in *Pierce County*, Commerce has acted outside its statutory authority by erroneously interpreting the statute and denying the benefits it was required to provide under the statute. *See Pierce County*, 144 Wn. App. at 804-08 & 812. If the Court concludes that Commerce erroneously interpreted the FFA, the Court should find that Commerce's actions,

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<sup>16</sup> *See* Opening Brief at 39-40 (citing and discussing *Pierce County v. State*, 144 Wn. App. 783, 804-08 & 812, 185 P.3d 594 (2008)).

which were the result of its erroneous interpretation, were outside Commerce's statutory authority.

**F. In depriving Ms. Brown of her right to access FFA mediation and treating her differently from the other similarly situated homeowners with loans owned by Freddie and Fannie that Commerce allowed to have mediation, Commerce violated her constitutional rights to due process and equal protection under the law.**

RCW 61.24.008(1) specifically refers to a homeowner's access to mediation as a "right to mediation." Commerce asserts, without citation to authority or discussion, that the right to FFA mediation is not akin to the right protected in *Nielsen v. Dept. of Licensing*, 177 Wn. App. 45, 309 P.3d 1221 (2013) (access to the courts). Response at 32. Commerce is wrong. FFA mediation takes place in the context of nonjudicial foreclosure, which substitutes for judicial foreclosure and dispenses with many of the protections that borrowers enjoy under the judicial process. That fact favors treating the right to mediation as a right akin to the right to access the court.<sup>17</sup>

*Nielsen* is instructive because it demonstrates that the correct analysis for Ms. Brown's challenge is fundamental fairness and the rational basis

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<sup>17</sup> FFA mediation is not ordinary mediation. For example, a nonjudicial foreclosure may not go forward while mediation is pending. RCW 61.24.163(16). The FFA mediator acts as a decision-maker on some issues and may issue a "not-in-good-faith" certification based on a beneficiary's failure to mediate in good faith, which has significant legal consequences. *See* RCW 61.24.163(14). Indeed, the homeowner can use that certification to enjoin the nonjudicial foreclosure itself. *Id.* The mediator's determination that a beneficiary violated its duty of good faith under RCW 61.24.163 is also a *per se* unfair or deceptive act in trade or commerce for a claim under the Consumer Protection Act, RCW 19.86. RCW 61.24.135(2).

test. *Id.* at 56. *Nielsen* does not hold that access to the courts is the only interest subject to the analysis. *Nielsen* teaches that there is an important question to ask about the “right” to FFA mediation: Is there an interest in FFA mediation that is encompassed within the protection of life, liberty, or property? The Court should conclude that there is and that analyzing Commerce’s actions under the *Nielsen* framework demonstrates Commerce’s actions are unconstitutional.

Commerce does not dispute that its interpretation of the FFA is unfair to homeowners, like Ms. Brown, with Freddie-owned notes who are denied mediation, while other homeowners with Freddie-owned notes are allowed mediation. Commerce could not explain to the Superior Court why, if note ownership was irrelevant, it treated Fannie and Freddie as beneficiaries by sending them letters notifying them about the Barbee and Starne mediations. RP 40-41; *see also* Opening Brief at 42 n. 37.<sup>18</sup>

Commerce argues that the burden of proof in an as-applied constitutional challenge is “beyond a reasonable doubt,” but cites no authority for that proposition. Response at 25-33. *Sch. Dist. Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 244 P.3d 1 (2010), involved a “facial challenge” to the constitutionality of a statute. *Lummi Indian Nation v. State*, 170 Wn.2d 247, 241 P.3d 1220 (2010), involved a facial challenge. *Lummi Nation* did say that if a statute is held

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<sup>18</sup> *See also* Commerce spreadsheet at CP 687-699 where Fannie and Freddie are identified by Commerce as the beneficiary in 208 FFA mediation referrals.

unconstitutional as applied, it cannot be applied in the future in a similar context. *Id.* at 258. Ms. Brown's interpretation avoids the fundamental unfairness inherent under Commerce's interpretation.

**G. Ms. Brown has been substantially prejudiced by Commerce's actions and has standing to bring this action notwithstanding Commerce's untimely claim that she does not.**

Commerce waived its argument, made for the first time in its Response, that Ms. Brown lacks standing under RCW 34.05.530. *See* Response at 42. Commerce was required to raise standing in the Superior Court; its failure to do so constitutes a waiver. RAP 2.5(a); *see Tyler Pipe Indus. Inc. v. Dept. of Revenue*, 105 Wn.2d 318, 327, 715 P.2d 123 (1986) (issue of standing waived if not raised below).<sup>19</sup>

Even if Commerce had timely raised standing, its argument that Ms. Brown is not protected by the FFA—*i.e.*, that she is not within its zone of interest—fails. Ms. Brown is a “borrower” as defined by the Deeds of Trust Act (DTA) and thus within the FFA's zone of interest.<sup>20</sup> She was listed as the borrower and as a one-third owner of her home on the mediation referral, AR 00037. Her Amended Petition pled the facts that

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<sup>19</sup> *See also Clark County Pub. Util. Dist. No.1 v. Dept. of Revenue*, 153 Wn. App. 737, 753, 222 P.3d. 1232 (2010) (refusing to consider agency's argument made for first time at appellate oral argument that utility districts' only remedy was by means of APA).

<sup>20</sup> Commerce's May 2013 Guidelines stated: “Only the borrower/grantor on a deed of trust can participate in mediation.” CP 151. The Guidelines also said: “Once a borrower received a Notice of Default, they are eligible for mediation if the referral submitted to Commerce meets all the other FFA eligibility criteria.” CP 150. Commerce told the trustee that it would “deem this case [Ms. Brown's] eligible for mediation” unless the trustee supplied the beneficiary declaration that said M&T was the “actual holder” of the

she was a one-third owner of her home, and had signed the Deed of Trust (DOT). CP at 45-67; *see* ¶¶ 2, 48, 49 & 53.<sup>21</sup> She explained she would inherit the other two-thirds of the home once probate of her late parents' estates was completed. AR 00037.

“Borrower” includes “the person’s successors if they are *liable* for those obligations under a written agreement with the beneficiary.” RCW 61.24.005(3) (emphasis added). Ms. Brown is a borrower based on her liability under the deed of trust. RCW 61.24.165(2) specifically extends mediation to all those who are “borrowers under a deed of trust.” The fact that she did not sign the note is unimportant. She was, at the time of her referral, a successor to the other two borrowers (her parents) under their wills *and* she was independently liable as a signer of the deed of trust. Her liability under the deed of trust included the loss of her one-third interest in her home through foreclosure *as well as the right to live in the home*.<sup>22</sup>

Further, not only is Ms. Brown a borrower, she is also a homeowner. Amended Petition, CP 45, 46, 48 & 55 at ¶¶ 2, 3, 14 & 53; AR 00037. The Legislature expressly stated its intent to extend mediation to homeowners. Laws of 2011, ch. 58, § 1, set forth at RCW 61.24.005, Reviser’s Note.

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promissory note. AR 000134-35. Commerce did not learn anything new about Ms. Brown’s circumstances in her Opening Brief.

<sup>21</sup> Had Commerce raised this below, Ms. Brown would have included the DOT in her motion to supplement the record. The DOT would show she was named as a borrower therein as pled in the Amended Petition.

<sup>22</sup> *See Washington Public Ports Ass’n v. Dept. of Revenue*, 148 Wn.2d 637, 647, 62 P.3d 462 (2003) (defining “liable” as “[b]ound or obliged in law or equity; responsible; chargeable; answerable; compellable to make satisfaction”) (citation omitted).

She is therefore among those persons whose interests the legislature intended to be protected by the FFA; she falls within its “zone of interest” as a borrower *and* a homeowner.<sup>23, 24</sup> As discussed above and in the Opening Brief, as a remedial statute the FFA should be liberally construed in favor of homeowners. *See supra* at 5 & Opening Brief at 13 (citing cases).

Even if the issue had been properly presented, the record has not been sufficiently developed to allow a just and fair determination of this untimely issue. *See Amalgamated Transit Union Local 587 v. State of Washington*, 142 Wn.2d 183, 203, 11 P.3d 762 (2000) (holding a party may not raise a standing issue for the first time on appeal when it has not provided sufficient argument); *see also Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003) (stating that “[t]he parties must have had a full and fair opportunity to develop facts relevant to the decision.”). The Court should reject Commerce’s new argument on this basis as well.

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<sup>23</sup> RCW 34.05.530(2) inquires whether the Legislature intended the agency consider the person’s asserted interests, even if the statute did not expressly state those interests. *See St. Joseph Hosp. & Health Care Ctr. v. Dept. of Health*, 125 Wn.2d 739, 739-42, 887 P.2d 891 (1995) (holding respondent had standing even though no statute expressly stated the agency had to consider respondent’s interests); *Clarke v. Securities Indus. Ass’n*, 479 U.S. 388, 399, 107 S. Ct. 750, 757 (1987) (zone of interest test is not meant to be especially demanding).

<sup>24</sup> Commerce’s reliance on *Allan v. Univ. of Washington*, 140 Wn.2d 323, 997 P.2d 360 (2000), is misplaced. In *Allan*, the court found that the wife did not meet the APA standing requirements because she did not have her own contractual relationship with the university. *Allan* is distinguishable because as shown above, Ms. Brown has her own contractual relationship with the beneficiary, namely the deed of trust she executed.

Finally, and most importantly, Ms. Brown has been substantially prejudiced by Commerce's failure to refer her to mediation. Commerce does not dispute that Ms. Brown would have benefited from mediation to try to save her home. Contrary to Commerce's assertions, she has met all requirements necessary to entitle her to the relief requested. *See* RCW 34.05.530.

**H. The record on review includes the evidence admitted by the Superior Court along with the Longworth and Lewis agency records.**

The Superior Court entered two orders supplementing the agency record at Petitioners' request and over Commerce's objections.<sup>25</sup> Commerce raised its objections again at oral argument and was rebuffed. RP 43. Commerce did not cross-appeal either order so its request to narrow the record made for the first time in its Response Brief, *see* Response at 10 & 15, is untimely.<sup>26</sup>

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<sup>25</sup> CP 85-702 (Petitioners' Motion to Supplement together with admitted documents), CP 703-23 (Commerce's Response), CP 724-34 (Reply), CP 735-36 (Order Granting Motion to Supplement Record), CP 757 (Order Denying Respondent's Motion for Reconsideration), CP 881-88 (Petitioners' Second Motion to Supplement Record on Review), CP 915-21 (Commerce's Response), CP 922-25 (Reply), CP 926-27 (Order Granting Petitioners' Second Motion to Supplement). The first Order resulted in the admission of the documents at CP 100-702. The second order confirmed that the Lewis agency record was admitted to supplement the record. The Lewis agency record is at AGO 001-0082. Petitioners brought their second Motion to Supplement because petitioner's counsel had withdrawn and wanted to ensure the administrative record did not change if Mr. Lewis was dismissed. CP 882.

<sup>26</sup> The supplemental record shows that other homeowners, like Ms. Brown, with Fannie- or Freddie-owned notes were denied FFA mediation. CP 176-255, CP 257-265, CP 360-426, CP 428-447, CP 449-452. The supplemental record also shows at least 208 referrals listing Fannie or Freddie as the beneficiary in which Commerce allowed mediation. CP 687-699. Finally, the supplemental record shows that other homeowners

A superior court's admission or refusal of evidence is within its discretion and will not be reversed *on appeal* absent a showing of manifest abuse. *Okamoto v. Employment Security Dept.*, 107 Wn. App. 490, 494-95, 27 P.3d 1203 (2001) (Superior court denial of Okamoto's request to supplement record in his unemployment compensation eligibility case upheld on appeal).<sup>27</sup> Because Commerce did not cross-appeal the orders supplementing the agency record, it waived its right to argue that evidence admitted by those orders should not be considered, and those orders are law of the case.<sup>28</sup> *See State v. Greve*, 67 Wn. App. at 171 n.3, cited *supra* at 11.

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with Fannie- or Freddie-owned notes who had FFA mediation saved their homes from foreclosure. CP 701-702.

<sup>27</sup> *Okamoto* set out the criteria in RCW 34.05.562 for receiving evidence not contained in the agency record before holding the standard of review for superior court decisions to admit or exclude evidence pursuant to RCW 34.05.562 is manifest abuse of discretion. *Id.*

<sup>28</sup> Even if Commerce had cross-appealed the Superior Court's orders supplementing the record, Commerce does not specify what evidence admitted to supplement the agency record the Court should disregard. Response at 15. Nor has Commerce argued that the Superior Court's admission of this evidence was a manifest abuse of discretion.

Commerce also objects to Opening Brief references to the Longworth and Lewis agency records. Response at 15. The Lewis agency record was admitted by Superior Court order, CP 926-27. Ms. Brown's and Mr. Longworth's cases were consolidated by the Superior Court, CP 82-84. Because the cases were consolidated, Commerce filed only one agency record. AR 000001-000215.

Commerce misstates the holding of *Waste Mgmt. of Seattle, Inc. v. Utilities & Transp. Comm'n*, 123 Wn.2d 621, 869 P.2d 1034 (1994). Response at 10. *Waste Mgmt.* said that while it would not rely upon the trial court's findings and conclusions because a complete adjudicative proceeding had taken place before an administrative tribunal (*id.* at 632), there is an exception to that rule which allows the appellate court to look to the superior court record where the superior court has taken in new evidence pursuant to RCW 34.05.562. *Id.* at 633-34.

The Superior Court acted well within its authority in granting Ms. Brown's motions to supplement the record to include these additional materials showing Commerce's differential treatment of similarly situated homeowners, by allowing FFA mediation to some homeowners with Freddie- and Fannie-owned notes while denying it to others. *See* RCW 34.05.562(1)(c) (granting trial court broad authority to supplement record where, as here, additional evidence "is needed to decide disputed issues regarding . . . other proceedings not required to be determined on the agency record"); *Children's*, 95 Wn. App. at 863 n. 9 (affirming supplementation of record in reviewing "other agency action" under RCW 34.05.570(4)).

**I. The secondary materials cited by Ms. Brown are all properly subject to judicial notice or derived from evidence admitted by the Superior Court.**

Without citing any authority, Commerce argues that information ordinarily subject to judicial notice may not be considered by this Court because it is not part of the record. Response at 15-16. This Court may take judicial notice of information "composed of facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and variable certainty." *See* ER 201; *see also State ex rel. Humiston v. Meyers*, 61 Wn.2d 772, 779, 380 P.2d 735 (1963). All of the secondary material that Commerce objects to is properly before the Court and is relevant and necessary to a full understanding of the issues in this case.

Footnotes 4 and 15 of the Opening Brief contain links to news articles regarding the mortgage servicing industry. Footnotes 20, 36, and 37 contain facts derived from evidence admitted by the Superior Court. Footnote 39 explains how servicing rights change frequently, thus emphasizing the importance of having the owner of the loan at mediation. Footnote 40 demonstrates why there is no rational basis to distinguish loans serviced by M&T and those serviced by Bank of America where Freddie or Fannie owns the loans.

### **III. CONCLUSION**

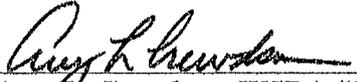
For all the foregoing reasons, Ms. Brown respectfully requests that the Court find that the owner of the loan is the determining factor for applying the FFA exemption. Since Commerce knew Freddie is the owner of her loan, and Freddie is not exempt from mediation, it had a duty to refer Ms. Brown to FFA mediation. In denying her mediation, Commerce failed to perform a duty required by law, was arbitrary and capricious, acted outside its statutory authority, and engaged in unconstitutional agency action. Accordingly, Commerce's decision

denying FFA mediation to Ms. Brown should be reversed.

DATED this 6th day of February, 2015.

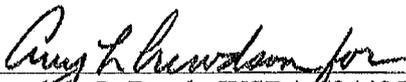
Respectfully submitted,

COLUMBIA LEGAL SERVICES      NORTHWEST JUSTICE PROJECT

  
Amy L. Crewdson, WSBA #9468  
[amy.crewdson@columbialegal.org](mailto:amy.crewdson@columbialegal.org)  
Matthew Geyman, WSBA #17544  
[matt.heyman@columbialegal.org](mailto:matt.heyman@columbialegal.org)

Amy L. Crewdson  
711 Capitol Way South #304  
Olympia, WA 98501  
(360) 943-6585

Matthew Geyman  
101 Yesler Way, Suite 300  
Seattle, WA 98104  
(206) 287-9661

  
Meredith O. Bruch, WSBA #24405  
[meredithb@nwjustice.org](mailto:meredithb@nwjustice.org)  
Ariel Speser, WSBA #44125  
[ariels@nwjustice.org](mailto:ariels@nwjustice.org)

Meredith O. Bruch  
311 N. 4th Street, #201  
Yakima, WA 98901  
(509) 574-4234

Ariel Speser  
408 E. 5th Street  
Port Angeles, WA 98362  
(360) 452-9137

Counsel for Petitioner-Appellant  
Darlene Brown

**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 Reply Brief of Appellant to be served, by email in accordance with an e-service agreement, upon the following counsel of record:

Attorneys for Washington State Department of Commerce

Mark Calkins, Assistant Attorney General

7141 Cleanwater Drive SW

PO Box 40109

Olympia, WA 98504-0109

Email: [marke@atg.wa.gov](mailto:marke@atg.wa.gov)

Copies to: [ahdolyef@atg.wa.gov](mailto:ahdolyef@atg.wa.gov)

[marilynw@atg.wa.gov](mailto:marilynw@atg.wa.gov)

[nicoleb@atg.wa.gov](mailto:nicoleb@atg.wa.gov)

[lindah5@atg.wa.gov](mailto:lindah5@atg.wa.gov)

[rebeccam3@atg.wa.gov](mailto:rebeccam3@atg.wa.gov)

DATED this 6th day of February, 2015.

  
Carla Sevenster

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

- Reply Brief of Appellant

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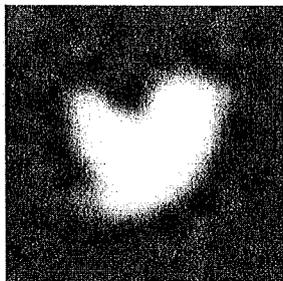
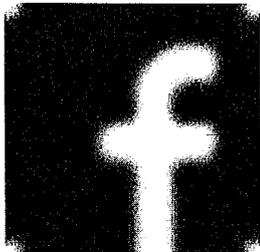
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Case No. 90652-1

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**  
Columbia Legal Services  
Working Families Project, Foreclosure Work Group

711 Capitol Way S., Suite 304, Olympia, WA 98501 (360) 943-6260 Ext 213  
[Carla.sevenster@columbialegal.org](mailto:Carla.sevenster@columbialegal.org) | [www.columbialegal.org](http://www.columbialegal.org)  
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