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SUPREME COURT OF THE STATE OF WASHINGTON

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DARLENE BROWN,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF COMMERCE,

Respondent.

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*CORRECTED* DEPARTMENT OF COMMERCE'S RESPONSE BRIEF

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## I. INTRODUCTION

When the Legislature adopted the Foreclosure Fairness Act (FFA) as part of the Deeds of Trust Act (DTA), chapter 61.24 RCW, it added a mediation program “for homeowners and beneficiaries to communicate with each other to reach a resolution and avoid foreclosure whenever possible.”<sup>1</sup> The FFA mediation program “applies only to borrowers who have been referred to mediation by a housing counselor or attorney.” RCW 61.24.163(1). The Legislature determined that proof that a bank was the “actual holder” of the promissory note was sufficient to establish that it was the beneficiary under the Act. The Legislature also exempted from the FFA mediation program a class of institutions that were not beneficiaries of deeds of trust “in more than two hundred fifty trustee sales of owner-occupied residential real property . . . during the preceding calendar year,” thereby excluding beneficiaries who instigated only a relatively small number of foreclosures in Washington during the prior year. RCW 61.24.166.

Excluding these beneficiaries from the mediation requirement was a rational legislative decision; it focuses limited resources on trying to avoid foreclosures by those problematic banks that most frequently foreclosed in Washington in the prior year. Moreover, applying the

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<sup>1</sup>Laws of 2011, ch. 58, § 1.

mediation statute (and its exclusion) to the party who has the power to enforce through foreclosure or adjust the terms of the loan, the actual holder of the promissory note, is also rational.

FFA mediation under RCW 61.24.163 is only available to two parties: the “borrower” and the “beneficiary” actually holding the borrower’s promissory note—provided that the beneficiary is not exempted under RCW 61.24.166. The criteria to qualify as “borrower” and “beneficiary” are expressly addressed in the FFA.

Brown fails to meet her burden under RCW 34.05.570(1)(a) to demonstrate that Commerce’s decision not to assign her referral to mediation was invalid as unconstitutional, outside Commerce’s statutory authority, or arbitrary or capricious.

First, the declaration of M&T Bank that it was the beneficiary of the promissory note executed by Brown’s father and stepmother as the borrowers (the “Brown Note”) provided “sufficient proof” under RCW 61.24.163(5)(c) of the bank’s identity as the beneficiary. Because M&T Bank was on the list of institutions exempted from FFA mediation under RCW 61.24.166, Commerce properly declined to assign Brown’s referral to mediation. Because M&T Bank had a statutory right to be exempt from FFA mediation, Brown cannot show she was “substantially prejudiced” by Commerce’s decision. Washington cases affirm the

validity of these statutory provisions. Because M&T Bank was a beneficiary exempted from FFA mediation under RCW 61.24.166, there is no merit in Brown's claims that Commerce's actions were outside of its statutory authority, were arbitrary or capricious, or were unconstitutional.

Second, Brown has not shown she qualified as a "borrower" under the FFA. Brown's admissions in her Amended Petition for Declaratory and Injunctive Relief (Amended Petition) establish that she did not qualify under RCW 61.24.005(3) as a "borrower" because she admitted she was "not obligated on the promissory note" under which only her (deceased) father and stepmother had executed as borrowers. Amended Petition at 11. AR at 000170-171.

Additionally, Brown's Amended Petition does not assert that she had acquired any vested legal interest in the property following the deaths of her father and stepmother in 2010 and 2011 respectively. She implies that the probate proceeding for the estates of her father and stepmother was pending but not concluded and provides no other statement to establish that she was a "successor in interest" at the time of Commerce's actions. Clerk's Papers (CP) at 45-67. Because Brown herself was not qualified for assignment to mediation, Brown cannot meet her burden to show she was "substantially prejudiced" by Commerce's decision as required under RCW 34.05.570(1)(d).

Third, Brown argues that under RCW 34.05.570(4)(b), Commerce failed to perform a “duty” required by law when it failed to assign her referral to mediation. Under the Administrative Procedure Act (APA), petitioners who seek judicial review of agency action are required to identify their claims in their petition. RCW 34.05.546. Brown failed to claim that Commerce violated a “duty” under RCW 34.05.570(4)(b) in her Amended Petition.<sup>2</sup> Opening Brief at 34-38. The Court should find that this claim is not properly before it.

## II. RESTATEMENT OF ISSUES

1. **Whether Commerce was entitled to rely on M&T Bank’s declaration that it was the “actual holder of the promissory note” as proof that M&T Bank was the beneficiary for purposes of applying the mediation exemption requirement.**
2. **Whether Brown can prove “beyond a reasonable” doubt under a rational basis standard of review, that the statutes Commerce applied in its decision not to assign Brown’s referral to FFA mediation violated Brown’s alleged equal protection or due process rights.**
3. **Whether Brown can prove that Commerce acted outside its statutory authority when it concluded that M&T Bank was the beneficiary actually holding the Brown promissory note and that it was therefore exempt from assignment to mediation under RCW 61.24.166.**

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<sup>2</sup> The Amended Petition’s claims and prayers for relief are exclusively based on RCW 34.05.570(4)(c)(i)-(iii). There is no reference to RCW 34.05.570(4)(b) in Brown’s Amended Petition. Amended Petition at 19-22. CP at 45-67.

4. Whether Brown can prove that Commerce acted arbitrarily or capriciously when it concluded that M&T Bank was the beneficiary holding the Brown promissory note and that it was therefore exempt from assignment to FFA mediation under RCW 61.24.166.
5. Whether Brown fails to demonstrate she was “substantially prejudiced” by Commerce’s decision because M&T Bank had a statutory right to be exempted from assignment to FFA mediation.
6. Whether Brown fails to demonstrate she was “substantially prejudiced” by Commerce’s decision because she was not a “Borrower” as required for assignment to mediation.
7. Whether Brown did not perfect a claim under RCW 34.05.570(4)(b) that Commerce failed to perform a duty required by law.

### III. STATEMENT OF THE CASE

In 2013, attorney Meredith Bruch submitted to Commerce Brown’s referral for the mediation program. The referral form stated that Brown “wishes to assume the loan from her [deceased] father and step-mother and to remain in the home. She is the joint owner of the home and will be receiving full title to the home at the near closure of the probate for her father and step-mother.” AR at 00035-37.

The agency record in this case does not show that Brown’s legal interest in the home, which was purchased by her (deceased) father and stepmother, is that of owner with legal title. In her Opening Brief, Brown states that she “lives in the Kennewick home inherited from her father and

stepmother.” Opening Brief at 7. However, the Amended Complaint shows Brown’s legal interest in the home was contingent on still-pending probate proceedings involving Brown’s deceased father and stepmother. Amended Petition at 12, § 57. The Amended Petition represents that Brown “is not obligated on the promissory note” securing the deed of trust on the home. Amended Petition at 11-12, §§ 53 and 57; *see also* AR at 000170-171 (promissory note). Brown’s admission that she is not obligated on the promissory note (signed only by her (deceased) father and stepmother) confirms that Brown is not a “borrower” as that term is defined at RCW 61.24.005(3). AR at 000170-171.

When Commerce received the Brown referral to the mediation program, it notified the listed trustee, Northwest Trustee Services (NWTS). AR at 00038. NWTS responded, “I believe this file to be ineligible for mediation as we have the beneficiary as M&T Bank, please advise.” AR at 00039. Commerce immediately notified Ms. Bruch that Commerce would not refer Brown to mediation because, “M&T Bank is exempt from mediation. . . . You can access the list of exempt financial institutions on our web page.” AR at 00042.

Over the next several days, Commerce communicated with Ms. Bruch and with the trustee, NWTS, to establish whether documentation confirmed M&T Bank as the beneficiary holding the

Brown promissory note consistent with the FFA. AR at 00042-000165. Commerce obtained a declaration from NWTS stating M&T Bank was the beneficiary holding the Brown promissory note. But Commerce expressed concerns to NWTS about two issues with the beneficiary declaration. Commerce questioned whether, on its face, the person signing the declaration had the requisite authority and whether the declaration complied with the statutory provisions requiring the declarant to state it was the "actual holder" of the note. AR at 000106-107, AR at 000122.

Commerce followed up with an email to NWTS asking for an update and explaining that absent a second declaration that corrected these issues, the case would be referred to mediation. AR at 000137.

In response, NWTS provided Commerce with a second declaration from M&T Bank. AR at 000137 and AR at 000142. The second declaration was signed by a person identified as M&T Bank's "Attorney in Fact" and included the statement that "M&T Bank is the actual holder of the promissory note . . . ." AR at 000169. Per Commerce's request (AR at 000143), NWTS also provided Commerce with a copy of the Brown Note securing the deed of trust on the Brown property. AR at 000170-171.

The Brown Note shows endorsements to M&T Bank. The Brown Note states that the borrower's obligations are owed to the "Note Holder"

and that the Note Holder becomes the entity to whom the Note is transferred—beginning with any transfer from the original “Lender.” The Brown Note includes the acknowledgement that “I understand that the Lender may transfer this Note. The Lender is anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the “Note Holder.” AR at 000170.

The Brown Note is identified as a “Uniformed Secured Note” or “Security Instrument”—consistent with its function as a negotiable instrument under the Uniform Commercial Code (UCC). See, e.g., RCW 62A.3-104 and RCW 62A.3-301. The Brown Note provided the Note Holder with authority to take all actions necessary to begin the non-judicial foreclosure process upon the default by the borrowers. As the Note Holder at the time of the mediation referral, M&T Bank had the authority to instruct the trustee, NWTs, to begin the foreclosure process. AR at 000170-171.

On the same day it received the second bank declaration and a copy of the Brown Note, Commerce emailed Brown’s attorney its final decision not to refer Brown to mediation. Commerce cited its reliance on the second declaration for its conclusion that M&T Bank was the beneficiary as the declared “actual holder” of the Brown promissory note—explaining that the declaration “fits the exact criteria described in

the RCW [RCW 61.24.030(7)(a)] . . . . M&T [Bank] certified to Commerce that they are exempt from mediation in 2013. According to the statute's definition they are the "beneficiary" and Commerce cannot assign a mediator to this case." AR at 000165. With the above decision, Commerce provided Ms. Bruch copies of the declaration and the promissory note.

Brown subsequently filed a "Petition for Declaratory and Injunctive Relief" in Thurston County Superior Court, naming Commerce as respondent. CP at 6-28. Brown later filed an Amended Petition. CP at 45-67. In the Amended Petition, Brown sought judicial review of "other agency action" under RCW 34.05.570(4), citing "Claims for Relief" under RCW 34.05.570(4)(c)(i),(ii) and (iii) and "Prayers for Relief" under those same subsections. Brown did not invoke judicial review under any other subsection of RCW 34.05.570.

Commerce stipulated to consolidating Brown's petition with the petitions of Brian A. Longworth and John Michael Lewis. The Honorable Christine Schaller heard argument and issued an order denying the relief sought under Brown's Amended Petition. Judge Schaller later issued a (*nunc pro tunc*) corrected final order to correct clerical mistakes.<sup>3</sup>

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<sup>3</sup> Judge Schaller's order and the corrected order also denied the relief Longworth sought under his claims and prayers for relief in the Amended Petition. The Lewis

Of the three petitioners who sought judicial review, only Brown has appealed the superior court's order. Brown also seeks direct review under Rules on Appellate Procedure (RAP) 4.2. The proper record in Brown's appeal should be the administrative record in the Brown case and any relevant supplemental records allowed by the superior court.<sup>4</sup>

#### IV. ARGUMENT

##### A. Standard of Review

Under RCW 34.05.570, an appellate court reviews an agency's decision de novo and applies the standards of the APA "directly to the record before the agency." *Washington Independent Telephone Association v. Washington Utilities and Transportation Commission*, 149 Wn.2d 17, 24, 65 P.3d 319 (2003). The appellate court reviews the agency's "administrative actions on the administrative, not superior court record." *Waste Management of Seattle, Inc., v. Utilities & Transp. Comm'n*, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994).<sup>5</sup>

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petition was denied by separate order on grounds that Lewis had failed to file a hearing brief or to appear at the hearing on the merits.

<sup>4</sup> The superior court order granted Brown's motion to supplement the record. Those records are identified and described in Brown's motion at 6-12. CP at 85-701. None of the supplemented records pertained to Brown herself. The agency record in the Longworth and Lewis cases should not be relevant for the Court's review as neither party has appealed the superior court's decision.

<sup>5</sup> Consequently, this Court has also held that error assigned to the superior court's decision is irrelevant to this court's determination of whether the agency action was invalid under the APA. "[A]ssignment[s] of error to the superior court findings and conclusions are not necessary in review of an administrative action." *Waste Management*, 123 Wn.2d 621 at 633.

**B. Scope of Review**

**1. Under The APA, The Court Should Limit Its Review To Claims Brown Perfected In Her Amended Petition In Consideration Of Commerce's "Action At The Time It Was Taken"**

The scope of the Court's review should be limited to those claims Brown asserted in her Amended Petition for judicial review under the APA. To obtain judicial review, the petitioner must file a petition consistent with the requirements of RCW 34.05.546. Under this section, the petition "must set forth" specified elements, including, "(7) The petitioner's reasons for believing that relief should be granted; and (8) A request for relief, specifying the type and extent of relief requested."

As provided under RCW 34.05.510, the APA at RCW 34.05 Part V is intended to establish "the exclusive means of judicial review of agency action" except, inter-alia, for certain "ancillary procedural matters." The kinds of "ancillary procedural matters" listed at RCW 34.05.510(2) do not appear to include exempting a petitioner from having to plead all claims for relief in her original petition for review (or in any amended petition) given the requirements of RCW 34.05.546. The claims Brown made in her Amended Petition were limited to assertions that Commerce's actions were invalid under RCW 34.05.570(4)(c)(i)-(iii). Amended Petition at 19-20, CP at 45-67.

Throughout her opening brief, Brown argues that under RCW 34.05.570(4)(b) Commerce violated a “duty” to assign her referral to mediation. Brief of Appellant at 6, 12, 34-37, and 47-48. RCW 34.05.570(4)(b) provides that “[a] person whose rights are violated by an agency’s failure to perform a duty that is required by law to be performed may file a petition pursuant to RCW 34.05.514, seeking an order pursuant to this subsection seeking performance . . . .” These arguments and references to the “failure to perform a duty” grounds for judicial review under RCW 34.05.570(4)(b) were not claims made in Brown’s Amended Petition and should be outside the Court’s scope of review.

Similarly, because the scope of judicial review is obtained and constrained under the APA (e.g., RCW 34.05.510), Brown should not be able to obtain judicial review of arguments in support of the three claims made in her Amended Petition relying on arguments to the effect that the “agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure” [RCW 34.05.570(3)(c)] or that the “agency has erroneously interpreted or applied the law.” RCW 34.05.570(3)(d). Those grounds for review are not available here. These claims are only grounds for judicial review in a challenge of an “agency order in adjudicative proceedings” under RCW 34.05.570(3).

Commerce's action was an administrative action allowing for review under RCW 34.05.570(4)—not an action resulting from an adjudicative proceeding.

These distinctions become relevant because Brown's constitutional arguments cross over into alleging that Commerce erroneously interpreted the law—an argument only permitted under RCW 34.05.570(3)(d), but not permitted under RCW 34.05.570(4)(c)(i). *See* Brief of Appellant at 13-33 and 44. For example, Brown's core argument about the meaning of "beneficiary" as the "owner of the promissory note" asserts that "[b]y focusing instead on the identity of the loan servicer,<sup>6</sup> Commerce erroneously interpreted the statute." Brief of Appellant at 14.

The appropriate "target" for Brown's challenge should have been the rational bases for the statutes themselves—this is a target that Brown has both missed and avoided. Brown should not be allowed to conflate the challenges she is required to prove under RCW 34.05.570(4)(c) with challenges she is not allowed to make—i.e., those challenges only allowed under RCW 34.05.570(3)(c) and (d). By confusing the challenges

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<sup>6</sup> Throughout her Opening Brief, Brown inserts misleading references to "servicer" in lieu of "beneficiary" in support of her argument that a beneficiary under the FFA must be the owner of the underlying obligation. *See, e.g.,* Opening Brief at 13, 14, 20, 24, 28, 31, 33, and 44. "Servicer" is not a term referring to any of the three parties (borrower, beneficiary, trustee) addressed as having rights or obligations in to non-judicial foreclosure and under the FFA. A beneficiary (actual holder of the note) may appoint an entity to function as a "servicer" to process the transactions between it and the borrower or the trustee. However, a servicer does not step into the shoes of the beneficiary as the entity entitled to enforce the terms of the note.

available under RCW 34.05.570(4)(c)(i)-(iii) with challenges under RCW 34.05.570(3)(c) and (d), Brown, in effect, would render superfluous the Legislature's adoption of more expansive grounds for judicial review of agency adjudicative orders than are available under judicial review of "other agency action." The case law is clear that "no part of a statute should be deemed inoperative or superfluous unless it is the result of obvious mistake or error. This requires every word, clause or sentence of a statute to be given effect, if possible." *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 13, 810 P.2d 917 (1991).

Brown's Amended Petition alleged that Commerce's actions were unlawful under RCW 34.05.570(4)(c)(i)-(iii). Amended Petition at 19-20, CP at 45-67. These are the only claims raised in the Amended Petition as required under RCW 34.05.546. Accordingly, the Court should not accept Brown's arguments that Commerce's actions were unlawful under any other claims presented in her opening brief—including the claim that Commerce failed to perform a duty under RCW 34.05.570(4)(b). *See* Brief of Appellant at 34-38.

**2. Under The APA, The Validity Of Commerce's Actions Should Be Considered Under The Record Relevant To Its Decision That M&T Bank Was Exempt From Assignment To FFA Mediation**

The scope of review should be limited to Commerce's agency record in the Brown case and any supplemental records admitted by the superior court that have relevance to Commerce's decision in the Brown case "as applied to the agency action at the time it was taken." RCW 34.05.570(1)(b). During the 13-day period that Commerce took action on the Brown mediation referral, the record of communications and documents considered by Commerce are contained in the agency record, AR at 00035-000171.

Brown's brief refers to alleged facts and records both outside the scope of the Commerce's record in the Brown case and outside of the context of Commerce's action "at the time it was taken" regarding Brown's mediation referral. For example, in Brown's "Statement of the Case", she provides a version of the record in the Longworth and Lewis cases, citing the agency record in those cases. Brief of Appellant at 9-10. Both Longworth and Lewis have abandoned their challenges to Commerce's action by failing to appeal the superior court's order denying their respective petitions.

Brown's references to the alleged "dismal conduct" of financial institutions and the New York Attorney General's description of a bank's conduct are not records or facts properly before this Court. Brief of Appellant at 21. The alleged facts under footnotes 4, 20, 36, 37, 39, and

40 of the Brief of Appellant are similarly not part of the record of Commerce's actions in the Brown case "as applied to the agency action at the time it was taken." RCW 34.05.570(1)(b).

**C. The Identity Of The Entity Documented As The Holder Of Brown's Promissory Note Determined Whether Or Not Commerce Could Assign The Referral To FFA Mediation**

**1. The FFA States Clearly What May Be Relied On As "Sufficient Proof" Of The Identity Of The Beneficiary**

In most residential real estate loans, a promissory note secures a deed of trust on the subject property, which by its terms may be foreclosed non-judicially. RCW 61.24 addresses non-judicial foreclosure of such deeds of trust.

Under chapter 61.24 RCW and under the FFA as a part of that chapter, "sufficient proof" of the identity of the beneficiary is addressed by RCW 61.24.163(5)(c) and RCW 61.24.030(7)(a).

RCW 61.24.163(5)(c) states that for mediation to proceed, the beneficiary must provide certain documents to the mediator, including "[p]roof 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)." (Emphasis added.) RCW 61.24.030 lists the "requisites to a trustees sale" and requires (in subsection (7)(a)) that the

trustee “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.” (Emphasis added.)

The plain language of these two subsections confirms the content of a beneficiary declaration that may be relied upon as “sufficient proof” of the identity of the beneficiary. Moreover, the language mirrors the definition of “beneficiary” at RCW 61.24.005(2): “[b]eneficiary” means the holder of the instrument or document evidencing the obligations secured by the deed of trust . . . .”

Although the Brown Note uses the term “Note Holder” rather than “beneficiary,” the meaning is the same under the plain language of the statutory scheme. AR at 000170-171. The rights to enforce the Brown Note are expressly identified as those of the “Note Holder.”

The Brown Note gives notice to the borrowers that the Note Holder is not equivalent to the “Lender” and that “anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the ‘Note Holder.’” As illustrated in the Brown Note, a promissory note secured by the deed of trust issued by the borrower is a negotiable

instrument that may change hands during the life of the loan. Under RCW 62A.3-302, a holder may transfer the instrument to a subsequent holder who then becomes a “holder in due course.”

When Brown’s father and stepmother signed the Brown Note as “borrowers” in June 2008, the original “Lender” and presumed Note Holder was Countrywide Bank, FSB. The Brown Note gave them notice that the original Lender could transfer its rights to a new Note Holder. The Note Holder’s rights are, instead, the rights to receive payments and to take action upon default by the borrowers. AR at 000170-171.

Commerce’s reliance on M&T Bank’s July 23, 2013 declaration as “sufficient proof” of M&T Bank’s identity as beneficiary conformed precisely to these statutory provisions. Brown’s arguments rest on a flawed interpretation of the meaning of “beneficiary” as used in chapter 61.24 RCW and the FFA sections of that chapter. Brown asserts that under the FFA, the “beneficiary” must be the “owner” of the underlying loan—i.e., “that it is the *owner* of the promissory note.” Brief of Appellant at 15. Brown’s proposed interpretation is at odds with the plain language of the statutory scheme and, as discussed below, is not supported under the case law interpreting “beneficiary” under chapter 61.24 RCW.

**2. Case Law Affirms The FFA's Statutory Provisions For Determining The Identity Of The Beneficiary As The Actual Holder Of The Promissory Note**

In 2012, the Washington Supreme Court found the “beneficiary” definition in RCW 61.24 consistent with the legislative intent of the FFA. The Court said: “[f]inding that the beneficiary must hold the promissory note (or other ‘instrument or document evidencing the obligation secured’) is also consistent with recent legislative findings to the Foreclosure Fairness Act of 2011, Laws of 2011, ch. 58, § 3(2).” *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 102, 285 P.3d 34 (2012).

The Court went on to interpret “holder” as used in RCW 61.24, by looking to the UCC:

We will also look to related statutes to determine the meaning of statutory terms. Both the plaintiffs and the attorney general draw our attention to the definition of “holder” in the Uniform Commercial Code (UCC), which was adopted in the same year as the deed of trust act.

*Bain*, 175 Wn.2d 83 at 103 (internal citations omitted).

The plaintiffs argue that our interpretation of the deed of trust act should be guided by these UCC definitions, *and thus a beneficiary must either actually possess the promissory note or be the payee.* We agree.

*Bain*, 175 Wn.2d 83 at 104 (internal citation omitted) (emphasis added).

As noted in *Bain*, the deed of trust “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." *Bain*, 175 Wn.2d 83 at 111, n.15 (internal citations omitted). The promissory note typically is, by its terms, negotiable - that is it may be conveyed by the holder to a new holder, with a concomitant change in the beneficiary of the deed of trust.

The essential negotiability of notes secured by deeds of trust is a fundamental aspect of residential real estate lending. It means that the beneficiary on a homeowner's deed of trust can and may change throughout the life of the loan. In *Bain*, the Washington Supreme Court definitively addressed how the beneficiary is to be identified: It is the party that holds the note. *Bain*, 175 Wn.2d at 89. It is not, as Brown asserts, an investor entity such as Fannie Mae or Freddie Mac who may "own" a contractual right to some or all of the proceeds of payments on the note but lack the standing to enforce the note as the named beneficiary.

Brown's arguments conflate the status of the "beneficiary" as the documented holder of the note with the term "servicer." *E.g.*, Brief of Appellant at 13. Nothing in RCW 61.24 prevents a beneficiary/note holder from also servicing the loan. There is nothing in the relevant record (AR at 00035-00171) that supports the assertion that Commerce's decision in this case regarding the identity of M&T Bank was based on

any consideration other than whether the bank had adequately documented its identity as “beneficiary.”

Two years after *Bain*, Court of Appeals Division One issued a decision addressing whether a beneficiary declaration conforming to RCW 61.24.030(7)(a) could be relied upon by a trustee for purposes of giving notice of a trustee’s sale. *Trujillo v. Northwest Trustee Services, Inc.*, 181 Wn. App. 484, 326 P.3d 768 (2014). A disputed issue was whether the first sentence of RCW 61.24.030(7)(a) should be interpreted to require proof that the beneficiary was the “owner” of the promissory note (Brown’s position) rather than proof the beneficiary was the “holder” of the note (the second sentence of this subsection). *Trujillo*, 181 Wn. App. 484 at 494.

The court examined the beneficiary’s declaration that it was the “actual holder” of the promissory note (conforming to the text of RCW 61.24.030(7)(a)) and concluded that “[a]bsent conflicting evidence it should be taken as true.” *Trujillo*, 181 Wn. App. 484 at 495-96. The court cited *Bain* as authority for the interpretation that the beneficiary is the “holder” of the note and cited the UCC as further clarifying “that the ‘holder’ of the note means ‘the person in possession.’” *Trujillo*, 181 Wn. App. 484 at 496.

The court discussed the term “owner” as used in RCW 61.24 in the context of the UCC, quoting a UCC comment that “[t]he right to enforce an instrument and ownership of the instrument are two different concepts . . . . Moreover, a person who has an ownership right in an instrument might not be a person entitled to enforce the instrument.” *Trujillo*, 181 Wn. App. 484 at 497 (emphasis in original).

The court concluded that the legislature “intended the words ‘owner’ and ‘holder’ to mean different things” and that the UCC “states that these terms are not synonymous.” *Trujillo*, 181 Wn. App. 484 at 498. Citing a pre-Deed of Trust Act, Washington Supreme Court decision, the court recognized that “although these terms are not synonymous, this does not preclude the possibility that an ‘owner’ of a note may also be its ‘holder.’ Where one has the status of both ‘owner’ and ‘holder,’ it is the status of holder of the note that entitles the entity to enforce the obligation. Ownership of the note is not dispositive.” *Trujillo*, 181 Wn. App. 484 at 498 (citing *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 450 P.2d 166 (1969)).

In *John Davis*, the Supreme Court held that “[John Davis] is the *holder and owner* of the notes and mortgages of the [borrower]. The *holder* of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument . . . . It is not

necessary for the *holder* to first establish that he has some beneficial interest in the proceeds.” *Trujillo*, 181 Wn. App. 484 at 499 (citing *John Davis*, 75 Wn.2d 214 at 222-23) (internal citation omitted; emphasis added in *Trujillo*).

*Trujillo* cites the current UCC section defining the “Person entitled to enforce” a negotiable instrument as including “(i) the holder of the instrument”. . . . A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument. . . .” RCW 62A.3-301; *Trujillo*, 181 Wn. App. 484 at 500.

The *Trujillo* court adopted the reasoning in *Bain* that the “interpretation of the Deeds of Trust Act should be guided by relevant provisions of the Washington UCC. The court noted that the UCC definition of “holder” refers to the person in possession of a negotiable instrument: “Like the definition for “beneficiary” [i.e., under RCW 61.24.005(2)], the definition of holder [RCW 62A.1-201(21)] does not include any reference to the term owner.” *Trujillo*, 181 Wn. App. 484 at 501.

The *Trujillo* decision rejected arguments identical to Brown’s in this case, and declined to hold that under RCW 61.24 a beneficiary must be the “owner” of the promissory note, not the “holder.” The court held that RCW 61.24.030(7)(a) does not require . . . [the declared beneficiary]

to also be the ‘owner’ of the note. It requires that a person entitled to enforce a note be a holder and need not also be an owner.” *Trujillo*, 181 Wn. App. 484 at 502.

The provisions for the “Note Holder” in the Brown Note are consistent with the conclusions in *Bain* and *Trujillo* under which the beneficiary is the holder of the note. *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 102, 285 P.3d 34 (2012). *Trujillo v. Northwest Trustee Services, Inc.*, 181 Wn. App. 484, 326 P.3d 768 (2014). As noted in *Bain*, “finding that the beneficiary must hold the promissory note . . . is also consistent with recent legislative findings to the Foreclosure Fairness Act . . . .” *Bain*, 175 Wn.2d 83 at 102. And, as noted in *Trujillo*, “RCW 61.24.030(7)(a), properly read, does not require [the beneficiary declarant] to also be the ‘owner’ of the note. Rather, it requires that a person entitled to enforce a note be a holder and need not also be an owner.” *Trujillo*, 181 Wn. App. 484 at 502.

Brown represents that in *Lyons v. U.S. Bank Nat. Ass’n*, 336 P.3d 1142 (2014), the Court held (contrary to *Trujillo*) that “the foreclosing beneficiary must be the owner of the promissory note.” Brief of Appellant at 30. The Court in *Lyons* considered whether a trustee acted in good faith when it failed to investigate conflicting information about the identity of the beneficiary. The beneficiary declaration examined by the Court in

*Lyons* was found not to have strictly complied with the provisions under RCW 61.24.030(7)(a) because the declaration included additional terms creating ambiguity over whether the declarant was an actual holder. *Lyons*, 336 P.3d 1142 at 1150-51.

*Lyons* reaffirmed the legitimacy of proving the identity of the beneficiary through reliance on a declaration conforming to the provisions of RCW 61.24.030(7)(a). This form of declaration does not require any proof or statement that the beneficiary is the “owner” of the underlying obligation, so long as the declaration is clear about who is the actual holder. Accordingly, *Lyons* does not support Brown’s argument that *Trujillo* “is now suspect, if not impliedly abrogated.” Instead, *Lyons* affirms that a declaration conforming to the terms under RCW 61.24.030(7)(a) can be relied on a sufficient proof of the identity of the beneficiary. That declaration form does not require the declarant to assert an “ownership” interest in the note.

**D. Under RCW 34.05.570(4)(c)(i), Brown Cannot Meet The Burden To Establish “Beyond A Reasonable Doubt” That, As Applied, The FFA Violates Her Alleged Rights To Equal Protection**

Brown has not met her burden to show that, as applied, the exemption of M&T Bank from FFA mediation as provided under RCW 61.24.166 was without reason or purely arbitrary.

Under RCW 34.05.570(4)(c)(i), the appellate court reviews whether Brown has demonstrated that, as applied, the FFA sections Commerce implemented were unconstitutional under the “beyond a reasonable doubt” standard. “It is well established that statutes are presumed constitutional and that statute’s challenger has a heavy burden to overcome that presumption; the challenger must prove that the statute is unconstitutional “beyond a reasonable doubt.” *Sch. Dists.’ Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605-606, 244 P.3d 1 (2010) [internal citations omitted]. “An ‘as applied challenge occurs where a plaintiff contends that a statute’s application in the context of the plaintiff’s actions . . . is unconstitutional.” *Lummi Indian Nation v. State*, 170 Wn.2d, 247, 258, 241 P.3d 1220 (2010) (internal citations omitted).

The beyond a reasonable doubt standard “refers to the fact that one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution. [W]hen we say ‘beyond a reasonable doubt’ we do not refer to an evidentiary standard. ‘Beyond a reasonable doubt’ in this context means that based on our respect for the legislature, we will not strike a duly enacted statute unless we are ‘fully convinced, after a searching legal analysis, that the statute violates the constitution.” *Sch. Dists.’ Alliance*

*for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605-606, 244 P.3d 1 (2010), citing *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998).

The relevant FFA provisions define “beneficiary” (RCW 61.24.005(2)), provide for how the beneficiary’s identity may be determined (RCW 61.24.163(5)(c) and RCW 61.24.030(7)(a)), and establish a class of beneficiaries exempt from mediation (RCW 61.24.166).

Brown recognizes that in the absence of grounds for a heightened scrutiny, her challenge is subject to a “rational basis” standard of review.<sup>7</sup> “Under the rational relationship test, ‘the legislative classification will be upheld unless it rests on grounds wholly irrelevant to achievement of legitimate state objectives.’ The challenger must also do more than challenge the wisdom of the legislative classification; he must ‘show conclusively that the classification is purely arbitrary.’” *State v. C. Little*, 116 Wn. App. 346, 351, 66 P.3d 1099 (2003) (citing *State v. Shawn*, 122 Wn.2d 553, 651, 859 P.2d 1220 (1993)).

Under the rational basis standard of review, the court may assume “any conceivable” rationale or state of facts that could provide a rational

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<sup>7</sup> Brown acknowledges that referral to FFA mediation “is not a fundamental right” and that “its actions are reviewed under a “fundamental fairness’ and ‘rational relationship’ standard.” Brief of Appellant at 44 (citing *Nielsen v. Washington Dept. of Licensing*, 177 Wn. App. 45, 53, 309 P.3d 1221 (2013)).

basis for the statutory classification. *E.g., Andersen v. King County*, 158 Wn.2d 1, 31, 138 P.3d 963 (2006). Empirical evidence is not necessary to support the classification. *Id.* In addition, a statute does not generally fail rational basis review because it is over- or under-inclusive. *Id.* “A classification does not fail rational basis review because it is not made with mathematical nicety or because in practice it results in some inequity.” *Id.* (internal quotations omitted).

This deferential standard of review was illustrated in *American Legion Post # 149 v. Washington State Department of Health*, 164 Wn.2d 570, 192 P.3d 306 (2008). In that as applied challenge to amendments to chapter 70.160 RCW, the *Post* challenged, inter alia, an exemption for defined hotel rooms from the smoking in places of employment prohibition. The Court upheld the exemption classification. The Court stated that “[t]he classification need not be made with ‘mathematical nicety,’ and its application may ‘result [ ] in some inequality.’ It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.” *American Legion*, 164 Wn.2d 570 at 609-10 (internal citations omitted).

Brown fails to articulate a challenge to the “rational basis” for the FFA’s beneficiary exemption that meets the “beyond a reasonable doubt” standard. First, the statute simply distinguishes between beneficiaries who

conducted less than 250 foreclosures in Washington in the prior year and those who conducted more than 250 foreclosures. RCW 61.24.166. Excluding beneficiaries who instigated only a relatively small number of foreclosures in Washington during the prior year from the mediation requirement was a rational legislative decision. The legislature reasonably focused limited mediation resources on trying to avoid foreclosures by those banks that most frequently foreclosed in Washington in the prior year.

Moreover, the legislature was entitled to attack the foreclosure problem in a way that would conceivably attempt to solve the most egregious lack of negotiation first. *See American Legion*, 164 Wn.2d at 609-10. Starting with banks who conducted more than 250 foreclosures in the prior year, especially where resources are limited, was perfectly rational, especially where the constitution allows the legislature to be under-inclusive in its line drawing taking a step by step approach to problem-solving. *Id.* These are conceivable reasons for the statutory distinctions that meet the rational basis standard.

Brown fails to meet the heavy burden of establishing the statutory exemption (RCW 61.24.166) as applied in her case was unconstitutional beyond a reasonable doubt.

**E. Under RCW 34.05.570(4)(c)(i), Brown Cannot Meet The Burden To Establish “Beyond A Reasonable Doubt” That, As Applied, The FFA Violates Her Alleged Due Process Rights**

Brown fails to articulate an “as applied” due process challenge under RCW 34.05.570(4)(c)(i) that meets the “beyond a reasonable doubt” standard. Brown’s due process argument, like her equal protection argument, relies on an interpretation of the FFA and the term “beneficiary” that is at odds with a plain meaning interpretation and the interpretation provided in *Bain and Trujillo*. The FFA clearly established that, as a “beneficiary,” M&T Bank had a right to be exempted from referral to mediation. That entitlement to exemption trumped any alleged “right” of Brown to have her referral assigned to mediation.

In *Washington Independent Telephone Ass’n v. Washington Utilities and Transp. Comm’n*, 149 Wn.2d 17, 65 P.3d 319 (2003), the Court concluded that “the Association members did not establish that they had a constitutionally protected property interest in their status as exclusive telecommunications providers in their service areas; consequently they were not entitled to an adjudicative hearing on . . . [another provider’s] petition for designation as an additional provider.” *Id.* at 20. The Court recognized that the statutory language used the term “may” in allowing the Commission to designate “more than one” provider in a service area. *Id.* at 25. Without proof of plaintiff’s members’

statutory entitlement to exclusivity in a service area, the Court concluded that it need not address all three prongs of the due process test articulated in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (U.S. Va. 1976). *Id.* at 25-26.<sup>8</sup>

As in the *Washington Independent Telephone Ass'n* case, where the plaintiff's members could not prove a constitutionally protected entitlement to exclusive assignment to a service area, in Brown's case she cannot establish a constitutionally protected entitlement to assignment to mediation. The Legislature clearly established a balance of interests with the adoption of the exemption from mediation for beneficiaries who qualify for listing under RCW 61.24.166. A borrower is not entitled to assignment to mediation when the beneficiary is listed under RCW 61.24.166 and thus Brown cannot establish a protected property interest. The absence of an entitlement to a recognized property interest

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<sup>8</sup> Washington case law consistently cites to *Mathews* for a three factor "due process" analysis. As noted in a recent appellate decision, "[u]nder *Mathews*, this court balances three factors: First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *State v. McCuiston*, 174 Wn.2d 369, 392-93, 275 P.3d 1092 (2012). See also *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (U.S. Va. 1976).

defeats a due process challenge.<sup>9</sup>

Brown cites the *Nielsen* decision in support of her argument that Commerce violated her due process rights by not assigning her referral to mediation. *Nielsen v. Washington State Department of Licensing*, 177 Wn. App. 45, 309 P.3d 1221 (2013). Brief of Appellant at 44-45. In *Nielsen*, the court considered a due process challenge to a statutory scheme that forced a driver accused of driving under the influence to choose between applying for an ignition interlock driver's license (IIDL) and appealing the administrative decision that would revoke the driver's license absent the IIDL. The court found this provision had the effect of denying the IIDL holder "the right to access the courts" and bore no rational relation to the state's interest in maintaining the deterrent effect of its drunk driving laws. These factors led the court to hold that "[b]ecause there is no rational basis for the challenged legislative provision, we hold that it violates substantive due process protections." *Id.* at 60-61.

The *Nielsen* decision does not support Brown's due process arguments. Brown has not established a protected right akin to the *Nielsen* right to access the courts. She has failed to establish that the FFA entitled

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<sup>9</sup> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . ." *Washington Indep. Tel. Ass'n*, 149 Wn.2d 17 at 24, quoting *Board of Regents State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

her to assignment to mediation is comparable to access to the courts. Under the FFA, Brown had no entitlement to assignment to mediation because M&T Bank had a statutory right to be exempted from assignment to mediation under the Legislature's policy decision to establish a category of beneficiaries exempt from mediation.

Additionally, as discussed below, Brown has not established that she herself qualified for assignment to mediation because she did not qualify as a borrower under the FFA.

**F. Under RCW 34.05.570(4)(c)(ii) Brown Cannot Establish That Commerce Acted Outside Its Statutory Authority Under The FFA When It Did Not Assign Her Referral To Mediation**

Under RCW 34.05.570(4)(c)(ii), this court must review whether Brown has demonstrated that Commerce acted outside of its statutory authority under the FFA when it determined that M&T Bank was exempt from FFA mediation.

For purposes of Brown's challenge under RCW 34.05.570(4)(c)(ii), the Court should consider what authority Commerce has been granted under the FFA as relevant to this case. "Administrative agencies have those powers expressly granted to them and those necessarily implied from their statutory delegation of authority. Agencies have implied authority to carry out their legislatively mandated purposes. When a power is granted to an agency, 'everything lawful and

necessary to the effectual execution of the power' is also granted by implication of law." *Tuerk v. State*, 123 Wn.2d 120, 124-25, 864 P.2d 1382 (1994) (internal citations omitted).

"The meaning of a statute is a question of law reviewed de novo. The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) (internal citations omitted). Accordingly, this standard requires the appellate court to interpret the applicable provisions of the FFA to ascertain the scope of Commerce's express and necessarily implied authority in relation to Brown referral. Additionally the Court should consider Commerce's authority under the FFA in view of the recent case law. Brown offers no persuasive argument or authority for how she meets her burden to show that Commerce acted outside its statutory authority under the FFA when it did not assign the Brown a referral to mediation.

Brown argues that Commerce erroneously interpreted the FFA and engaged in an unlawful decision making process. Commerce's administrative decisions upon receipt of the Brown referral were squarely within the scope of its authority under the FFA. As discussed above,

Commerce applied the statutory exemption to the mediation requirement consistent with this court's prior decision in *Bain*. Commerce did as the statute directed, accepting evidence of the bank's exemption as directed by the legislature. Arguments that Commerce erroneously interpreted the law, engaged in unlawful decision-making, or failed to perform a duty have no merit and, in any event, are not available to the Petitioners under RCW 34.05.570(4)(c)(ii).

**G. Under RCW 34.05.570(4)(c)(iii) Brown Cannot Establish That Commerce's Determination That M&T Bank Was Exempt From Mediation Was "Arbitrary And Capricious"**

Under RCW 34.05.570(4)(c)(iii) this Court must review whether Brown has demonstrated that Commerce's determination that M&T Bank was the beneficiary and was therefore exempt from FFA mediation was "arbitrary and capricious."

The arbitrary or capricious standard is narrow, and requires that the party asserting it "must carry a heavy burden." *Pierce County Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). Arbitrary or capricious agency action is willful and unreasoning action taken without regard to the attending facts or circumstances. *Squaxin Island Tribe v. Washington State Dept. of Ecology*, 177 Wn. App. 743, 742, 312 P.3d 766 (2013) (citing *Wash. Indep. Tel. Ass'n v. Washington Util. & Transp. Comm'n*, 149 Wn.2d 26, 65 P.3d 319 (2003)). Reviewing courts

give due deference to the specialized knowledge and expertise of an administrative agency. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 595, 90 P.3d 659 (2004). And the courts avoid exercising discretion that our legislature entrusted to the agency. *Squaxin Island Tribe*, 177 Wn. App. 743 at 742 (citing *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 90 P.3d 659 (2004)).

The reviewing court must review the record to determine whether the agency reached its decision “through a process of reason, *not whether the result was itself reasonable in the judgment of the court.*” *Squaxin Island Tribe*, 177 Wn. App. 743 at 742 (citing *Rios v. Dep’t of Labor & Industries*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002) (internal quotation marks omitted) (quoting *Aviation W. Corp. v. Dep’t of Labor & Indus.*, 138 Wn.2d 413, 432, 980 P.2d 701 (1999)). “[N]either the existence of contradictory evidence nor the possibility of deriving conflicting conclusions from the evidence renders an agency decision arbitrary and capricious.” *Squaxin Island*, 177 Wn. App. 743 at 742 (citing *Rios*, 145 Wn.2d 483).

Brown attempts to meet her burden to show Commerce’s decisions were arbitrary and capricious with arguments premised on an interpretation of the FFA at odds with the plain meaning of the applicable statutes and in conflict with the interpretations in *Bain* and *Trujillo*.

Brown has not met her “heavy burden” of proving Commerce’s actions were “arbitrary and capricious.” Commerce’s administrative decisions, based on the record before it (e.g., the mediation referral, the two M&T Bank beneficiary declarations, the Brown note) were clearly within the scope of its authority under the FFA and cannot be construed as “arbitrary and capricious.” For example, at best, Brown’s argument is that Commerce should not have relied on M&T Bank’s second beneficiary declaration. That declaration conforms exactly to the form allowed as proof of beneficiary under the FFA statutes. As noted above, “[n]either the existence of contradictory evidence nor the possibility of deriving conflicting conclusions from the evidence renders an agency decision arbitrary and capricious.” *Squaxin Island*, 177 Wn. App. 73 at 742.

Upon receipt of the Brown referral and before making final decisions, Commerce reviewed documents provided by the beneficiary and borrower. Commerce considered issues raised by the referring entities regarding the beneficiary declarations. Commerce sought out additional information to resolve questions as to the identity of the beneficiary. AR at 00035-000169.

The M&T Bank beneficiary declaration established that it was in the class of federally insured depository institutions exempted from mediation under RCW 61.24.166. Commerce’s action confirming the

beneficiary's identity, determining it was exempt from FFA mediation under RCW 61.24.166, and determining that Brown's referrals could not be assigned to mediation, was determined by a process of reason. Commerce considering the record before it and exercised its statutory authority to consider M&T Bank's declaration as sufficient proof the bank was the beneficiary. Commerce's actions under these circumstances does not meet the criteria for being arbitrary or capricious.

**H. Brown Cannot Show She Was "Substantially Prejudiced" Because She Did Not Qualify As A Borrower Under The FFA**

Under RCW 34.05.570(1)(d), Brown must convince the Court she was "substantially prejudiced" by Commerce's decision before she is entitled to relief. In her Opening Brief, Brown asserts her status as a "borrower" for the first time: "many borrower's like Ms. Brown cannot participate [in mediation] because Commerce misinterpreted the exemption statute . . . ." Brief of Appellant at 21.

Brown cannot have been "substantially prejudiced" without qualifying as a "borrower" as that term is defined under the FFA. *See* RCW 34.05.570(1)(d). On July 23, 2013, when Commerce decided that M&T Bank was exempt and declined to assign Brown's referral to mediation, the term "borrower" was defined as "a person . . . that is liable for all or part of the obligations secured by the deed of trust under the instrument or

other document that is the principal evidence of such obligations, or the person's successors if they are liable for those obligations under a written agreement with the beneficiary." RCW 61.24.005(3). Based on Brown's admission that she was "not obligated on the promissory note," Brown did not qualify as a borrower. Amended Petition at 11, § 53.<sup>10</sup>

In an amendment taking effect June 12, 2014, the Legislature amended RCW 61.24.165 (adding subsections (5) and (6)) to expand the scope of persons who may be referred to mediation. RCW 61.24.165 included the provision that "a person may be referred to mediation if the borrower is deceased and the person is the successor in interest of the deceased borrower who occupies the property as his or her primary residence . . . ." RCW 61.24.165(5). This provision was not in effect at the time Commerce acted on Brown's referral.

Although RCW 61.24.165(5) does not define "successor in interest," the use of this term in the case law consistently represents a condition where a successor has a perfected status to a predecessor's legal interest. To illustrate, in *Stella Sales, Inc. v. Johnson*, 97 Wn. App. 11,

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<sup>10</sup> Commerce did not directly address Brown's status as a Borrower under the FFA when it determined not to assign Brown's referral to mediation. Commerce's decision was focused on identifying the beneficiary and then concluding M&T Bank was exempted from assignment to mediation. AR at 00035-171. Commerce did not reach the issue of whether Brown herself qualified for FFA mediation. However, this court can consider any reason for affirming the superior court's decision. RAP 2.5(a).

985 P.2d 391 (1999), the court held that “[w]hen a party to a lawsuit dies, the cause of action survives, but the action must be continued by or against the deceased party’s representatives or successors in interest.” The court recognized that the transferees of the subject property (by quit claim deed) qualified as successors in interest. *Id.* at 14; 18-19. By contrast, in *Oltman v. Holland America Line, USA, Inc.*, 163 Wn.2d 236, 178 P.3d 981 (2008), the Court found that the wife (husband and wife were plaintiffs) did not qualify as a successor in interest under a travel cruise contract because she herself was not bound by the contract. This precluded her from asserting a forum selection clause: “Susan Oltman did not travel under the contract nor is she an heir, successor in interest or personal representative of a person traveling under the contract. By its express terms, the cruise contract does not apply to nor purport to bind her.” *Oltman*, 163 Wn.2d 236 at 250. As illustrated in these two examples, under Washington case law a successor in interest must acquire a legally perfected interest in the property interest held by the predecessor in interest.

Even under RCW 61.24.165(5), based on Brown’s admissions in her Amended Petition and the record in this case, Brown did not demonstrate that she would have qualified as a “successor in interest” because whatever interest she may have had in the subject property under

either her father or stepmother's pending probate was not represented in her Amended Petition as a perfected interest resulting from a concluded probate proceeding. At most, her Amended Petition represents that the "estates of Ms. Brown's father and stepmother" were subject to a pending probate proceeding. See, Amended Petition at 12, § 57. As such, Brown's interests in the subject property were inchoate.

Brown's inability to show she had "borrower" status is analogous to cases interpreting the lack of APA standing as precluding entitlement to relief.

Under RCW 34.05.530, a person petitioning for judicial review must satisfy three standing requirements stated in the rule. These include whether "[t]hat persons interests are among those that the agency was required to consider when it engaged in the agency action challenged." RCW 34.05.530(2). Under RCW 34.05.570(1)(d), the reviewing court "shall grant relief only if it determines that the person seeking judicial relief has been substantially prejudiced by the action complained of."

In *Allan v. University of Washington*, 140 Wn.2d 323, 997 P.2d 360 (2000), the wife of a faculty member challenged the university's amendments to the faculty disciplinary code. The Court determined that, in consideration of the APA standing requirements, the wife was not

aggrieved or adversely affected by the amendments and lacked standing to seek a declaratory judgment as to the validity of the amendments.

In *Allan*, the Court considered RCW 34.05.530 (1) and (3) to be “injury in fact” requirements and subsection (2) to be a “zone of interest” requirement. *Id.* at 327. The Court concluded that the wife could not demonstrate “a concrete interest of her own” because, unlike her faculty member husband, she had no contractual relationship with the university. Her attenuated “community property interests” in her husband’s employment or any threat to his employment were not “sufficiently real” to satisfy APA standing and entitle her to the requested relief. *Id.* at 332.

Brown’s status is similarly not of a person who comes under the “zone of interest” under the FFA. Brown is not a “borrower” and consequently has no standing to obtain a referral to mediation under RCW 61.24.163(1). Absent standing to obtain a referral, she cannot satisfy the requirement to show any “injury in fact” based on Commerce’s actions in this case.

Accordingly Brown cannot meet the requirement of showing she was “substantially prejudiced” as a condition for obtaining relief under RCW 34.05.570(1)(d).

**I. Even If This Court Considers the Argument, Commerce did not Fail to Perform a Required Duty**

This Court should conclude that Brown failed to perfect her challenge under RCW 34.05.570(4)(b) that Commerce failed to perform a required duty when she omitted this challenge from her Amended Petition. But even if this court reaches this argument, it fails.

Upon receipt of a mediation referral, the FFA necessarily requires Commerce to determine the identity of the beneficiary (at that point in time) and whether that beneficiary is exempt from referral to mediation under RCW 61.24.166. Under the FFA, Commerce had no “duty” to assign the Brown referral to mediation upon obtaining the second M&T Bank declaration identifying it as the beneficiary and therefore an institution exempted from FFA mediation under RCW 61.24.166.

Under RCW 61.24.163(3), Commerce’s express and implied authority required it to determine if documentation (in a form allowed under the FFA) established the identity of the beneficiary in the Brown mediation referral and if that beneficiary was exempt from assignment to mediation under RCW 61.24.166. Commerce performed its statutorily defined functions. The Petitioners clearly do not agree with Commerce’s decisions, but have not established that Commerce “failed to perform a duty” as contemplated under a challenge under RCW 34.05.570(4)(b).

**J. Under RCW 4.84.350 Brown Should Not Be Entitled To An Award Of Attorneys' Fees Because Commerce's Actions Were "Substantially Justified" As Conforming Exactly To The Statutory Scheme Guiding Its Decisions In The Brown Case**

When Commerce applied the exemption in RCW 61.24.166, it did so consistent with the plain language of the statutory requirement of proof, and consistent with case law interpreting the statutory scheme. Under these circumstances, even if Brown were to prevail in this appeal, which she should not, Commerce was "substantially justified" in its actions under the statutes and case law in effect at the time it made its decision. As a result, Brown is not entitled to attorneys' fees under RCW 4.84.350.

**V. CONCLUSION**

Commerce respectfully asks this Court to affirm the superior court's order denying the three grounds for relief Appellant Darlene Brown claimed in her Amended Petition. The agency record in this case documents that Commerce precisely and properly fulfilled its role to consider whether the Brown referral was eligible for assignment to mediation under the Foreclosure Fairness Act. When Commerce was informed by the trustee that the beneficiary holding the Brown promissory note appeared to be exempt from mediation, Commerce took prompt and deliberate steps to confirm the accuracy of this information. Commerce properly concluded that the beneficiary, M&T Bank, had provided the

requisite proof that it was the beneficiary under a declaration conforming to the statutory provisions (RCW 61.24.163(5)(c), RCW 61.24.030(7)(a) and RCW 61.24.005(2)). The case law, in particular the *Bain* and *Trujillo* decisions, affirm Commerce's application of these FFA provisions to the Brown referral. Brown has failed to meet her burden to demonstrate the invalidity of Commerce's actions under any of the three claims for relief stated in her Amended Petition.

Brown's admission in her Amended Petition that was "not obligated on the promissory note" signed only by her father and stepmother precludes Brown from qualifying as a "borrower" under the FFA. Because Brown was not a borrower, she was not entitled to any referral to mediation under RCW 61.24.163(1). Lacking any right to referral to mediation, Brown cannot show entitlement to the relief requested in her Amended Petition. Under RCW 34.05.570(1)(d), Brown's failure to satisfy the "borrower" criteria precludes her from showing she was "substantially prejudiced" by Commerce's decisions. Without the standing to show "substantial prejudice" Brown's requests for relief are without merit.

Brown's lack of status as a "borrower" also refutes her arguments that any of her due process or equal protection rights were violated under the FFA as applied by Commerce. M&T Bank's entitlement to exemption

prevents Brown from having any unconditional right to assignment to mediation (even if Brown had been able to qualify as a “borrower”). The Legislature’s discretion to adopt the exemption provided under RCW 61.24.166 as applied to M&T Bank is presumptively valid under the deferential standard to which it is entitled. Brown has not met her burden to demonstrate that this exemption was unconstitutional “beyond a reasonable doubt.”

Commerce respectfully requests that the Court affirm Commerce’s decision not to assign Brown’s referral to mediation after identifying M&T Bank as the declared beneficiary holding the Brown promissory note and determining that M&T Bank was exempt from FFA mediation under RCW 61.24.166.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of January, 2015.



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**CERTIFICATE OF SERVICE**

I hereby declare under penalty of perjury under the laws of the state of Washington that on the 8th day of January, 2015, I caused to be delivered a copy of the foregoing *Department of Commerce's Response Brief* in the manner indicated.

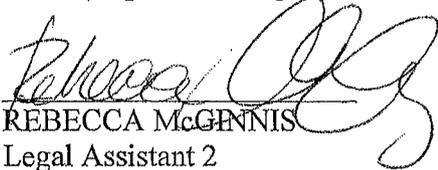
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DATED this 8th day of January, 2015, at Olympia, Washington.

  
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Attached for filing in *Brown v. Washington State Department of Commerce*, No. 90652-1, please find the corrected Department of Commerce's Response Brief and Errata to Department of Commerce's Response Brief. Please do not hesitate to contact me if you have any problems with the attachments.

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