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SUPREME COURT  
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CERTIFICATION FROM UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON

IN

LAURA ZAMORA JORDAN, as her separate estate,  
and on behalf of others similarly situated,

Plaintiff,

v.

NATIONSTAR MORTGAGE, LLC,  
a Delaware limited liability company,

Defendant.

**DEFENDANT NATIONSTAR MORTGAGE LLC'S  
ANSWER TO *AMICUS CURIAE* BRIEF OF  
NORTHWEST CONSUMER LAW CENTER**

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## TABLE OF CONTENTS

	<i>Page</i>
I. INTRODUCTION .....	1
II. ARGUMENT .....	1
A. The Entry Provisions Are Enforceable And Necessary Even Though Relatively Few Defaulted Borrowers Abandon Their Homes .....	1
B. The Entry Provisions Are Not Inconsistent With Offering Borrowers Alternatives To Foreclosure .....	3
C. The Evidence Does Not Support NWCLC's Claim That Lenders Abuse The Authority Granted By The Entry Provisions .....	4
III. CONCLUSION .....	7

## TABLE OF AUTHORITIES

Page(s)

### Cases

<i>Borg-Warner Acceptance Corp. v. Scott</i> , 86 Wn.2d 276, 543 P.2d 638 (1975).....	7
<i>Faircloth v. Old Nat'l Bank</i> , 86 Wn.2d 1, 541 P.2d 362 (1975).....	7
<i>Jackson v. Peoples Fed. Credit Union</i> , 25 Wn. App. 81, 604 P.2d 1025 (1979).....	7
<i>Johnson v. JP Morgan Chase Bank N.A.</i> , No. 14-5607 RJB, 2015 WL 4743918 (W.D. Wash. Aug. 11, 2015).....	3
<i>Mellon v. Reg'l Tr. Servs. Corp.</i> , 182 Wn. App. 476, 334 P.3d 1120 (2014).....	3
<i>Mount Vernon Dodge, Inc. v. Seattle-First Nat'l Bank</i> , 18 Wn. App. 569, 570 P.2d 702 (1977).....	7
<i>Ragde v. Peoples Bank</i> , 53 Wn. App. 173, 767 P.2d 949 (1989).....	7
<i>Walker v. Countrywide Home Loans, Inc.</i> , 98 Cal. App. 4th 1158, 121 Cal. Rptr. 2d 79 (2002).....	2

### Statutes

Revised Code of Washington	
Ch. 7.60.....	2
§ 19.86.090.....	3
§ 61.24.031.....	3
§ 61.24.135(2).....	3
§ 61.24.163.....	3

## Regulations

### Code of Federal Regulations

#### Title 12

§ 1024.38(b)(2) .....	3
§ 1024.40.....	3
§ 1024.41.....	3

#### Title 24

§ 203.501.....	4
§ 203.604.....	3, 4
§ 203.605.....	3, 4

## Other Authorities

### Fannie Mae Servicing Guide (Nov. 25, 2015)

Ch. D2-2.....	3, 4
§ D2-2-11 .....	2
Ch. D2-3.....	4

### Freddie Mac Single-Family Seller/Servicer Guide

§ 64.6.....	3, 4
§ 64.7.....	2, 4
§ 65.6.....	3, 4
§§ 65.12-65.28 .....	3
§ 65.30.....	2, 4
§ 65.33.....	2, 4
§ 67.27.....	4
§ 67.28.....	4

### HUD Handbook 4000.1, *FHA Single Family Housing*

<i>Policy Handbook</i> (rev. Sept. 30, 2015).....	2-4
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### Judicial Council of California, 2015 Court Statistics Report .....

### Michelle J. McFee, *Safeguard Properties calls \$1 million*

<i>settlement with Illinois AG “an amicable resolution”,</i> The Plain Dealer (June 15, 2015) .....	6
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### Edward L. Rubin, *The Code, the Consumer, and the Institutional*

<i>Structure of the Common Law</i> , 75 Wash. U. L.Q. 11 (1997) .....	6
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## I.

### INTRODUCTION

Northwest Consumer Law Center's Amicus Brief advances three principal propositions.

None of them support plaintiff Jordan's argument that Washington law does or should prohibit a home loan borrower from agreeing to permit the lender to enter, secure and maintain the house if the borrower has apparently abandoned it.

Moreover, the amicus brief's third proposition is unsupported and untrue.

## II.

### ARGUMENT

#### **A. The Entry Provisions Are Enforceable And Necessary Even Though Relatively Few Defaulted Borrowers Abandon Their Homes**

The amicus brief begins by stating that many home loan borrowers who default do not abandon or vacate their homes. NWCLC Brief, 3, 4.

That proposition is undoubtedly true. Nationstar Mortgage LLC ("Nationstar") never suggested otherwise.<sup>1</sup>

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<sup>1</sup> Though relatively few defaulted borrowers abandon their homes, the risk of abandonment increases as default lengthens, particularly if the lender is unable to maintain contact with the borrower. That is why the FHA, Fannie Mae and Freddie Mac require property inspections after 45

However, that proposition does not advance Jordan's argument that her deed of trust's Entry Provisions are contrary to Washington law or public policy.

The Entry Provisions protect the lender from loss and the community from blight in the relatively few instances in which the borrower does abandon (or appears to have abandoned) the house, leaving it exposed to potential damage and deterioration. Only in those instances is it "reasonable and appropriate" for the lender to enter, secure and maintain the house. The Entry Provisions authorize entry only in those instances. *See* Freddie Mac Brief, 10-11.

Though relatively infrequently needed or invoked, the Entry Provisions serve an important function.<sup>2</sup> They are not contrary to Washington law or public policy.

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days or more of delinquency. *See* HUD Handbook 4000.1, *FHA Single Family Housing Policy Handbook*, pp. 575-76 (rev. Sept. 30, 2015); Fannie Mae Servicing Guide, § D2-2-11 (Nov. 25, 2015); Freddie Mac Single-Family Seller/Service Guide, §§ 64.7, 65.30, 65.33; *see also Walker v. Countrywide Home Loans, Inc.*, 98 Cal. App. 4th 1158, 1175, 121 Cal. Rptr. 2d 79, 91 (2002) (10% of inspected homes were found to be vacant).

<sup>2</sup> Echoing Jordan, the NWCLC implies that the Entry Provisions are unnecessary because in cases of "true abandonment," lenders can get a receiver appointed under RCW ch. 7.60. *See* NWCLC Brief, 5. Appointment of a receiver is not a practical alternative, as the City of Spokane's brief shows. *See* Spokane Brief, 6-7. It is difficult, time-consuming and expensive to obtain a receiver. There are too few qualified receivers. *Id.*

**B. The Entry Provisions Are Not Inconsistent With Offering Borrowers Alternatives To Foreclosure**

The NWCLC's second proposition is that even after default, borrowers have many "legal options for remaining in their homes or, at a minimum, preserving value in their homes." NWCLC Brief, 4-5.

This proposition is also true but irrelevant to the certified questions.

State and federal law as well as Fannie Mae and Freddie Mac guidelines already require loan servicers to offer defaulted borrowers notice, advice and assistance in exploring alternatives to foreclosure.<sup>3</sup> A borrower already has ample legal remedies if he or she is not given the required assistance.<sup>4</sup>

The Entry Provisions address an entirely different subject: protecting the property if the borrower decides to abandon it rather than explore alternatives to foreclosure.

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<sup>3</sup> RCW 61.24.031, 61.24.163; 12 C.F.R. §§ 1024.38(b)(2), 1024.40, 1024.41; 24 C.F.R. §§ 203.604, 203.605; HUD Handbook 4000.1, *supra* n. 1, pp. 569-604; Fannie Mae Servicing Guide, ch. D2-2 (Nov. 25, 2015); Freddie Mac Single-Family Seller/Servicer Guide, §§ 64.6, 65.6, 65.12-65.28.

<sup>4</sup> RCW 19.86.090, 61.24.135(2); *see Mellon v. Reg'l Tr. Servs. Corp.*, 182 Wn. App. 476, 490, 334 P.3d 1120, 1127 (2014); *Johnson v. JP Morgan Chase Bank N.A.*, No. 14-5607 RJB, 2015 WL 4743918, at \*10 (W.D. Wash. Aug. 11, 2015).

The Entry Provisions are completely consistent with giving defaulted borrowers help in avoiding foreclosure. FHA regulations prove the point, requiring loan servicers to both (a) give borrowers notice and aid in evaluating their foreclosure avoidance options, and (b) inspect, and if necessary, enter, secure and maintain abandoned properties.<sup>5</sup> Fannie Mae and Freddie Mac guidelines impose the same two duties on loan servicers.<sup>6</sup>

**C. The Evidence Does Not Support NWCLC's Claim That Lenders Abuse The Authority Granted By The Entry Provisions**

NWCLC's final proposition is that lenders and loan servicers routinely abuse the authority that the Entry Provisions confer to lockout borrowers who wish to stay and to thwart their efforts to avoid foreclosure, thus benefitting lenders by making foreclosure less costly and time-consuming. NWCLC Brief, 5-7.

The record in this case does not support NWCLC's accusation. Nor do the few news reports it cites.

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<sup>5</sup> 24 C.F.R. §§ 203.501, 203.604, 203.605; HUD Handbook 4000.1, *supra* n. 1, pp. 569-604, 666-669.

<sup>6</sup> Fannie Mae Servicing Guide, ch. D2-2, D2-3 (Nov. 25, 2015); Freddie Mac Single-Family Seller/Servicer Guide, §§ 64.6, 64.7, 65.6, 65.30, 65.33, 67.27, 67.28.

To be sure, loan servicers occasionally make mistakes, wrongly thinking homes have been abandoned when that is not the case. No area of human endeavor is free from error. And, even if Nationstar was mistaken about Jordan and all 52 borrowers whose declarations she submitted, Nationstar's error rate would still be about 1.5% (of the 3,600-member class). Considering the difficulty of determining abandonment from an outside view of a home, that error rate is astonishingly small. If trial courts had equally low error rates, there would be little need for appellate courts.<sup>7</sup>

There is no evidence that Nationstar has entered any borrower's home knowing that it was not vacant or abandoned. Nor is there any evidence that Nationstar has used its authority to enter, secure and maintain properties to evict borrowers or to facilitate foreclosures.

Furthermore, as Freddie Mac's brief points out, a borrower has ample legal remedies if a loan servicer mistakenly enters his or her house

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<sup>7</sup> *See, e.g.*, Judicial Council of California, 2015 Court Statistics Report, at p. 67 (California Courts of Appeal reversed in 17% or 18% of civil appeals disposed of by written opinion in fiscal years 2012 through 2014); available at <http://www.courts.ca.gov/documents/2015-Court-Statistics-Report.pdf>.

when it has not been abandoned or vacated. *See* Freddie Mac Brief, 16.<sup>8</sup> Regulators and public prosecutors have the necessary tools to prevent the sort of widespread misuse of the Entry Provisions that the NWCLC envisions but cannot prove.<sup>9</sup>

Any self-help remedy can be misused by mistake or intentionally. Nevertheless, contract clauses authorizing self-help remedies are as enforceable under Washington law as any other contract provision.<sup>10</sup> Indeed, in upholding self-help repossession of personal property collateral against a constitutional attack 40 years ago, this Court “reasoned that the self-help provisions of the [Uniform Commercial] [C]ode are necessary to protect the interests of creditors and that, but for these provisions of the code, there would be increased costs to defaulting debtors, increased interest

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<sup>8</sup> The McElhaney lawsuit mentioned in NWCLC’s brief (pp. 6-7 & n. 4) illustrates the point. The suit was dismissed after the McElhaney received an undisclosed sum in settlement.

<sup>9</sup> *See, e.g.,* Michelle J. McFee, *Safeguard Properties calls \$1 million settlement with Illinois AG “an amicable resolution”*, The Plain Dealer (June 15, 2015), available at [http://www.cleveland.com/business/index.ssf/2015/06/safeguard\\_properties\\_calls\\_1\\_m.html](http://www.cleveland.com/business/index.ssf/2015/06/safeguard_properties_calls_1_m.html).

<sup>10</sup> *See* Edward L. Rubin, *The Code, the Consumer, and the Institutional Structure of the Common Law*, 75 Wash. U. L.Q. 11, 36-40 (1997).

rates, additional burdens on court systems, and less readily available credit.”<sup>11</sup>

That same reasoning applies with equal force to the Entry Provisions which allow another necessary contractual self-help remedy. As shown in Nationstar’s Answering Brief, the Entry Provisions are enforceable under Washington law and public policy.

### III.

#### CONCLUSION

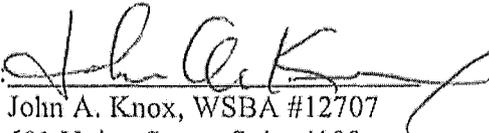
For the reasons stated, the Court should answer the first certified question in the affirmative and the second in the negative.

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<sup>11</sup> *Mount Vernon Dodge, Inc. v. Seattle-First Nat’l Bank*, 18 Wn. App. 569, 582, 570 P.2d 702, 710 (1977) (citing *Borg-Warner Acceptance Corp. v. Scott*, 86 Wn.2d 276, 278, 543 P.2d 638, 640 (1975); *Faircloth v. Old Nat’l Bank*, 86 Wn.2d 1, 4-6, 541 P.2d 362, 363-65 (1975)); see also *Ragde v. Peoples Bank*, 53 Wn. App. 173, 177, 767 P.2d 949, 951 (1989) (“the business community must be given some latitude to pursue reasonable methods of collecting debts even though such methods often might result in some inconvenience or embarrassment to the debtor”); *Jackson v. Peoples Fed. Credit Union*, 25 Wn. App. 81, 84-85, 604 P.2d 1025, 1028 (1979) (same).

RESPECTFULLY SUBMITTED AND DATED this 7th day of  
January, 2016.

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NATIONSTAR MORTGAGE, LLC,  
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**DEFENDANT NATIONSTAR MORTGAGE LLC'S  
CERTIFICATE OF SERVICE**

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**CERTIFICATE OF SERVICE**

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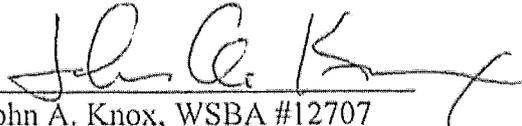
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I certify under penalty of perjury of the laws of the State of  
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Dear Clerk of Court,

Attached for filing in PDF format are the following documents in Laura Zamora Jordan v. Nationstar Mortgage LLC, Supreme Court Cause No. 92081-8.

**DEFENDANT NATIONSTAR MORTGAGE LLC'S ANSWER TO AMICUS CURIAE BRIEF OF NORTHWEST CONSUMER LAW CENTER; and CERTIFICATE OF SERVICE.**

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