IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF FLORIDA

RONALD DESBRUNES,

Appellant, Case No.: 4D22-2647

vs.

US BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AM1,

Appellee.
_____/

APPELLANT'S RESPONSE TO AMICI CURIAE'S BRIEF

The undersigned, as counsel for Appellant RONALD DESBRUNES, hereby files Appellant's Response to the "Amicus Curiae Brief in Support of US Bank National Association's Motion for Rhearing [sic]" (hereinafter "Amici Curiae's Brief") filed within this Court's record as an attachment to the "USFN — America's Mortgage Banking Attorneys,[1] American Legal and Financial

[1] Appellant refers to "USFN — America's Mortgage Banking Attorneys" as "USFN" herein.

Network,[2] and Legal League[3] Motion for Leave to File Amicus Brief in Support of Appellee's Motion for Rehearing, Rehearing En Banc, and Certification" (hereinafter "Amici Curiae's Motion"),[4] and states as follows:

Introduction

This Court entered its decision in this appeal on February 14, 2024. On February 29, 2024, Appellee[5] filed a Motion for Rehearing, a Motion for Rehearing En Banc, and a Motion for Certification (hereinafter also referred to collectively as "Bank's Three Post-Decision Motions"). On the same day USFN, ALFN, LL, and 32 Florida law firms (a total of 35 amici curiae) filed Amici Curiae's Motion with the attached Amici Curiae's Brief. This Court granted Amici Curiae's Motion on March 18, 2024. The question now before this Court is whether Bank's Motion for Rehearing, Motion for

[2] Appellant refers to "American Legal and Financial Network" as "ALFN" herein.
[3] Appellant refers to "Legal League" as "LL" herein.
[4] Appellant refers to USFN, ALFN, LL, and 32 *amici curiae* law firms collectively as "Amici Curiae" herein (see "List of Amici Curiae" in the first operative exhibit appearing within the Amici Curiae's aggregate "Exhibit" to Amici Curiae's Brief, which identifies 32 law firms as additional *amici curiae* in this case).
[5] Appellant alternatively refers to Appellee as "Bank" herein.

Rehearing En Banc, and Motion for Certification should be individually granted or denied.

Appellant respectfully submits for this Court's kind consideration that Amici Curiae's Brief with Exhibit comprises well over 30 pages, much of which has required substantially more than a cursory review to deconstruct the multiple layers of legal arguments conflated therein. Further, in light of Bank's pending Motion for Certification of three enumerated issues, Bank appears to be motivated to pursue an appeal of this matter to the Florida Supreme Court. Appellant must be allowed a meaningful opportunity to provide a competent response to Amici Curiae's Brief for the purpose of making Appellant's record in this case in preparation for any such potential appeal. For these reasons and considerations, Appellant respectfully requests this Court's patience and understanding regarding the length of Appellant's instant Response to Amici Curiae's Brief, which is approximately equivalent to the size of Amici Curiae's Brief with Exhibit.

The following analysis attempts to follow in approximate sequence the order in which Amici Curiae presented issues and argument within Amici Curiae's Brief.

I. Amici Curiae argues that Fla. R. Civ. P. 1.260(a)(1) does not apply to *in rem* foreclosure actions.

Section I of Amici Curiae's Brief is dedicated to an argument that Fla. R. Civ. P. 1.260(a) does not apply to pending *in rem* mortgage foreclosure actions involving a deceased foreclosure defendant's homestead property, and therefore that no substitution of a proper party defendant was required below (hereinafter "Amici Curiae's *in rem* argument"). [Amici Brief 6-18].

An understanding of the construction and operation of six separate sources of the law is necessary to present a rational and complete response to Amici Curiae's *in rem* argument, which are:

Source #1: Art. VI, cl. 2, U.S. Const. (the "supremacy clause")
Source #2: Amend. XIV, §1, U.S. Const. (the "due process clause")
Source #3: Fla. R. Civ. P. 1.260(a)(1) (substitution of deceased parties)
Source #4: Art. X, §4(a)(1), Fla. Const. (the "Florida homestead exemption")
Source #5: §733.607(1), Fla. Stat. (possession of protected and unprotected homestead by a personal representative)
Source #6: §733.608, Fla. Stat. (responsibilities and duties of personal representatives)

Appellant will sequentially address the six sources of law, each of which is directly relevant to Amici Curiae's *in rem* argument.

A. <u>Source #1</u> (Art. VI, cl. 2, U.S. Const.): Florida law is subordinate to the United States Constitution under Art. VI, cl. 2, U.S. Const. (the supremacy clause).

Art. VI, cl. 2, U.S. Const. (commonly referred to as the "supremacy clause") establishes that the United States Constitution and federal law (generally) are the supreme law of the United States and take precedence over state laws and state constitutions.

B. <u>Source #2</u> (Amend. XIV, §1, U.S. Const.): Bank's failure to substitute a personal representative with legal standing to represent the estate of deceased defendant Francois Desbrunes in the lower tribunal action constitutes a violation of Amend. XIV, §1, U.S. Const. (the due process clause).

Amend. XIV, §1, U.S. Const. (commonly referred to as the "due process clause") states in relevant part:

> "… No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amend. XIV, §1, U.S. Const.

Ultimately, the entirety of the arguments presented within Amici Curiae's Brief necessarily fail because the due process guarantees within Amend. XIV, §1, U.S. Const. take precedence over Florida law by virtue of Art. VI, cl. 2, U.S. Const. (the

supremacy clause). Appellant argued within Appellant's initial brief (cited as "IB" herein) and Appellant's reply brief (cited as "RB" herein) that, within the action below, Bank violated the due process clause of Amend. XIV, §1, U.S. Const.

In the initial brief, Appellant argued that Bank (and the lower tribunal) violated due process protections as the result of Bank's opposition to (and the trial court's denial of) Appellant's Motion for Abatement of Action [R. 2126-2127] and Bank's prosecution of the lower tribunal action subsequent to the filing of a suggestion of death in the lower court record [R. 1958-1959] despite Bank's failure to comply with the substitution requirements of Fla. R. Civ. P. 1.260(a)(1). [IB. 7]. In the reply brief, Appellant argued that constitutional due process protections were violated by Bank failing to file or serve any notice of hearing regarding Bank's Motion for Leave to File Amended Complaint and Modify Style [R. 1988] as specifically required for motions for substitution under Fla. R. Civ. P. 1.260(a)(1), and by the lower tribunal failing to hold any hearing on Bank's Motion for Leave to File Amended Complaint and Modify Style prior to entry of the lower court's Order granting Bank's said Motion for Leave. [RB. 12]. In refuting argument presented within

Bank's answer brief [AB. 7-8, 14-18], Appellant also argued, inter alia, that the absence within the lower court's record of a motion for substitution fulfilling the requirements of Fla. R. Civ. P. 1.260(a)(1) resulted in all record activity subsequent to the service and filing of the Suggestion of Death on December 17, 2021 [R. 1958-1959] being a legal nullity under Florida law, thereby constituting a violation of constitutional due process guarantees. [RB. 12-13].

Amici Curiae's *in rem* argument that Fla. R. Civ. P. 1.260(a) does not apply to pending *in rem* mortgage foreclosure actions involving a deceased foreclosure defendant's homestead property, and therefore that no substitution of a proper party defendant was required below [Amici Brief 6-18] is fallacious and erroneous under the due process clause of the United States Constitution. The due process clause of Amend. XIV, §1, U.S. Const. makes no distinction regarding whether citizens are deprived of their property without due process of law within an *in rem* or *in personam* proceeding. Any deprivation of any person's property by any state action is prohibited in the absence of due process of law. Amend. XIV, §1, U.S. Const. Rendition of the final judgment in the foreclosure action below in the absence of a legal representative of the estate of

deceased sole defendant Francois Desbrunes (i.e., a personal representative of such estate) constitutes such prohibited state action.

C. <u>Source #3</u> (Fla. R. Civ. P. 1.260(a)(1)): Subsequent to the filing of the Suggestion of Death in the record below on December 17, 2021 [R. 1958-1959], all record activity below was a legal nullity due to Bank's failure to revive the lower tribunal action by timely compliance with the substitution requirements of Fla. R. Civ. P. 1.260(a)(1) which do apply, inter alia, to *in rem* foreclosure actions.

Fla. R. Civ. P. 1.260 (Survivor; Substitution of Parties) (a) (Death) states:

> (1) *If a party dies* and *the claim is not thereby extinguished*, the court may order substitution of the proper parties. ***The motion for substitution*** may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, ***shall be filed and served on all parties*** as provided in Florida Rule of General Practice and Judicial Administration 2.516 and upon persons not parties in the manner provided for the service of a summons. ***Unless the motion for substitution is made within 90 days after a statement noting the death is filed and served*** on all parties as provided in Rule of Florida Rules of Civil Procedure January 1, 2024 67 General Practice and Judicial Administration 2.516, ***the action shall be dismissed as to the deceased party.***
>
> (2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an

> action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action shall not abate. A statement noting the death shall be filed and served on all parties as provided in Rule of General Practice and Judicial Administration 2.516 and *the action shall proceed in favor of or against the surviving parties*.[6]

Fla. R. Civ. P. 1.260. (Emphasis added).

Amici Curiae's *in rem* argument that Fla. R. Civ. P. 1.260(a) does not apply to pending *in rem* mortgage foreclosure actions involving a deceased foreclosure defendant's homestead property, and therefore that no substitution of a proper party defendant was required below [Amici Brief 6-18] is fallacious and erroneous under the plain, clear, and unambiguous language of Fla. R. Civ. P. 1.260(a).

The specific provisions of Fla. R. Civ. P. 1.260(a)(1)[7] do not mention, infer, or imply that *in rem* actions are treated any

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[6] Subparagraph (a)(2) of Fla. R. Civ. P. 1.260 is irrelevant to this instant case, as there were no surviving parties upon the death of sole defendant Francois Desbrunes in the action below.

[7] Revised by the Florida Supreme Court effective April 8, 2021; had the Florida Supreme Court intended to limit the scope of the Rule to preclude its application to *in rem* actions, it recently had the opportunity to do so. No such revision was made. *In Re: Amendments to Florida Rule of Civil Procedure 1.260*, No. SC20-1240 (April 8, 2021).

differently than other types of actions under the Rule. To justify Bank's circumvention of Fla. R. Civ. P. 1.260(a)(1), Amici Curiae argues [Amici Brief 7, 16, 18] that foreclosure plaintiffs in general, and Bank as plaintiff below specifically, are allowed to "dismiss" a deceased defendant [Amici Brief 18] by "dropping" such deceased defendants within *in rem* foreclosure actions [Amici Brief 5, 7, 16, 18], and are allowed to "add" (or "include") parties [Amici Brief 5, 7, 16, 21] identified by an *ad litem* [Amici Brief 4, 22] as *possible* heirs to the estate of a deceased defendant (all of which improper actions were performed by Bank as plaintiff below).

Amici Curiae states, "… the law permits the plaintiff to *drop the decedent* and *amend to include the new property owners*, and *parties who may have an interest* in the property."[8] [Amici Brief 7] (Emphasis added). Amici Curiae's argument is factitious and wrong. Florida law did not permit the plaintiff below (and does not permit foreclosure plaintiffs in general) to contravene the mandatory

[8] Amici Curiae fails to articulate how Florida law could permit a foreclosure plaintiff to maintain a foreclosure action if a sole deceased defendant were dropped and there were no "new property owners" or "parties who may have an interest in the property" to conveniently add to the caption of an amended complaint.

requirements of Fla. R. Civ. P. 1.260(a)(1) by *dropping* deceased defendant Francois Desbrunes from the case style, and by *adding* or *including* any *purported* heirs to the case style who do not possess the requisite legal standing to represent the estate of the deceased homeowner.

Amici Curiae's Brief asserts on page 18:

> **[1] US Bank *named* the "proper parties" and *dismissed the deceased defendant* via its amended complaint which satisfied the *spirit* and *purpose* of rule 1.260**. See *Sas*, 687 So. 2d at 55. Notwithstanding, this Court found the amendment insufficient to satisfy the requirements of rule 1.260 and declared all the proceedings following Desbrunes' suggestion of death a nullity. **[2] This finding was contrary to the *clear language* of rule 1.260** and outside the purview of the "relief" contemplated when a party failed to comply with the rule. Nothing in the rule or in the cases relied upon by the Court provided a legal basis for declaring an *in rem* foreclosure proceeding against the **[3] *indispensable parties***, **[4] *undisputed heirs*** and **[5] *current owners* of the property** to be a nullity. Rather, the remedy is the **[6] dismissal of that defendant**—which already **occurred here when US Bank amended the complaint to remove Desbrunes**. See Fla. R. Civ. P. 1.260(a). The **[7] Appellee's conduct in dropping Desbrunes was proper** as **he, nor his estate, possessed an interest in the property.**"

[Amici Brief 18]. (Emphasis and enumeration added.)

Amici Curiae's argument is fallacious, erroneous, improperly

conflates multiple issues, and is utterly wrong, as follows:[9]

[1] Amici Curiae first asserts "US Bank *named* the 'proper parties' and *dismissed the deceased defendant* via its amended complaint which satisfied the *spirit* and *purpose* of rule 1.260." [Amici Brief 18] (Emphasis added). It is not possible to "dismiss" a deceased defendant. It is axiomatic that a deceased person cannot be a party to a lawsuit. This is why the Florida Supreme Court promulgated Fla. R. Civ. P. 1.260(a)(1), allowing no more than 90 days for parties to *revive* actions that had *abated* as the result of a death of an indispensable party. See *Floyd v. Wallace*, 339 So.2d 653, 654 (Fla.1976) in which the Florida Supreme Court, citing *Izlar v. Slyke*, 94 Fla. 1218, 115 So. 516 (1928), reiterated the rule that "… the death of an indispensable party before a decree pro confesso or before a final decree *abates* the action, which must be *revived* by bringing in a *legal representative*. … The instant cause of action abated upon the death of Verna Lee Wallace, an indispensable party…" (Emphasis added). The only procedure available to Bank as

[9] Appellant is necessarily obliged to affirmatively refute Amici Curiae's argument within pages 11-18 of Appellant's instant Response for the purpose of setting this Court's record straight regarding the facts in this case and the law as it applies to the facts.

plaintiff below was the timely *substitution* under Fla. R. Civ. P. 1.260(a)(1) of a person with the requisite legal standing to represent the estate of deceased defendant Francois Desbrunes (i.e., a personal representative appointed by a probate court to administer the estate of the deceased defendant).

Amici Curiae argues that Bank's filing of the amended complaint, which modified the style of the action to reflect *the estate* of the deceased defendant Francois Desbrunes (instead of naming the deceased defendant personally), "… satisfied the spirit and purpose of rule 1.260…." [Amici Brief 18]. Amici Curiae's argument is without merit. The *spirit* of the Rule is that plaintiffs who fail to timely and properly *substitute* a deceased defendant will find their cases involuntarily dismissed. The *purpose* of the Rule is to ensure that trial courts prudently consider whether a proposed party defendant possesses the requisite legal standing to be *substituted* in place of a deceased defendant for the purpose of *reviving* an *abated* action. Bank's abuse of the Florida Rules of Civil Procedure in modifying the style of the lower tribunal action for the fallacious design of "dismissing" a deceased defendant to circumvent the application of the Rule satisfied neither the spirit nor the purpose of

Fla. R. Civ. P. 1.260(a)(1). Amici Curiae's reliance on *Sas, id.*, is misplaced, as the case is inapposite to Amici Curiae's argument under the facts in this instant case.

[2] In its decision in this instant case, this Court properly held under Fla. R. Civ. P. 1.260(a)(1) and interpretive Florida case law that "... all action after the suggestion of death was a legal nullity and invalid because the proper party was not before the trial court." [Decision 2]. Appellant finds it incomprehensible how Amici Curiae could assert, "... [t]his finding was contrary to the clear language of rule 1.260..." as if making such a bald assertion would somehow render it true. In fact, the clear language of Fla. R. Civ. P. 1.260(a)(1) requires the holding expressed within the decision issued by this Court.

[3] The only indispensable party remaining in the action subsequent to the death of sole defendant Francois Desbrunes was Bank as plaintiff below. The persons purported by ad litem below to be heirs to the estate of deceased sole defendant Francois Desbrunes were not record title holders of the foreclosure property at issue below, and were neither "current owners of the property" nor indispensable parties to the action below.

[4] Amici Curiae's representation that the persons *purported* to be heirs by the ad litem below were "undisputed heirs" is disingenuous and fallacious. [Amici Brief 18]. All record activity subsequent to the filing of the suggestion of death within the lower tribunal record [R. 1958-1959] was a legal nullity, as held within this Court's decision in this case. The ad litem appointed by the lower tribunal possessed no legal authority under §49.31, Fla. Stat. to adjudicate any persons to be legal heirs to the estate of Francois Desbrunes, or to represent the estate of deceased sole defendant Francois Desbrunes within the action below. Any effort expended by the persons purported to be heirs to dispute Bank's improper characterization of their status within the caption of Bank's amended complaint below absent a probate court's adjudication would also have been a legal nullity, and a waste of their limited financial resources.

[5] Amici Curiae implies that the persons purported by the ad litem below to be heirs of the estate of deceased sole defendant Francois Desbrunes were the "current owners of the property" at the time of rendition of the lower tribunal's final judgment. Amici Curiae earlier argued that the "record title owner" of a mortgaged

property is an indispensable party to a foreclosure action involving such property [Amici Brief, p. 8], citing *Citibank, N.A. v. Villanueva*, 174 So. 3d 612, 613 (Fla. 4th DCA 2015) in support of this argument. Although an *inter vivos* record title owner is an indispensable party to a related foreclosure action, Amici Curiae's argument is erroneous under the facts in our instant case. Upon the death of homestead foreclosure defendant Francois Desbrunes, a personal representative of the estate of Francois Desbrunes became the indispensable party defendant to the action below, as required under §733.607(1) and §733.608, Fla. Stat. See *Source #5* (§733.607(1), Fla. Stat.) and *Source #6* (§733.608, Fla. Stat.) herein. Subsequent to the death of sole defendant Francois Desbrunes, the record title of the foreclosure property remained in the name of Francois Desbrunes within the official records of Broward County, Florida until the Broward County Clerk of Court issued a certificate of title on November 28, 2022 to LITTLEFATSHEEP INVESTMENT LLC as the purchaser of the foreclosure property at the judicial sale. Any person's potential interest in the foreclosure property at issue below which may have *vested* at the time of Francois Desbrunes' death did not result in the issuance of a new certificate of title and

did not automatically *transfer* the deed to the foreclosure property to any persons. Amici Curiae's belief that legal title to Francois Desbrunes' homestead property automatically transferred to any other person upon the death of Francois Desbrunes is erroneous. The final vestige of state action consummating the unconstitutional divestment of deceased foreclosure defendant Francois Desbrunes' homestead property from his estate by the lower tribunal's Final Summary Judgment of Foreclosure for lack of due process was the issuance of the new certificate of title by the Broward County Clerk of Court to the purchaser of the foreclosure property subsequent to the judicial sale.

[6] Again, dismissal of a deceased defendant is not possible under Florida law. Deceased persons are non-entities under the law. A timely substitution of a personal representative under Fla. R. Civ. P. 1.260(a)(1) who possessed the requisite legal standing to represent the estate in matters involving the disposition of an estate asset was the only procedure available to Bank as plaintiff below, and Bank failed to comply with the Rule's requirements.

[7] Under §733.607(1), Fla. Stat., a personal representative was required to take possession or control of the unprotected

homestead property, and to represent the interests of the estate of deceased defendant Francois Desbrunes within the foreclosure action below. See the detailed discussion of *Source #5* (§733.607(1), Fla. Stat.) and *Source #6* (§733.608, Fla. Stat.) herein. The interest of the personal representative in preserving the estate for distribution to persons determined by the probate court to be legal heirs of the estate, and the interests of persons adjudicated by a probate court to be legal heirs to the estate of deceased foreclosure defendant Francois Desbrunes, were the operative interests in the foreclosure property subsequent to the death of foreclosure defendant Francois Desbrunes which were violated by Bank as plaintiff below under both Florida law and the due process clause of the United States Constitution (Amend. XIV, §1, U.S. Const.).

Amici Curiae's argument that "dropping" a deceased foreclosure defendant and "adding" other defendants who do not possess the requisite legal standing to represent the estate of the deceased defendant constitutes compliance with Fla. R. Civ. P. 1.260(a)(1) is erroneous and without merit. [Amici Brief 5, 7, 16, 18]. The action below automatically abated upon the filing of the suggestion of death [R. 1958-1959] regarding sole defendant

Francois Desbrunes. No proper party defendant with legal standing to represent the interests of the *estate* of Francois Desbrunes was timely substituted, and Bank's attempt to "add" or "name" other defendants that did not possess the requisite legal standing to represent the interests of the entire estate of the deceased sole defendant failed to revive the action. Again, see *Floyd v. Wallace*, 339 So.2d 653, 654 (Fla.1976) in which the Florida Supreme Court, citing *Izlar v. Slyke*, 94 Fla. 1218, 115 So. 516 (1928), reiterated the rule that "… the death of an indispensable party before a decree pro confesso or before a final decree *abates* the action, which must be *revived* by bringing in a *legal representative*. … The instant cause of action abated upon the death of Verna Lee Wallace, an indispensable party…" (Emphasis added).] Francois Desbrunes, as the sole defendant in the action below, was clearly an indispensable party.[10] This Court properly held in its decision in this instant case, "The [lower] court erred in denying the motion to abate and entering

[10] Verna Lee Wallace was indispensable to *Floyd, id.*, by virtue of being the sole plaintiff. Fla. R. Civ. P. 1.260(a)(1) does not differentiate between deceased plaintiffs or defendants. Defendant Francois Desbrunes was an indispensable party below by virtue of being the sole defendant within the lower tribunal action.

a final summary judgment without substituting a legal representative of the mortgagor's estate." *Desbrunes v. U.S. Bank National Ass'n*, 2024 WL 591432, at 2.

Within this instant action, the persons that Bank attempted to "add" to Bank's fatally flawed amended complaint did not possess legal standing to represent the estate of deceased defendant Francois Desbrunes. Any individual heir(s) of the estate of Francois Desbrunes did not possess the requisite legal standing to represent the interests of the entire estate. Only a personal representative appointed by a probate court of competent jurisdiction would possess the requisite legal standing to represent the interests of the entire estate of deceased defendant Francois Desbrunes within the lower tribunal foreclosure action for the benefit of all persons adjudicated to be legal heirs to the estate.

Although Bank (as plaintiff below) was not able to identify *the* personal representative of the estate of deceased defendant Francois Desbrunes (because a probate case had not yet been opened), Bank and Bank's counsel certainly knew where to find a probate court of competent jurisdiction within Broward County, Florida. Bank's counsel simply needed to file a petition to open a probate case in

Broward County, and the probate court would have proceeded to appoint a personal representative that Bank could have timely substituted in place of the deceased defendant in the action below.

D. <u>Source #4</u> (Art. X, §4(a)(1), Fla. Const.): If a mortgage associated with a homestead property is properly recorded in the official records of the county in which it is located, that homestead property is *not protected* under the Florida homestead exemption.

Art. X, §4, Fla. Const. provides, in relevant part:

> SECTION 4. Homestead; exemptions.—
>
> (a) There ***shall be exempt*** from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, ***except for*** the payment of taxes and assessments thereon, **obligations contracted for the purchase**, improvement or repair **thereof**, or obligations contracted for house, field or other labor performed on the realty, **the following property** owned by a natural person:
>
> (1) **a homestead**, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family; …

Fla. Const. Art. X, Sect. 4(a). (Emphasis provided).

As reflected within the clear language of Art. X, §4(a), Fla. Const., **an obligation contracted for the purchase of a homestead property is *not protected* under the Florida Constitution's homestead exemption provisions**. The language presented within the homestead exemption provisions creates *exceptions* to the general *exemption* of homestead property from the claims of creditors. One of those exceptions involves mortgage loans borrowed for the purpose of purchasing a homestead property. This *exception* for mortgage loan creditors from the broader *homestead exemption* is what allows foreclosure plaintiffs like Bank to bring foreclosure actions against homestead property that would otherwise be *protected* from claims by creditors. The homestead foreclosure property at issue below was *not protected* from Bank's mortgage loan under the Florida Constitution's homestead exemption provisions by virtue of the Bank's mortgage which was recorded in the official records of Broward County, Florida and which constitutes an *exception* to the homestead *exemption* provisions.

E. <u>Source #5</u> (§733.607(1), Fla. Stat.): A personal representative is *required* to take possession or control of a decedent's *homestead property* that is *not protected* under the Florida Constitution's homestead exemption for the purpose of managing, protecting, and preserving such unprotected homestead property for the benefit of the estate.

§733.607, Fla. Stat. (2017) provides, in relevant part:

> §733.607 Possession of estate.—
>
> (1) Except as otherwise provided by a decedent's will, **every personal representative** has a right to, and **shall take possession or control of, the decedent's property, <u>except the *protected* homestead</u>**, but any real property or tangible personal property may be left with, or surrendered to, the person presumptively entitled to it unless possession of the property by the personal representative will be necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by a beneficiary is conclusive evidence that the possession of the property by the personal representative is necessary for the purposes of administration, in any action against the beneficiary for possession of it. **The personal representative shall take all steps reasonably necessary for the management, protection, and preservation of the estate until distribution and may maintain an action to recover possession of property or to determine the title to it.** …
>
> §733.607, Fla. Stat. (2017).

The clear and unambiguous language of §733.607 ***requires***

that a personal representative ***must*** take possession or control of ***homestead property*** **that is *not protected* under the Florida Constitution's homestead exemption** for the purpose of managing, protecting, and preserving such *unprotected homestead property* (and all other property of a decedent's estate) prior to distribution of estate property to persons determined by the probate court to be legal heirs to such estate.

F. <u>Source #6</u> (§733.608, Fla. Stat.): A decedent's homestead property that is *not protected* under the Florida Constitution's homestead exemption *is an asset of the estate* in the hands of the personal representative; the *personal representative also possesses the legal authority to determine whether a homestead property is protected or not protected* under the Florida Constitution's homestead exemption to allow for the proper administration of a homestead property under Florida probate law and the Florida Constitution's homestead exemption.

§733.608, Fla. Stat. (2011) provides, in relevant part:

> §733.608 General power of the personal representative.—
>
> (1) **All real** and personal **property of the decedent, except the *protected* homestead**, within this state and the rents, income, issues, and profits from it ***shall*** **be assets in the hands of the personal representative**…
>
> (2) If property that reasonably appears to the personal representative to be *protected* homestead is not occupied by a person who appears to have an interest in the property, the

> personal representative is authorized, *but not required*, to take possession of that property for the limited purpose of preserving, insuring, and protecting it for the person having an interest in the property, *pending a determination of its homestead status*. …
> …
> (11) The personal representative shall not be liable for failure to take possession of the *protected* homestead or to expend funds on its behalf. **In the event that the property is determined by the court *not to be protected homestead***, subsections (2)-(10) shall not apply and **any liens previously filed** [by the personal representative under subsections (2)-(10)] **shall be deemed released upon recording of the order** in the official records of the county where the property is located.

§733.608, Fla. Stat. (2011).

Amici Curiae states, "Under §733.608, Fla. Stat., *protected* homestead is not an asset in the hands of a personal representative." [Amici Brief 11]. (Emphasis added). Amici Curiae's *statement* does have limited legitimacy, but Amici Curiae misapprehends Florida law through Amici Curiae's erroneous belief that the deceased defendant's homestead property at issue below was *protected homestead* property in this case. Consistent with Appellant's foregoing argument regarding the language presented within the Florida Constitution's homestead exemption provisions,

the deceased defendant's homestead property at issue below was *not protected* under the Florida Constitution's homestead exemption by virtue of Bank's mortgage which was properly recorded within the official records of Broward County, Florida. Therefore, in the event a property is determined by a probate court **not to be *protected* homestead**, the clear language of §733.608 requires that the **personal representative shall be liable for failure to take possession of an *unprotected* homestead *or to expend funds on its behalf*.**

The foregoing analysis provides conclusive grounds that a personal representative of deceased defendant Francois Desbrunes was an indispensable party to the lower tribunal action, that the Final Summary Judgment of Foreclosure entered by the lower tribunal is a nullity under the law and is therefore void and unenforceable, and that Amici Curiae's *in rem* argument is factitious, erroneous, and without merit.

G. A simple example.

A simple example shall illustrate the factitious nature of Amici Curiae's argument and the critical importance of this Court overturning the lower tribunal's final judgment as reflected within

this Court's decision in this instant appeal. If an unprotected homestead property were the subject of a foreclosure action seeking $1,000.00 in remaining unpaid principal under the loan, and if the deceased foreclosure defendant's estate included over $1,000.00 in liquid assets that could be used to satisfy the debt owed to the mortgage creditor, §733.607(1) properly requires a personal representative of such estate to take possession or control of the *unprotected homestead* foreclosure property to preserve that estate asset for the benefit of persons adjudicated by the probate court to be legal heirs to the estate of the deceased foreclosure defendant.

Bank abused the Florida Rules of Civil Procedure by improperly "dropping" and "dismissing" deceased sole defendant Francois Desbrunes, and "adding" parties (whether dispensable or improper) to circumvent the substitution requirements under Fla. R. Civ. P. 1.260(a)(1). Amici Curiae's erroneous *in rem* argument enabled Bank (and other similarly situated foreclosure plaintiffs) to obstruct a personal representative from managing, preserving, maintaining, and protecting the deceased defendant Francois Desbrunes' estate by failing (whether negligently or intentionally) to ensure that a probate action has been opened. Bank thereby

precluded a personal representative from any possible opportunity to satisfy the outstanding mortgage note obligation with any other assets of the estate as required under §733.607(1), Fla. Stat. (2017) and §733.608, Fla. Stat. (2011). This simple example demonstrates how the arbitrary abuse of Florida law utilized by Bank as plaintiff below allows foreclosure plaintiffs to unconstitutionally deprive a deceased foreclosure defendant's estate of *unprotected homestead* property in violation of Florida law and the due process clause of the United States Constitution regardless of the balance being due to the mortgage creditor under such mortgage and note. Amend. XIV, §1, U.S. Const. Such arbitrary abuse of Florida law exercised by Bank as plaintiff below constitutes an abhorrent, contumacious, and reprehensible practice that should not be tolerated by this Court or allowed to continue in the future within (at a minimum) this Court's jurisdiction.

II. The required consequence of Bank's noncompliance with Fla. R. Civ. P. 1.260(a)(1) was this Court's decision finding that all record activity subsequent to the filing of the suggestion of death below [R. 1958-1959] was a legal nullity and invalid.

Section II of Amici Curiae's Brief is dedicated to an argument that, ***even if*** Bank violated Fla. R. Civ. P. 1.260(a)(1) by failing to

timely substitute a legal representative of the estate of deceased sole defendant Francois Desbrunes, this Court's only recourse was dismissal of the action below. Appellant previously addressed the absence of substantive merit within this Section II of Amici Curiae's argument (see pages 11 to 18 above). Additionally, Amici Curiae apparently fails to appreciate that this Court remanded this case to the lower tribunal for further proceedings consistent with this Court's decision. It would clearly be consistent with this Court's decision for the lower tribunal to dismiss this action for Bank's failure to timely substitute a legal representative of the estate of deceased sole defendant Francois Desbrunes under the requirements of Fla. R. Civ. P. 1.260(a)(1). Amici Curiae's argument is fallacious and (likely) meaningless regarding the consequence of this Court's decision.

It should be noted that Amici Curiae's argument would have this Court defy binding case precedent. Again, in *Floyd v. Wallace*, 339 So.2d 653, 654 (Fla.1976) the Florida Supreme Court, citing *Izlar v. Slyke*, 94 Fla. 1218, 115 So. 516 (1928), reiterated the rule that "… the death of an indispensable party before a decree pro confesso or before a final decree *abates* the action, which must be

revived by bringing in a *legal representative*." (Emphasis added). The binding precedent of *Floyd, id*. requires this Court to find that all record activity subsequent to the filing of the suggestion of death within the lower tribunal record was (and is) a legal nullity under Florida law applicable to the facts in this case, as the lower tribunal action was never timely *revived* subsequent to the automatic *abatement* at the time of filing of the suggestion of death on December 17, 2021. [R. 1958-1959] through a timely substitution of a personal representative of the estate of deceased sole defendant Francois Desbrunes under Fla. R. Civ. P. 1.260(a)(1).

III. Any purported repercussions related to this Court's decision fail to justify any past, present, or future violations of Florida law (as discussed herein) or the due process protections guaranteed under Amend. XIV, §1, U.S. Const.

Section III of Amici Curiae's Brief is dedicated to an argument that this Court should affirm the lower tribunal's final judgment of foreclosure to avoid "widespread repercussions." An affirmance by this Court of the judgment below, which is clearly void under both Florida law and the due process clause of the United States Constitution (Amend. XIV, §1, U.S. Const.) as argued herein, cannot be justified or countenanced upon any evidence of purported

repercussions, including but not limited to the inadmissible evidence filed within this Court's record in this instant appeal (see Appellant's Objection to Amici Curiae's Brief filed within this Court's record on even date herewith). This Court's decision in this case must stand.

At its essence, Amici Curiae's argument regarding purported repercussions of this Court's decision assumes the position that, ***even if*** *Bank as plaintiff below (and other similarly situated foreclosure plaintiffs in other cases unidentified by Amici Curiae) violated Florida law and the due process protections guaranteed under the United States Constitution* (Amend. XIV, §1, U.S. Const.), the lack of knowledge of Florida law and constitutional due process protections demonstrated by such foreclosure plaintiffs and their counsel and their resulting violations of Florida and federal law should be disregarded by this Court through an affirmance of the lower court's void final judgment for the purpose of avoiding such repercussions. Appellant respectfully posits that ignorance of the law is no excuse. In *Ellis v. Hunter*, 3 So.3d 373 (Fla. 5th DCA 2009) Florida's Fifth District Court of Appeal stated, in pertinent part:

In rejecting a similar due process argument … the Supreme

> Court of Wisconsin, in *State v. Iglesias*, 185 Wis.2d 117, 517 N.W.2d 175 (1994), explained that with respect to providing adequate notice, "a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply.... It is well established that ***persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property.***" Id. at 184 (quoting *Texaco, Inc. v. Short*, 454 U.S. 516, 532, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982)); see also *Davis v. State*, 928 So.2d 442, 448 (Fla. 5th DCA 2006) (rejecting the argument that the county violated the defendant's due process rights when it failed to give him proper notice of code violations and an opportunity to correct them because "**every person is presumed to know the law and ... ignorance of the law is no excuse.**" (quoting *Am. Home Assur. Co. v. Plaza Materials Corp.*, 908 So.2d 360, 377 (Fla. 2005)).

Ellis v. Hunter, 3 So.3d 373, 379 (Fla. 5th DCA 2009). (Emphasis added).

It should also be noted that Amici Curiae argues:

> … **[T]he effects of this ruling** will ripple throughout the mortgage foreclosure community, including … **bona fide purchasers**. … The instability this [Court's] ruling causes for already-foreclosed homes is likewise important to note. Certainty and finality in property ownership are fundamental principles of our legal system and community. However, **this ruling** calls into question the validity of foreclosure judgments/sales entered without a personal representative, rendering them potentially void or voidable, which **would cast doubt on the ownership rights of countless properties**. … [Amici Brief 19-20].

Apparently the 35 Amici Curiae (including 32 Florida law firms) are not familiar with §702.036, Fla. Stat. (2018) which states,

in pertinent part:

> 702.036 Finality of mortgage foreclosure judgment.—
>
> (1)(a) In any action or proceeding in which a party seeks to set aside, invalidate, or challenge the validity of a final judgment of foreclosure of a mortgage or to establish or reestablish a lien or encumbrance on the property in abrogation of the final judgment of foreclosure of a mortgage, **the court shall treat such request solely as a claim for monetary damages and may not grant relief that adversely affects the quality or character of the title to the property** …

The argument presented within Section III of Amici Curiae's Brief is erroneous and without merit.

IV. This case does not present issues of exceptional importance under Fla. R. App. P. 9.331(d) or issues of great public importance under Fla. R. App. P. 9.330(a)(2)(C).

Appellant finds it difficult to conceive how Amici Curiae can argue that issues and argument presented within Amici Curiae's Brief constitute issues of either exceptional importance (regarding motions for rehearing en banc) or great public importance (regarding motions for certification) when the words "exceptional" and "public importance" do not appear anywhere within Amici Curiae's Brief prior to the presentation of the three questions proposed for certification. In particular, Amici Curiae's argument

that Question 3 (regarding the propriety of appointing an *ad litem* under §49.31, Fla. Stat. (2023) should be certified as an issue of great public importance is disingenuous because the term "ad litem" appears only one other time throughout the Amici Curiae's Brief (within the portion entitled "Identity and Interest of Amici Curiae"). As the *ad litem* issue was not mentioned within the "Summary of the Argument" or "Argument" portions of Amici Curiae's 22-page Brief, it is difficult to conceive how Amici Curiae can argue that any issues related to *ad litem* appointments can rise to the level of "great public importance." Amici Curiae's argument that Question 3 should be certified to the Florida Supreme Court is without merit.

Appellant devoted significant time and effort analyzing Bank's Motion for Rehearing En Banc and Bank's Motion for Certification within Appellant's previously filed responses and objections. Appellant must necessarily hereby incorporate herein by reference the argument reflected within Appellant's Response and Objection to Appellee's Motion for Rehearing En Banc, and within Appellant's Response and Objection to Appellee's Motion for Certification. Reiterating said arguments herein which are currently under review

by this Court should be unnecessary.

Ultimately, if the new issues and arguments raised for the first time in this proceeding on February 29, 2024 by the filing within this Court's record of Bank's Three Post-Decision Motions, Amici Curiae's Motion, and Amici Curiae's Brief were of the nature and character required to qualify as issues of either exceptional importance or great public importance, Bank's appellate counsel would (or should) have seen fit to include them within Bank's Answer Brief.

Conclusion

The violations of Florida law and the due process guarantees under the 14th Amendment of the Constitution of the United States by Bank as Appellee (and plaintiff below) are clear. Amici Curiae's expectation that this Court should reverse its decision and embrace the clear violations of Constitutional due process protections apparent upon the face of the record below is misplaced. By holding within this Court's decision that the lower tribunal's final judgment must be reversed, this Court has established its locus on the right side of history. See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (involving due process violations in Florida under Amend. XIV, §1,

U.S. Const.).

The errors committed by Bank and Bank's counsel in the lower tribunal action could have been easily avoided. If Bank had timely filed a simple petition[11] to open a probate action as an interested person in such estate,[12] and then timely substituted the duly-appointed personal representative of the estate as a proper party defendant in the foreclosure action below, Bank as plaintiff below could have avoided the violations of Florida law and the due process clause of the United States Constitution existent within the lower tribunal action.

The decision entered by this Court in this case is correct and proper under Florida law and the due process clause of the United States Constitution. This Court overlooked no issue presented by the parties in this appeal, and this Court's decision reflects that

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[11] For example, Florida Lawyers Support Services, Inc. lists a 2-page Form P-3.0160 Petition for Administration by an interested party (intestate nonresident-single petitioner) (available at https://flssi.org/wp-content/uploads/2024/01/2024-Probate-Long-Order-Form.pdf)

[12] The filing fee to open a probate case involving Summary Administration of $1000.00 or more is $346.00 (available at: https://www.browardclerk.org/GeneralInformation/FeesAndCosts#CourtFilingFees)

this Court did not misapprehend Florida law. This case is not of exceptional importance, and this case does not present any issues of great public importance. As stated within Appellant's responses and objections to Bank's Three Post-Decision Motions, a rehearing, rehearing *en banc*, or certification of this case to the Florida Supreme Court is not warranted. A more in-depth understanding of relevant Florida law and constitutional due process law by counsel that represent plaintiffs in foreclosure actions *is* warranted.

An affirmance of the lower tribunal's Final Summary Judgment of Foreclosure would constitute a violation of Florida law as discussed in detail herein (including but not limited to Fla. R. App. P. 1.260(a)(1)) and would violate the due process protections guaranteed under Amend. XIV, §1, U.S. Const. Appellee Bank's Motion for Rehearing, Motion for Rehearing En Banc, and Motion for Certification must be denied.

WHEREFORE, Appellant respectfully requests that this Court:

(1) Enter an order denying Appellee's Motion for Rehearing, Motion for Rehearing En Banc, and Motion for Certification; and

(2) Deny Bank's pending Motion for Leave to File a Reply to

Appellant's responses and objections to Bank's Three Post-Decision Motions; and

(3) Deny any future motions in this case related to Bank's Three Post-Decision Motions.[13]

Dated: April 2, 2024

Respectfully submitted,

SAJLAW P.A.

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[13] *Broward County v. Coe*, 376 So.2d 1222, 1223 (Fla. App. 1979) ("Somewhere the curtain must ring down on litigation.").

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished electronically to the recipients on the attached service list on this 2nd day of April, 2024.

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