No. 22-CV-5

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

NEW PENN FINANCIAL, LLC d/b/a
SHELLPOINT MORTGAGE SERVICING,
APPELLANT,

V.

LASHAN DANIELS, *et al.*,
APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF THE ISSUES

The District of Columbia Condominium Act of 1976, D.C. Code § 42-1901.01 *et seq.*, allows a condominium association to foreclose on a unit for unpaid assessments and gives the association a super-priority lien for the most recent six months of unpaid assessments. The proceeds from such a foreclosure sale are first used to satisfy the association's lien, with any remaining funds distributed to junior lienholders in order of priority. If the sale fails to generate sufficient funds to satisfy the junior liens, then they are extinguished, and the foreclosure-sale purchaser acquires free and clear title. New Penn Financial, LLC, doing business as Shellpoint Mortgage Servicing, acquired a first deed of trust that was so extinguished, and it sued to preserve its interest or invalidate the sale. After the Superior Court dismissed the suit, Shellpoint decided to challenge the Act on constitutional grounds for the first time on appeal. The District of Columbia participates only to defend the Act against the constitutional challenges and therefore addresses the following issues:

1. Whether Shellpoint forfeited its constitutional claims by failing to raise them before the Superior Court—and alternatively, whether this Court should entertain its facial due process challenge when the Act has since been amended to cure any alleged defect in its notice provisions and Shellpoint does not allege a lack of actual notice in this case.

2. Even if the constitutional Taking Clause claim were not forfeited, whether the Act effected a taking by permitting Brandywine to foreclose on the unit, where background principles of state property law had already conditioned the first deed of trust when it was created, and the challenged government action took place before Shellpoint acquired its interest; the statute merely reassigns lien priority rather than destroys a lien; and the scheme does not physically invade a cognizable property interest.

STATEMENT OF THE CASE

In 2007, Lashan Daniels bought a unit at the Brandywine Crossing I Condominium Complex, subject to a $204,000 mortgage secured by a first deed of trust. When Ms. Daniels failed to pay her monthly assessments, Brandywine secured a super-priority lien on her unit and, in 2014, sold it at a foreclosure sale to Tyroshi Investments, LLC, for $5,000. About one year after the foreclosure sale, Shellpoint acquired Ms. Daniels's deed of trust and, in 2016, instituted foreclosure proceedings against her in the Superior Court. It later added Tyroshi and Brandywine as defendants and sought a declaratory judgment that its first deed of trust had not been extinguished by the earlier foreclosure sale or, alternatively, that the sale was void. The Superior Court dismissed Shellpoint's claims.

On January 5, 2022, Shellpoint filed a timely notice of appeal. On appeal, Shellpoint raises for the first time two constitutional challenges to the underlying

statutory scheme: a facial due process challenge and a Takings Clause claim. Pursuant to D.C. Ct. App. R. 44(b), on February 2, Shellpoint provided notice to the Attorney General for the District of Columbia of its newly raised constitutional claims. On July 6, the District notified the Court that it wishes to file a brief and participate in oral argument to defend the District's law.

STATEMENT OF FACTS

1. The District Of Columbia Condominium Act.

The Condominium Act of 1976 provides for the creation and governance of condominiums and regulates the offering of condominium units. D.C. Law 1-89, 23 D.C. Reg. 9632b (Mar. 29, 1977) (codified at D.C. Code § 42-1901.01 *et seq.*). Among other things, the statute permits a condominium association to place a lien against a unit—and, if necessary, institute a foreclosure sale—if the owner fails to pay her monthly condominium assessments, fees, charges, or other penalties. *Id.* § 313 (codified at D.C. Code § 42-1903.13). When first enacted, the Act provided that the condominium association's lien would be prior to other liens or encumbrances, except for, among other things, a first mortgage or first deed of trust that was recorded before the date on which the assessment became delinquent. *Id.* § 313(a).

In 1991, the Council amended the statute to "give [condominium] associations the maximum flexibility in collecting unpaid condominium assessments." D.C.

Council, Committee Report on Bill 8-65, at 3 (Nov. 13, 1990). As amended, the statute provided that the association's lien "shall [also] be prior to a [first] mortgage or [first] deed of trust . . . to the extent of the common expense assessments . . . which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien." Condominium Act of 1976 Reform Amendment Act of 1990, D.C. Law 8-233, § 2(gg)(2), 38 D.C. Reg. 261, 283-84 (Mar. 8, 1991). In 2014, the Council expanded this provision to give an association a super-priority lien not only for the six months immediately before an enforcement action, but also for the six months immediately before "recordation of a memorandum of lien against the title to the unit by the unit owners' association." Condominium Amendment Act of 2014, D.C. Law 20-109, § 2(l), 61 D.C. Reg. 4304 (June 21, 2014) (codified at D.C. Code § 42-1903.13(a)(2)). Thus, if a unit owner failed to pay her monthly assessments, an association could acquire a super-priority lien—which was superior to a prior-recorded first mortgage or first deed of trust—for the most recent six months of assessments due immediately before an enforcement action or before the recording of the lien. D.C. Code § 42-1903.13(a)(2).

This Court has since clarified the contours of this statutory scheme. Two months after the 2014 amendments, this Court held in *Chase Plaza Condominium Association, Inc. v. JPMorgan Chase Bank, N.A.* that if an association forecloses on

its six-month super-priority lien, it may distribute the proceeds first to satisfy its own lien. 98 A.3d 166, 172 (D.C. 2014). "Any liens [including a first mortgage or first deed of trust] that are [left] unsatisfied by the foreclosure-sale proceeds are extinguished, and the foreclosure-sale purchaser acquires free and clear title." *Id*. The Court explained that lenders could protect themselves "either by requiring payment of assessments into an escrow account or by paying the assessments themselves to prevent foreclosure." *Id.* at 175. In 2018, this Court clarified that the first mortgage or first deed of trust was extinguished even if the association expressly sold the unit "subject to the first mortgage or first deed of trust," *Liu v. U.S. Bank Nat'l Ass'n*, 179 A.3d 871, 874 (D.C. 2018), and even if it seeks to recover more than the "six-month portion . . . entitled to super-priority status," *4700 Conn 305 Tr. v. Cap. One, N.A.*, 193 A.3d 762, 764 (D.C. 2018) (citing *Liu*, 179 A.3d at 879 n.9).

The Condominium Act also establishes some requirements regarding notice of the foreclosure sale. Originally, the Act required notice to be sent by certified mail to the unit owner. D.C. Law 1-89, § 313(c). As amended in 1991, the Act required that notice be sent 30 days before the sale to the unit owner by certified mail and to the Mayor. D.C. Law 8-233, § 2(gg)(2)(c)(4). It also required that the association give "public notice" through an advertisement in a local newspaper, on at least three separate days during the 15-day period before the sale, and "by any other means the [association] deems necessary and appropriate to give notice of

sale." *Id*. § 2(gg)(2)(c)(5). When this Court held in *Chase Plaza* that a foreclosure sale could extinguish a prior-recorded first mortgage or first deed of trust, it recognized that the statute did not explicitly require notice to the holders of a first mortgage or first deed of trust. 98 A.3d at 177 & n.7. However, the Court "ha[d] no occasion to address those issues" in part because no argument had been raised regarding the constitutionality of the statute's notice provisions. *Id.* at 177 n.7.

Three years later, in 2017, the D.C. Council amended the statute once again, in part "to improve notice requirements before foreclosure sales." Condominium Owner Bill of Rights and Responsibilities Amendment Act of 2016, D.C. Law 21-241, 64 D.C. Reg. 1602 (Apr. 7, 2017). Among other changes, this amendment expanded the statute's notice requirements, specifying additional parties who must receive notice before a foreclosure sale:

> At least 31 days in advance of the [foreclosure] sale, a copy of the Notice of Foreclosure Sale of Condominium Unit for Assessments Due shall be sent by a delivery service providing delivery tracking confirmation and by first class mail to:
>
> (I) The Mayor or the Mayor's designated agent;
> (II) Any and all junior lien holders of record; and
> (III) Any holder of a first deed of trust or first mortgage of record, their successors and assigns, including assignees, trustees, substitute trustees, and [the Mortgage Electronic Registration System].
>
> The unit owners' association shall be in compliance with this requirement if it sends notice as provided herein to the lienholders as their names and addresses appear in land records.

Id. (codified at D.C. Code § 42-1903.13(c)(4)(E)).

2. Ms. Daniels Fails To Pay Her Condominium Assessments, And Brandywine Forecloses On Her Unit And Sells It To Tyroshi.

In June 2007, Ms. Daniels borrowed $204,000 from Countrywide Home Loans, Inc. to purchase a unit in the Brandywine Crossing I Condominium Complex at 713 Brandywine Street, SE. App. 88-90. Ms. Daniels secured the mortgage with a signed promissory note and deed of trust. App. 88-90. All three documents were recorded with the District of Columbia Recorder of Deeds that day. App. 84-87. The deed of trust incorporated a condominium rider that required Ms. Daniels to pay all condominium dues and assessments and, if not timely paid, authorized the "Lender [to] pay them" instead and include such amounts as additional debts secured by the deed of trust. App. 101-02.

Beginning in September 2009, Ms. Daniels stopped paying her condominium assessments. App. 130. On April 28, 2010, Brandywine recorded the first "notice of condominium lien for assessments due" for $6,040.73 and costs, covering the period between September 21, 2009, to December 31, 2010. App. 130; *see* App. 299. On June 24, 2011, Brandywine recorded another lien for $4,740 plus costs for the period between January 1, 2011, to December 31, 2011. App. 132; *see* App.

299.[1] In 2012, Countrywide assigned its interest in Ms. Daniels's property to Bank of America, N.A., its successor by merger. App. 178-79.

On May 22, 2014, about three years after Brandywine's second notice to Ms. Daniels, the association recorded a "Notice of Foreclosure Sale of Condominium Unit for Assessments Due" against Ms. Daniels's unit. App. 174-75. The Notice of Foreclosure Sale stated that Ms. Daniels owed Brandywine $7,838.50 in unpaid assessments plus additional fees and charges (totaling nearly $13,000 in all), and that a foreclosure sale was scheduled for June 24, 2014. App. 174. Brandywine served Bank of America, by certified mail, with notice of the foreclosure sale around May 5 and again around May 27. App. 181-82, 192-97. The Notice was also advertised in *The Washington Times* on June 13, June 18, and June 23. App. 84. There is no claim that Bank of America failed to receive the notices—only that the mailing address used for the notices differed from the specific address listed for Bank of America on the recorded assignment of the deed of trust. App. 216 & n.4.

In light of the foreclosure sale, Ms. Daniels stopped paying her mortgage and defaulted under the note and deed of trust. App. 239. On June 24, the foreclosure

[1] There appears to be a typo in the dates for both notices, which suggest the notices were recorded in 2000 and 2001 (and on April 9 and May 20, respectively). App. 130, 132. But because the Superior Court and the parties below used the April 28, 2010 and June 24, 2011 dates, the District does so here too. *See, e.g.*, App. 78 ¶¶ 48-49, 239, 334.

sale took place. App. 79 ¶ 56. Brandywine sold the unit to the highest bidder, Tyroshi, for $5,000. App. 79 ¶ 56. The sale advertised that the unit would be sold subject to any superior liens, including the first deed of trust. App. 79 ¶ 53-55. And the deed to Tyroshi explicitly stated that the sale was "subject to the balance on a first deed of trust in the face amount of $204,000.00." App. 84. Brandywine and Tyroshi executed the deed on July 19, 2014. App. 84-87. According to Shellpoint, the unit's tax-assessed value was $131,380, putting its foreclosure sale price at about 3.8 percent of that value. App. 207.

About one year later, on July 29, 2015, Bank of America assigned its interest in the first deed of trust to Shellpoint. App. 109. On August 18, Shellpoint recorded its interest. App. 109-10. About one month later, on September 25, Tyroshi's deed from the sale was recorded. App. 85, 239.

3. Shellpoint Brings This Suit To Foreclose On Ms. Daniels's Unit.

On April 12, 2016, about two years after Ms. Daniels stopped paying her mortgage, Shellpoint filed a complaint in the Superior Court to institute foreclosure proceedings against her. App. 9. After realizing that the property had already been sold at a foreclosure sale, Shellpoint filed a first amended complaint in September and added Tyroshi as a defendant. *See* App. 240, 314. During this period, Ms. Daniels filed for bankruptcy, and the case was stayed for about a year, until January 2018. *See* App. 240. In March 2018, Tyroshi filed an answer to Shellpoint's

complaint, asserting that the earlier foreclosure sale had extinguished Shellpoint's deed of trust. *See* App. 240.

On September 25, 2018, Shellpoint filed a second amended complaint, adding Brandywine as a defendant and adding new claims for declaratory relief. App. 70. Shellpoint sought a declaratory judgment that its first deed of trust had not been extinguished by the foreclosure sale and, in the alternative, that the foreclosure sale was void based on unconscionability and materially false representations. App. 78-83. As to notice, Shellpoint alleged that "[t]he Condo Foreclosure Sale was not noticed adequately under D.C. Law" and that Brandywine "failed to provide [Shellpoint] with proper notice of its foreclosure sale." App. 79-80 ¶¶ 61-62. Shellpoint did not raise any constitutional challenges to the Condominium Act, nor did it mention any other deficiencies with the statutory scheme. In fact, Shellpoint never mentioned D.C. Code § 42-1903.13 or the words "constitution," "due process," or "takings."

In March 2019, Brandywine moved to dismiss the second amended complaint or, in the alternative, for summary judgment. Relevant here, Brandywine challenged Shellpoint's "conclusory" assertion that it had failed to provide proper notice on two grounds. First, Brandywine attached evidence that it had "provided Bank of America notice of the Condo Foreclosure Sale on May 5, 2014 and again on May 27, 2014" through certified mail. App. 157. Second, because Shellpoint's reasons

for discussing notice were unclear, Brandywine assumed its arguments about notice were part of a wrongful foreclosure claim, which compensates a property owner if a foreclosure is executed contrary to law. *See* App. 162. As a result, Brandywine argued, Shellpoint failed to state a claim because District law at the time of the foreclosure sale required that notice be served only on the unit owner and Mayor, not on other lien holders. App. 163.

In its opposition, Shellpoint raised several grounds to set aside the foreclosure sale. First, it argued that the sale price "shock[ed] the conscience" given that the unit sold for less than four percent of its tax-assessed value. App. 211-12. Second, Shellpoint claimed that Brandywine had "improperly advertised" the sale resulting in an "inadequate price" by falsely representing that the unit would be subject to prior mortgage liens. App. 213-16. Regarding Brandywine's evidence that it gave Bank of America notice of the foreclosure sale, Shellpoint argued that "solely focusing on the adequacy of the sale notices . . . [was] a straw man [argument]," and that the "allegedly insufficient sale notices are only one of several factors" to void the foreclosure sale. App. 216. Shellpoint also argued that Bank of America's purported receipt of the notices would "only deepen the factual basis showing that the Association falsely represented the sale advertisement terms, both constructively by publication, and directly by notice." App. 216. In a footnote, Shellpoint stated that Brandywine's proof that notice was served on Bank of America did not indicate

that notice was mailed to Bank of America's address on the recorded assignment of deed of trust. App. 216 n.4. Notably, even though Brandywine directly argued that Shellpoint failed to state a claim because District law at the time of the foreclosure sale required notice only to the unit owner and Mayor, Shellpoint did not raise any concerns—constitutional or otherwise—with the statutory scheme.

On July 12, 2019, the Superior Court granted in part Brandywine's motion, ruling that the foreclosure sale extinguished Shellpoint's deed of trust. App. 238-45. As to notice, the court agreed that because the statute did not at the time require Brandywine to serve notice on junior lienholders, Shellpoint failed to state a claim. App. 244. The court further recognized that the record suggested notice *had* been served on Bank of America, Shellpoint's predecessor, even if not necessarily at the particular address on the recorded assignment of the deed of trust. App. 244 n.5. Though the court dismissed Shellpoint's argument that its deed of trust survived the foreclosure sale, it allowed the argument that the foreclosure sale was void on equitable grounds and unconscionability to proceed. App. 244-45.

On August 2, 2021, the Superior Court issued a corrective and omnibus order dismissing all remaining claims in the case. App. 297. Based on recent precedent, the court determined that the unconscionability of a foreclosure sale price must be assessed at the time of the foreclosure sale, not the time of the litigation. Thus, whether a purchase price was unconscionable is based on the parties' assumptions

at the time of the sale—that the unit would be subject to the first deed of trust, as advertised—and not based on its knowledge, years later in litigation, that the first deed of trust had been extinguished despite the sale's advertisement terms to the contrary. App. 307-09. For that reason, even though "Tyroshi undoubtedly purchased the [p]roperty erroneously believing it to be subject to" Bank of America's deed of trust, App. 308, the low sale price reflected that expected encumbrance and could not be unconscionable.

After the court's corrective order, Shellpoint filed a motion to alter or amend. App. 312-19. Shellpoint argued that the court erred in issuing the corrective order without giving Shellpoint a chance to respond, and that the record did not demonstrate that Brandywine foreclosed on the most recent six months of the lien or that Tyroshi held the subjective belief that the unit was encumbered by the first deed of trust. App. 316-18. Though Shellpoint acknowledged Brandywine's argument that District law did not require "notice of the Condo Sale . . . to be sent to [Shellpoint]," App. 315, Shellpoint again failed to raise any challenges to this statutory scheme or argue that the statute's notice provisions were constitutionally deficient. After considering Tyroshi's opposition, the court on December 6 denied Shellpoint's motion to alter or amend. App. 331-37. The court explained that it had the power to revise any order before entry of final judgment; that the record amply reflected that Brandywine's two liens covered the six months immediately preceding

"recordation of a memorandum of lien against the title to the unit," as allowed under the Act; and that assessing unconscionability based on purchase price is an objective standard. App 332-36 (emphasis omitted).

STANDARD OF REVIEW

This Court reviews constitutional challenges de novo. *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 172 (D.C. 2008).

SUMMARY OF ARGUMENT

I.A. Shellpoint forfeited both constitutional claims by failing to raise them before the Superior Court. This Court should thus decline to address them. Indeed, enforcing forfeiture is particularly important for constitutional claims, given the shared underlying principles of judicial restraint and constitutional avoidance. Here, Shellpoint had multiple opportunities to raise a constitutional challenge—or indeed, any challenge at all to the statutory scheme. It failed to do so. Instead, Shellpoint centered its argument below on the contours and execution of the foreclosure sale, rather than service of notice or the validity of the Condominium Act itself. Moreover, there are no countervailing equitable reasons to excuse Shellpoint's forfeiture. Shellpoint is a sophisticated party represented by competent counsel, and it makes no attempt in its opening brief to explain why an exception to the forfeiture principle should apply (or that its constitutional arguments were, in fact, raised

below). This Court should thus decline to reach the constitutional claims based on the principles of forfeiture alone.

I.B. Even if not forfeited, this Court should still decline to entertain Shellpoint's facial due process challenge. Not only are facial challenges disfavored, but Shellpoint brings one against a statute that it concedes has already been amended to cure any alleged defect. Indeed, Shellpoint explicitly challenges only the 1992 version of the Condominium Act, arguing that this earlier version violates due process by failing to require notice to holders of the first mortgage or first deed of trust, or junior lien holders. But the Act was amended in 2017 to now require such notice. Shellpoint offers no explanation for why this Court should decide the constitutionality of a statutory provision that no longer exists. Moreover, Shellpoint does not allege on appeal that it (or its predecessor) actually failed to receive notice. Instead, it sidesteps the issue when confronted with evidence to the contrary. Thus, Shellpoint asks this Court to answer what is essentially a hypothetical question about the facial validity of a since-amended statute that Shellpoint does not even allege caused it any harm. This Court should decline the invitation.

II. Finally, even assuming the Takings Clause challenge is not forfeited, the Condominium Act is constitutionally sound. First, the statutory scheme giving condominium associations a super-priority lien for unpaid assessments has been in place for decades—well before the first deed of trust was created and Shellpoint

acquired its interest. Thus, Shellpoint's property rights were already circumscribed by background principles of state law at the time it obtained its interest in this property. Second, even if Shellpoint's property rights were not conditioned by state property law, the statute does not effect a taking under either the per se or *Penn Central* framework. It merely reassigns lien priority rather than destroying a lien; it did not retroactively or automatically destroy Shellpoint's interest; and it does not physically invade or intrude on any cognizable property interest, but instead, simply redistributes the benefits and burdens of public life. At bottom, Shellpoint is merely subject to a general restriction requiring it to bear more risk (which it can alleviate through other means) in holding deeds of trust. Its loss is a manifestation of that risk, not a product of the government singling it out to bear burdens that should be borne by the general public. And, when secured lenders are on notice of a risk—as is the case here, where long-standing state law gives condominium associations a super-priority lien for unpaid assessments—the government is not constitutionally required to insure that risk.

ARGUMENT

I. This Court Should Not Decide The Constitutional Claims, Which Are Not Proper For Adjudication.

A. Both constitutional claims are forfeited, and this Court should not consider them for the first time on appeal.

Shellpoint has forfeited its constitutional claims by failing to raise them before the Superior Court. "It is axiomatic that appellate courts normally will not consider

points not presented to the trial court." *Stockard v. Moss*, 706 A.2d 561, 567 (D.C. 1997). Thus, "[q]uestions not properly raised and preserved during the proceedings under examination, and points not asserted with sufficient precision to indicate distinctly the party's thesis, will normally be spurned on appeal." *Little v. United States*, 665 A.2d 977, 980 (D.C. 1995) (quoting *Miller v. Avirom*, 384 F.2d 319, 321-22 (D.C. Cir. 1967)); *see Vizion One, Inc. v. D.C. Dep't of Health Care Fin.*, 170 A.3d 781, 790 (D.C. 2017) ("'[C]laims' not presented in the trial court will be forfeited." (citation omitted)). "In our jurisprudential system, trial and appellate processes are synchronized in contemplation that review will normally be confined to matters appropriately submitted for determination in the court of first resort." *Wallace v. Skadden, Arps, Slate, Meagher & Flom LLP*, 799 A.2d 381, 388 (D.C. 2002) (quoting *Miller*, F.2d at 321). This general principle reflects "considerations of fairness" and "prevents the trial of cases piecemeal or in installment." *Miller*, 384 F.2d at 322 (citations omitted). Accordingly, this Court is "constrained to avoid decision on an issue which has never been aired before the trial court." *Little*, 665 A.2d at 980.

This principle holds especially true for constitutional claims. Both this Court and the Supreme Court have consistently noted that, because of the "great gravity and delicacy" of constitutional questions, "courts should generally avoid ruling on constitutional questions unless they have no other choice." *Lewis v. Hotel & Rest.*

Emps. Union, Local 25, AFL-CIO, 727 A.2d 297, 301 (D.C. 1999) (citing *Kremens v. Bartley*, 431 U.S. 119, 128 (1977)); *see Gaynor v. United States*, 16 A.3d 944, 948 (D.C. 2011) ("[This Court] ordinarily will not address constitutional issues . . . when the case may be resolved on different grounds."); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." (citation omitted)). "The practice of avoiding constitutional issues if it is reasonably possible to do so is predicated on a fundamental rule of judicial restraint, which is perhaps more deeply rooted than any other doctrine of constitutional adjudication." *Olevsky v. District of Columbia*, 548 A.2d 78, 81 (D.C. 1988) (citing *Jean v. Nelson*, 472 U.S. 846 (1985)).

These longstanding principles of forfeiture and constitutional avoidance strongly counsel against reaching Shellpoint's belated constitutional claims. Shellpoint argues for the first time on appeal that D.C. Code § 42-1903.13 (1992) violates the Due Process and Takings Clauses. Br. 35-49. Prior to this appeal, Shellpoint never raised any challenge—constitutional or otherwise—to the statutory scheme over multiple years of Superior Court litigation. Indeed, the terms "constitution," "takings," or "due process" never appear in any of Shellpoint's filings below. *See* App. 70-83 (second amended complaint); 201-19 (opposition to Brandywine's motion to dismiss or, in the alternative, motion for summary

judgment); 293-96 (opposition to Daniels's motion to dismiss); 312-19 (motion to alter or amend the Superior Court's corrective and omnibus order). Tellingly, though Shellpoint served the District with a notice of its constitutional challenge when it appealed, *see* D.C. App. R. 44(b), it failed to file the equivalent notice when this case was before the Superior Court, *see* Super. Ct. Civ. R. 5.1—presumably because Shellpoint understood that it was not bringing a constitutional challenge at the time.[2] As a result, the Superior Court did not rule on any constitutional issues in dismissing the claims in this case. *See* App. 238-45, 297-31.

The closest Shellpoint came to alluding to a due process violation is when it alleged that "[t]he Condo Foreclosure Sale was not noticed adequately under D.C. Law" and that Brandywine "failed to provide [Shellpoint] with proper notice of its foreclosure sale." App. 79-80, ¶¶ 61-62 (second amended complaint). (Shellpoint never comes close to alleging a Takings Clause claim.) But this allegation failed to preserve Shellpoint's constitutional due process claim for several reasons. *First*, Shellpoint never raised any concerns with the statutory scheme itself—yet, on appeal, its constitutional argument is that the statute is facially invalid. Br. 35. Its allegations below centered on the adequacy of the notice "under D.C. Law," rather

[2] Though "[a] party's failure to file and serve the notice . . . does not [itself] forfeit a claim or defense that is otherwise timely asserted," Super. Ct. Civ. R. 5.1(d), it helps to demonstrate that Shellpoint was not bringing a constitutional claim at the time, especially given Shellpoint's behavior on appeal.

than the validity of that law. App. 79 ¶ 61. "[P]oints not asserted with sufficient precision to indicate distinctly the party's thesis" are insufficient to preserve a claim for appeal. *Little,* 665 A.2d at 980 (citing *Miller*, 384 F.2d at 322); *see Wagner v. Georgetown Univ. Med. Ctr.*, 768 A.2d 546, 554 n. 9 (D.C. 2001) ("[A] litigant has an obligation 'to spell out its arguments squarely and distinctly,' or else forever hold its peace." (citation omitted)).

Second, in subsequent filings, Shellpoint clarified that its grievances involved only the content of the notice in this case, not any purported deficiency in the statutory requirement of service. In opposing dismissal, Shellpoint argued that the notice was improper because it "falsely represented the terms of the Condo Sale" by suggesting the unit would be sold subject to the Deed of Trust. App. 207. Indeed, in response to Brandywine's proof that it had "provided Bank of America notice of the Condo Foreclosure Sale on May 5, 2014 and again on May 27, 2014," App. 157 (citing App. 181-82, 189-90, 192-97), Shellpoint simply stated that whether or not Bank of America received notice was beside the point:

> [Brandywine's] Motion . . . provides an affidavit and supporting documents purporting to show that notice of the sale was given to [Shellpoint's] predecessor-in-interest, Bank of America. In solely focusing on the adequacy of the sale notices, the Association attacks a straw man. . . . [T]he allegedly insufficient sale notices are only one of several factors (and arguably the least of them), including false representations and grossly inadequate sale price, which may, alone or in combination, justify the Court setting aside the sale. Last assuming the sale notices were sent to Bank of America, that would only deepen the factual basis showing that the Association falsely represented the

> sale advertisement terms, both constructively by publication, and directly by notice.

App. 216.

Third, Shellpoint had ample opportunities to challenge the statute's notice provisions below but failed each time to do so. For example, Brandywine argued in its motion to dismiss that Shellpoint's allegations of improper notice lacked merit because, at the time of the foreclosure sale in 2014, the statute required notice only to the unit owner and the Mayor, and "not to other lienholders." App. 163. If Shellpoint had intended to raise a constitutional challenge below, it could have easily clarified that intent in response to Brandywine's argument. It did not. Instead, Shellpoint questioned the relevance of whether its predecessor received notice and argued that receiving notice would have only deepened the basis for its false representation claim. App. 216. Similarly, the Superior Court explicitly held in its July 2019 order that because, at the time of the sale, "the statute only mandated notice to the unit owner and to the Mayor or the Mayor's designated agent," Brandywine was not required to notice Shellpoint and thus any "failure to send [Shellpoint] notice does not invalidate the sale." App. 244. Again, if Shellpoint had intended to raise a constitutional concern, it could have easily clarified its intent in its motion to alter or amend—or at least mentioned due process or other concerns with the statutory scheme. App. 312-19. And again, it did not—despite actively

recognizing that the court rejected its claim in part because District law had not required "notice of the Condo Sale . . . to be sent to [Shellpoint]." App 315.

Shellpoint's only response to Brandywine's proof of service below was in a footnote, arguing that the exhibits do not prove notice was sent to the *specific* Bank of America address as provided on the deed of trust—and thus, presumably, there was no proof Shellpoint's predecessor received actual notice. App. 216 n.4. Even then, Shellpoint does not allege that it (or its predecessor) did not *actually* receive notice. And in either case, as a constitutional matter, "[t]he touchstone is reasonableness: the Due Process Clause 'does not require . . . heroic efforts' and '[Supreme Court] cases have never required actual notice.'" *Quincy Park Condo. Unit Owners' Ass'n v. D.C. Bd. of Zoning Adjustment*, 4 A.3d 1283, 1290 (D.C. 2010) (second alteration in original) (quoting *Dusenbery v. United States*, 534 U.S. 161, 170-71 (2002)). Instead, notice to persons "who reasonably can be relied upon to inform the interested parties" is constitutionally sufficient. *Id.* Thus, if, as in *Quincy Park*, notice to the condominium association was constitutionally sufficient under the Due Process Clause to "serve[] as the practical equivalent of notice to the individual owners," then so too should notice to a Bank of America address. *Id.* Shellpoint failed to raise any of these issues below.

Finally, there are no countervailing equitable reasons to excuse Shellpoint's forfeiture. Shellpoint is a sophisticated party represented by competent counsel. *Cf.*

Farmer-Celey v. State Farm Ins. Co., 163 A.3d 761, 766 (D.C. 2017) ("[*P*]*ro se* litigants are not always held to the same standards as are applied to lawyers." (citation omitted)). The forfeited claims are constitutional—precisely the type of issue this Court should avoid unless absolutely necessary. *See Lewis*, 727 A.2d at 301. And Shellpoint's opening brief does not even attempt to suggest that the constitutional claims were raised below or that an exception to the principle of forfeiture applies. *See Miller*, 384 F.2d at 322 (declining to excuse forfeiture where the litigant never explained its "singular omissions" or distinguished its case from the "host of [cases] in which th[e] principle [of forfeiture] was conventionally applied"). Shellpoint should not be permitted to explain this defect for the first time in its reply brief. *See Stockard*, 706 A.2d at 566 ("It is the longstanding policy of this court not to consider arguments raised for the first time in a reply brief."). Forfeiture alone is thus a sufficient basis to decline to hear the constitutional claims.

B. Even apart from forfeiture, this Court should not consider a facial due process challenge to the notice provisions when the statute has since been amended to cure any defect and Shellpoint does not claim a lack of actual notice.

Shellpoint's facial due process challenge is unprecedented. It asks this Court to declare a statute facially unconstitutional, even though that statute has been amended to cure the alleged defect and Shellpoint does not claim it suffered any due process violation itself. Even assuming the due process challenge were not forfeited—and it was—this Court still should not entertain it.

As a general matter, broad "[f]acial challenges are disfavored." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). That is because they typically involve "relaxing familiar requirements of standing" to assess how the law would be applied to different parties and circumstances, *Thompson v. United States*, 59 A.3d 961, 966 n.11 (D.C. 2013) (citation omitted), and because they "carr[y] too much promise of 'premature interpretatio[n] of statutes' on the basis of factually bare-bones records," *Plummer v. United States*, 983 A.2d 323, 339 (D.C. 2009) (second alteration in original) (citation omitted). Indeed, "[c]laims of facial invalidity often rest on speculation," running "contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Wash. State Grange*, 552 U.S. at 450 (quoting *Ashwander*, 297 U.S. at 346-47 (Brandeis, J., concurring)). "Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks." *Sabri v. United States*, 541 U.S. 600, 609-10 (2004).

Indeed, a "facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*,

481 U.S. 739, 745 (1987). Courts "have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *Id.* (citing *Schall v. Martin*, 467 U.S. 253, 268 n.18 (1984)); *see Sabri*, 541 U.S. at 609-10 (enumerating the "relatively few settings" when the Supreme Court has "overcome [its] well-founded reticence" to recognize the validity of facial attacks alleging overbreadth, such as cases involving free speech, the right to travel, abortion, and legislation under § 5 of the Fourteenth Amendment (citations omitted)). Shellpoint does not even attempt to explain how its facial challenge fits within that framework. Thus, "outside [those] limited settings, and absent a good reason, [this Court should] not extend an invitation to bring [facial] overbreadth claims" or similar facial arguments. *Id.* at 610.

This principle applies especially strongly here, where the statute has been amended to cure any alleged defect, and Shellpoint has failed to make any as-applied allegations. *First*, the challenged provisions were amended in 2017 to expressly require that notice of a foreclosure sale be given to holders of the first mortgage or first deed of trust, and junior lien holders, in addition to the unit owner and Mayor. 64 D.C. Reg. 1602 (codified at D.C. Code § 42-1903.13(c)(4)(E)). Shellpoint explicitly challenges only the prior 1992 version of the statute, and it appears to concede that the 2017 amendments cured any supposed due process issue. *See* Br. 2, 42. Thus, "as a practical matter," the question of the statute's facial due process

validity "has become moot" for the future—and it would be "inappropriate" for this Court to reach a facial constitutional challenge when the "statute being challenged has been amended." *Massachusetts v. Oakes*, 491 U.S. 576, 582-84 (1989) (plurality opinion) (citing *Bigelow v. Virginia*, 421 U.S. 809 (1975)).

Indeed, in *Massachusetts v. Oakes*, the Supreme Court explicitly declined to reach a facial overbreadth challenge because the statutory provision in question had been repealed and thus could not inflict any similar harm going forward. 491 U.S. at 583-84 ("Because it has been repealed, the former version of § 29A cannot chill protected expression in the future. Thus . . . the overbreadth question in this case has become moot as a practical matter, and we do not address it."). So too here. Indeed, Shellpoint never even attempts to justify why this Court should consider a facial challenge to a no-longer-existing version of the statute. There "[i]s no need for any comment on the [facial] challenge," *id.* at 582, and this Court should "not needlessly pit a statute against the Constitution," *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 16 (D.C. 1987) (en banc).

Moreover, Shellpoint fails to raise an as-applied challenge on appeal that it (or its predecessor) actually suffered a due process violation. In fact, the evidence affirmatively demonstrated the opposite: that Brandywine twice served notice on Bank of America by certified mail. *See* App. 182, 188, 192-97. Indeed, even though the Superior Court explicitly acknowledged this fact in its order, App. 244 n.5,

Shellpoint fails to respond or allege that the court was mistaken in its opening brief. *See Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053, 1059 n.7 (D.C. 2014) (deeming argument waived when party fails to challenge trial court's tacit finding on appeal). And, as explained above, Shellpoint does not respond to Brandywine's proof of notice in any relevant way. *See supra* Part I.A.

This provides an independent reason to avoid the due process facial challenge: the party requesting relief has failed to even allege that it *itself* was injured by the supposedly deficient provision. Instead, Shellpoint asks this Court to resolve what amounts to a hypothetical question about a statute's constitutionality. But this Court "must be careful not to . . . speculate about hypothetical or imaginary cases," especially one based on a "factually barebones record[]." *Plummer*, 983 A.2d at 338 (citation omitted). "It is neither [a court's] obligation nor within [its] traditional institutional role to resolve questions of constitutionality with respect to each potential situation that *might* develop." *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (emphasis added); *see Metro. Baptist Church v. D.C. Dep't of Consumer & Regul. Affs.*, 718 A.2d 119, 130 (D.C. 1998) (explaining that "prudential" principles of "sound judicial economy" counsel against deciding an "abstract" conflict

(citations omitted)). For all those reasons, in addition to forfeiture, Shellpoint's facial due process challenge should not be considered.[3]

II. Even If Shellpoint Had Not Forfeited The Takings Claim, The Condominium Act Does Not Violate the Takings Clause.

"A party challenging governmental action as an unconstitutional taking bears a substantial burden." *Beretta*, 940 A.2d at 180 (alteration omitted) (quoting *E. Enters. v. Apfel*, 524 U.S. 498, 523 (1998) (plurality opinion)). That burden is even greater when the alleged taking "arises from some public program adjusting the benefits and burdens of economic life to promote the common good," rather than "interference with property [that] can be characterized as a physical invasion by [the] government." *Id.* (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104,

[3] Even if this Court were otherwise willing to entertain the due process challenge, it should first decide whether the sale should be invalidated on non-constitutional grounds, *see* Br. 29-35, especially if this Court believes Shellpoint has presented colorable non-constitutional claims. *See, e.g.*, *U.S. Bank Tr., N.A. v. Omid Land Grp., LLC*, No. 19-CV-0737, 2022 WL 3093734 at *5 (D.C. Aug. 4, 2022) (remanding to determine whether the reasonableness of the purchase price from a pre-*Liu* and pre-*4700 Conn 305 Trust* foreclosure sale was affected by the belief that a sale advertised as subject to a first deed of trust could indeed preserve the lien); *Chase Plaza*, 98 A.3d at 178 & n.8 (remanding to determine whether the purchase price was unconscionably low); *4700 Conn 305 Tr.*, 193 A.3d at 766 (remanding to consider whether the sale should be invalidated on equitable or other grounds where the sale price was significantly below the "amount of the mortgage and apparent value of the [u]nit," and the sale terms were "erroneously conditioned on assumption of the first deed of trust"). Thus, this Court should first consider whether the statute itself or other equitable principles of District law, including the doctrine of unconscionability, requires invalidating the foreclosure sale absent constitutionally adequate notice.

124 (1978)). Regulatory takings—like the one Shellpoint asserts on appeal—are particularly challenging, as they "entail[] complex factual assessments of the purposes and economic effects of governmental actions." *Arthur v. District of Columbia*, 857 A.2d 473, 491 (D.C. 2004) (citation omitted).[4]

Shellpoint's Takings Clause challenge fails at every turn. Not only was its property right already circumscribed by the long-standing statutory scheme, but the Condominium Act also did not effect a taking under either the per se or *Penn Central* framework. At bottom, Shellpoint is merely subject to a general restriction requiring them to bear more risk in holding deeds of trust. Their loss is a manifestation of that risk, and it is not a product of the government singling them out to bear burdens that "in all fairness and justice, should be borne by the public as a whole." *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 542 (D.C. 2011) (citations omitted). It is within the power of a state to prospectively reassign priority among lienholders. *See Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg.*, 388 P.3d 970, 975 (Nev. 2017) ("[W]e have not found[] a single case that has held a state may not statutorily alter the priority of liens unless it compensates subsequent lienholders whose interests are diminished or destroyed as a result."). Indeed, bankruptcy law takes that starting point as a given. Thus, when secured lenders are

[4] That these challenges are difficult and fact-based only emphasizes that this Court should decline to reach the Takings Clause issue for the first time on appeal.

on notice of a risk—as in the case here, where long-standing state law gives condominium associations a super-priority lien for unpaid assessments—the government is not constitutionally required to insure that risk.

A. The Condominium Act conditioned the alleged property right at issue long before the first deed of trust arose.

First, property rights like the one Shellpoint asserts on appeal do not exist in a vacuum. "[P]roperty rights protected by the Takings Clause are creatures of state law," *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2076 (2021), and they are likewise conditioned by background principles of state law. Thus, to state a valid claim for a governmental "taking" of private property, the property interest asserted must have been "part of [the party's] title to begin with." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992). While it is true, as Shellpoint argues, that non-possessory security interests such as mortgages and liens can in the abstract constitute "property," *see United States v. Sec. Indus. Bank*, 459 U.S. 70, 76 (1982), Br. 45, those interests are still subject to background principles inhering in state property law in its jurisdiction. When an entity voluntarily submits to a state regime that conditions certain property rights, those conditions can limit the scope of those rights and circumscribe an otherwise colorable takings claim. *See Lucas*, 505 U.S. at 1030 ("[T]he Takings Clause does not require compensation when an owner is barred from putting [property] to a use that is proscribed by those 'existing rules or understandings.'"); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005)

(emphasizing that "background principles of nuisance and property law" limit the government's liability under the Takings Clause (citing *Lucas*, 505 U.S. at 1026-32)); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) ("[P]roperty interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." (citations omitted)).[5]

Here, Shellpoint challenges a statutory scheme that has been in place since 1991—a decade and a half before the first deed of trust was created in 2007. Shellpoint did not acquire its interest in the first deed of trust until 2015—six years after Brandywine first recorded one of two liens against the property, App. 130, and one year after this Court decided in *Chase Plaza* that a first deed of trust could be extinguished if a condominium-initiated foreclosure sale failed to generate sufficient proceeds. 98 A.3d at 172. Notably, this Court's holding was based on a long-standing, "general principle of foreclosure law" that was "derived from the common law and is well settled in this and other jurisdictions." *Id.* at 173 (citing, *e.g.*, *Pappas*

[5] Though the Supreme Court noted in *Palazzolo v. Rhode Island* that not all statutes and regulations enacted before acquisition of title inherently limit the title, the plaintiff there acquired title by operation of law, rather than by voluntarily creating an interest subject to the new law. 533 U.S. 606, 614, 629-30 (2001). Moreover, *Palazzolo* merely held that prospective statutes are not categorically immune from Takings Clause challenges. *Id.* at 629-30. Instead, the relevant inquiry is whether the statute has been subsumed into the legal fabric such that it implies a limit on the title. *Id.* at 630.

v. E. Sav. Bank, FSB, 911 A.2d 1230, 1234 (D.C. 2006)). As a result, the original deed of trust that was created in 2007 and later acquired by Shellpoint in 2015 established a security interest already vulnerable to extinguishment under the Condominium Act. "When '"background principles" of state law already serve to deprive the property owner' of the interest it claims to have been taken, it cannot assert a claim under the Takings Clause. . . . The State cannot take what the owner never had." *Wells Fargo Bank, N.A. v. Mahogany Meadows Ave. Tr.*, 979 F.3d 1209, 1214 (9th Cir. 2020) (internal citations omitted).

Notably, in *Wells Fargo Bank*, the Ninth Circuit evaluated a Takings Clause challenge to a similar Nevada state law, which gave homeowners' associations a super-priority lien against units for the last nine months of unpaid assessments. *Id.* at 1212. Like the District's statute, the Nevada law under review made the super-priority portion of the lien superior to all others, including the first deed of trust, and permitted the association to extinguish the first deed of trust by foreclosing on the super-priority lien. *Id.* But because the Nevada law was enacted in 1991 and Wells Fargo did not acquire its lien until 2008, "[t]he interest Wells Fargo [wa]s asserting—that is, the right to maintain its lien unimpaired by a later [homeowners' association] lien—was not part of [its] title to begin with." *Id.* at 1214 (last alteration in original); *see Saticoy Bay*, 388 P.3d at 975 (rejecting a takings challenge to the same Nevada statute on a similar basis); *Bair v. United States*, 515 F.3d 1323, 1329

(Fed. Cir. 2008) (holding that a statute giving super-priority status to liens was a "'background principle' that inheres in the title to property interests arising after its enactment, therefore precluding a takings claim based on the application of the statute to those property interests").[6] Thus, as in *Wells Fargo Bank*, Shellpoint (and its predecessors) had a property interest in the deed of trust that was always vulnerable, by applicable law, to an association's super-priority lien. Because Shellpoint never had the unconditional property right that it asserts, there was no deprivation of property that could form the basis for a Takings Clause claim.

B. Even assuming the Condominium Act had not conditioned a previously unfettered property interest, it does not effect a taking.

Even if Shellpoint's property interest was not already circumscribed by the Act, its claim still fails because the statute does not effect a per se or *Penn Central* taking. There are "two guidelines relevant here for determining when government regulation is so onerous that it constitutes a taking." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017). The first—often called a categorical or per se taking—asks

[6] To be sure, at the time Shellpoint acquired the deed, this Court had not yet issued its opinion in *Liu*, which clarified that a first deed of trust could be extinguished even if the foreclosure sale advertised the property as being encumbered. 179 A.3d at 874. But Shellpoint never makes this point or even cites *Liu* in its opening brief, so any argument to that effect is forfeited on appeal. And in either case, *Chase Plaza* made it clear that a foreclosure sale could validly extinguish a first deed of trust, and the statute's anti-waiver provision on which *Liu* was based was in effect at the time of Shellpoint's acquisition. *See* D.C. Code § 42-1901.07 ("[A] provision of this chapter may not be varied by agreement and any right conferred by this chapter may not be waived."); *Liu*, 179 A.3d at 878.

whether a regulation "denies all economically beneficial or productive use of land." *Id.* (citations omitted). If it does, the regulation is a taking.

The second guideline applies "when a regulation impedes the use of property without depriving the owner of all economically beneficial use." *Id.* at 1943 (citations omitted). In such cases, a taking may still occur "depend[ing] largely 'upon the particular circumstances.'" *Penn Cent.*, 438 U.S. at 124 (quoting *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958)). Courts engage in an "essentially ad hoc, factual inquir[y]," *id.*, guided by a trio of *Penn Central* factors: "(1) the character of the government action; (2) the economic impact of government regulation on the property owner; and (3) the owner's reasonable investment-backed expectations." *Embassy Real Est. Holdings, LLC v. D.C. Mayor's Agent for Historic Pres.*, 944 A.2d 1036, 1052 (D.C. 2008) (citing *Penn Cent.*, 438 U.S. at 124). The Act does not effect a taking under either theory.

1. The Act does not effect a per se taking.

Shellpoint asserts that the Condominium Act effects a "*per se*, physical taking." Br. 45. But an intangible security interest, like a lien, cannot be physically taken. *See Wells Fargo Bank*, 979 F.3d at 1213-14 ("Because Wells Fargo's lien was an intangible interest, we are not sure that it makes sense to apply the analysis applicable to physical takings, as opposed to the regulatory-takings analysis of [*Penn Central*]."). In fact, courts have largely considered categorical takings in the context

of land ownership. *See, e.g.*, *Lucas*, 505 U.S. at 1009; *Andrews v. City of Mentor*, 11 F.4th 462, 470 (6th Cir. 2021) (characterizing the *Lucas* rule as "land-use regulations that deprive a piece of real property of 'all economically beneficial use' categorically qualify as takings"). As a result, Shellpoint's per se takings claim is a poor fit with the circumstances of this case.

Even if this Court analyzes Shellpoint's claim under the per se framework, however, the Condominium Act itself does not deprive Shellpoint of all "economically beneficial use" of its lien. Instead, the lien is extinguished *only if* a number of actions by other private parties take place: the borrower fails to pay the assessments owed; the association secures a super-priority lien and institutes a foreclosure sale; and the foreclosure sale fails to net sufficient funds to cover the first deed of trust. Moreover, the lien holder has several simple ways to protect its interest. It could require the borrower to place funds in escrow to satisfy the assessments, much as lenders do for property taxes. *See Chase Plaza*, 98 A.3d at 175. The lien holder could also pay any overdue assessments itself and add those amounts to the balance of the loan—indeed, the deed of trust here authorized this very process. App. 101-02; *see Chase Plaza*, 98 A.3d at 175. Or the lien holder could purchase the property itself at foreclosure. All of these factors make this case a far cry from a government regulation that, in one fell swoop, eliminates an individual's property interest. *See, e.g.*, *Lucas*, 505 U.S. at 1006 (government

regulation directly barred individual from building habitable structures on his parcels, rendering them valueless).

In order to reach a contrary result, Shellpoint relies on authorities finding takings where government action completely eliminates a security interest vested under state law. Br. 46-47. But these authorities cannot support Shellpoint's claim that prospective statutes reassigning lien priority require compensation. For example, in *Armstrong v. United States*, the Court concluded that the federal government effected a taking when, by contract, it took title to and possession of certain materialmen's property after the company using the property defaulted on its contract with the government. 364 U.S. 41, 46 (1960). The Court determined that the materialmen "had valid liens under [state] law" to the property before the company's default, but "[i]mmediately afterwards, they had none." *Id.* at 46, 48. Importantly, in *Armstrong*, the government action destroyed the materialmen's liens *after* they had acquired an interest in the property. *Id.* at 46-49. Here, the opposite is true. The government action establishing the super-priority scheme took place *before* Shellpoint acquired its interest—and indeed, before the interest was even created.[7] Moreover, unlike the challenged action in *Armstrong*, the Condominium

[7] Similarly, Shellpoint's reliance on *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935), is misplaced. Br. 46. There, the Court struck down a statute that retrospectively limited a bank's recovery on a mortgage in large part because the statute applied retroactively. *See Sec. Indus.*, 459 U.S. at 76-77 ("In

Act does not completely destroy a lien but merely reassigns lien priority, and a junior lien holder can fully recover if a foreclosure sale generates enough proceeds to satisfy the first deed of trust or other junior lien. Consequently, if the Act is not a categorical taking, Shellpoint must rely on the *Penn Central* partial takings theory.

2. The Act does not effect a *Penn Central* taking.

Shellpoint also fails to show a taking under *Penn Central*. As a preliminary matter, Shellpoint never makes a *Penn Central* takings argument or even cites to *Penn Central* in its opening brief. *See* Br. 44-49. "[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." *Kamit Inst. for Magnificent Achievers v. D.C. Pub. Charter Sch. Bd.*, 81 A.3d 1282, 1289 n.25 (D.C. 2013) (alteration in original).

But even if the argument is not forfeited in Shellpoint's opening brief, the Condominium Act does not effect a *Penn Central* regulatory taking. First, the character of the government action is not akin to a "physical invasion or transfer of

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Radford, we held that the . . . statute was void because it effected a 'taking of substantive rights in specific property acquired by the Bank *prior* to' its enactment." (emphasis added) (citing *Radford*, 295 U.S. at 590)). That is not the case here, where Shellpoint acquired any property interest decades after the challenged government action. Moreover, unlike in *Radford*, the Condominium Act here merely reassigns lien priority rather than placing any limits on the value of the lien.

the owner's property." *Embassy Real Est. Holdings*, 944 A.2d at 1052 n.18. Instead, the statutory scheme "merely affects property interests through legislative altering of the benefits and burdens of economic life to promote the common good." *Beretta*, 940 A.2d at 181 (internal quotation marks and citation omitted).

Second, the economic impact of the Act on lien holders like Shellpoint is relatively minimal. As just noted, there may be no impact at all if the foreclosure sale generates sufficient funds. And lenders can readily avoid any potential impact by enforcing an escrow requirement, paying the outstanding assessments themselves and recovering from the borrower, or, if necessary, buying the property at the foreclosure sale. *See supra* at 36. Thus, contrary to Shellpoint's assertion, the statutory scheme does not provide a "huge windfall" for certain real estate investors at the expense of the lien holder. Br. 49. Rather, the lien holder can take a number of steps to protect its own interests.

Third, the challenged government action could not have upset the lender's "reasonable investment-backed expectations." *Embassy Real Est. Holdings*, 944 A.2d at 1052. As explained, the statute had been in place for decades before Shellpoint acquired its interest and before the interest was even created. *See id.* at 1054-55 (distinguishing between the instant case, where "petitioner took a calculated (and, as it turned out, unwise) risk," and *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922), in which a "*subsequently enacted*" statute interfered with the owner's

property rights). Even if Shellpoint's predecessors did not know for certain that the association would have a super-priority lien that could extinguish their security interest, they were at least on notice of the risk. And at the time of Shellpoint's acquisition, *Chase Plaza* had clarified the law; Brandywine had twice recorded its super-priority liens; and the foreclosure sale (notice of which had also been recorded) had already taken place. *See* 98 A.3d at 172; App. 78-79, 130, 132, 174-75.

CONCLUSION

This Court should reject both constitutional challenges.

Respectfully submitted,

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REDACTION CERTIFICATE DISCLOSURE FORM

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:
   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:
     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer identification number would have been included;
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     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); see also 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the

purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

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