IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,344

EMIL J. WEIMAN, et al.,

Petitioners,

v.

THOMAS N. McHAFFIE, et al.,

Respondents.

BRIEF OF AMICI CURIAE MORTGAGE BANKERS ASSOCIATION OF FLORIDA AND FEDERAL NATIONAL MORTGAGE ASSOCIATION

ON ORDER ACCEPTING DISCRETIONARY JURISDICTION
TO REVIEW A DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA,
FIRST DISTRICT, CERTIFIED TO BE OF GREAT PUBLIC IMPORTANCE

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INTEREST OF THE AMICI CURIAE

This brief is filed on behalf of the Mortgage Bankers Association of Florida (the "MBA") and the Federal National Mortgage Association (the "FNMA"). The MBA (through its members) and FNMA are directly and extensively involved in the origination, closing, and servicing of thousands of residential mortgages in Florida and in the purchase, sale and pledge of such loans in the secondary market.

The MBA is comprised of approximately 120 regular members. Its members include mortgage companies, national banks, state chartered banks, state savings and loan associations, and federal savings and loan associations.1/ The members of the MBA are predominantly in the business of originating and servicing residential real estate mortgages in Florida.

The FNMA is a federally chartered institution, organized in 1938 for the purpose of providing secondary market support for the new Federal Housing Administration ("FHA") mortgages. In 1968, the FNMA was divided into two entities: the "new" FNMA, amicus herein (also commonly known as "Fannie Mae") and the Government National Mortgage Association (also commonly known as "Ginnie Mae"). The latter entity assumed the governmental housing program responsibilities of the original FNMA, while the "new" FNMA retained the secondary market function. Although

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1/ Many regular MBA member institutions, which are not banks or savings and loan associations, are licensed mortgage brokers under Chapter 494, Florida Statutes. The MBA membership does not include any state or federal credit unions.

FNMA is now privately owned, the President of the United States appoints five of its fifteen directors and the Secretary of the Department of Housing and Urban Development has general regulatory responsibility over the association.

FNMA's basic function is to maintain a secondary market for residential mortgages. It fulfills this function by purchasing and selling mortgages originated by federally and state chartered savings and loan associations, credit unions, commercial banks, mortgage companies and others. A large portion of the mortgage money available to buyers of residential or commercial property is generated through the mechanism of the secondary mortgage market, as the purchase of existing mortgages from originating lenders makes money available for new loans. In 1983, FNMA purchased an aggregate principal balance of approximately $3 billion in Florida mortgages.

This Court's resolution of the legal and policy issues in this case will have an impact far beyond its effect on the immediate parties. The outcome of this case will affect the practices and vitality of the primary and secondary residential mortgage industry in Florida and, in turn, the stability of the housing industry in Florida.

The MBA and FNMA have substantial experience with, and an important perspective regarding, the legal and policy issues presented to this Court in this case. The MBA and FNMA appreciate the opportunity granted by this Court to participate in this case as amici curiae.

REQUEST TO PARTICIPATE IN ORAL ARGUMENT

The MBA and FNMA are grateful to have been afforded the opportunity to file this brief; because of the great significance of the resolution of this case to those amici, they respectfully request the opportunity to participate in the oral argument in this important case. A reduced period of ten or fifteen minutes would be sufficient. These amici have prepared a separate motion to that effect.

STATEMENT OF THE FACTS AND THE CASE

The amici adopt and incorporate the Statement of the Facts and the Case set forth in the initial brief of Petitioners, Emil and Joyce Weiman. For purposes of clarity and continuity of the arguments presented in this brief, amici specifically note the following procedural aspects of this case:

1. In the appellate court proceeding below, the First District Court of Appeal affirmed, in part, the trial court's final judgment in a declaratory judgment action which found a due-on-sale clause contained in a mortgage to be unenforceable. Weiman v. McHaffie, 448 So.2d 1127 (Fla. 1st DCA 1984).

2. The district court's opinion acknowledges that the focal issue in this case is the effect of federal legislation, specifically the Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320 (Oct. 15, 1982), on the enforceability of due-on-sale clauses in Florida. 448 So.2d at 1128. The district court recognized that this federal law provides, "an unqualified authorization for due-on-sale enforcement by all types of mortgage lenders on all new loan transactions," 448 So.2d at 1128 (emphasis supplied). The district court determined, however, that Florida qualifies as a "window period" state under the Act. Based on this finding, which is contested by Petitioners and these amici, the district court erroneously concluded that due-on-sale clauses contained in certain Florida mortgages are excluded from the federal law's preemption of

state restrictions on due-on-sale enforceability as to transfers occurring during that "window period" (October 15, 1982 to October 15, 1985).

3. The district court expressly held that "the other grounds relied upon by the trial court in its final judgment finding this [due-on-sale] clause unenforceable are without merit and we see no reason to discuss them." 448 So.2d at 1129. This brief, therefore, focuses on the sole issue addressed by the district court and certified to this Court: whether Florida is a "window period" state under the provisions of the Garn-St. Germain Depository Institutions Act of 1982.

CERTIFIED QUESTION

The district court, recognizing that, "the question involved in this appeal has far-reaching implications for certain financial institutions and the people of this state," certified the following question to this Court:

> IS A DUE-ON-SALE CLAUSE IN A FLORIDA MORTGAGE EXECUTED ON SEPTEMBER 8, 1980, TO A PRIVATE LENDER OR SELLER, ENFORCEABLE AS TO AN ATTEMPTED TRANSFER OCCURRING SUBSEQUENT TO OCTOBER 15, 1982, BUT BEFORE OCTOBER 15, 1985, WITHOUT A SHOWING THAT THE MORTGAGEE'S SECURITY WILL BE IMPAIRED BY THE TRANSFER?

Weiman, 448 So.2d at 1129.

These amici respectfully suggest that this question must be answered in the affirmative by this Court. Under the provisions of the Garn-St. Germain Act, which preempt all state restrictions on the enforcement of due-on-sale clauses by all types of mortgage lenders, Florida does not qualify as a "window period" state, because Florida has no intermediate appellate court with statewide jurisdiction. Therefore, due-on-sale clauses contained in Florida mortgages are enforceable as to all transfers of mortgaged property occurring after the effective date of the Garn-St. Germain Act, October 15, 1982.

SUMMARY OF THE ISSUES AND THE ARGUMENT

This case calls upon the Court to clarify the status and jurisdictional authority of Florida district courts of appeal. This issue is raised in this proceeding as a result of the lower court's application of the Garn-St. Germain Act in Florida. The Act, promulgated by Congress in 1982, preempts all state restrictions on the enforcement of due-on-sale clauses and authorizes lenders to enforce due-on-sale clauses as to transfers of mortgaged property occurring after the effective date of the Act, October 15, 1982.

The lower court determined that Florida falls within a special exception provided in the Act for states which have statewide laws restricting the enforcement of such clauses. In these "window period" states, the preemptive provisions of the Act do not apply to transfers of mortgage property until October 15, 1985. Among the otherwise entirely preemptive provisions of the Act, Congress specifically confined the window period exception to only those states which had clearly adopted regulations or judicial opinions which unconditionally apply throughout the entire state -- state constitutional provisions, statutes, and judicial decisions which "apply statewide." 12 U.S.C. §1701j-3(c)(1). There is no Florida constitutional or statutory provision or Florida Supreme Court decision restricting due-on-sale enforceability. The pivotal issue in this case, therefore, is whether a decision rendered by a

Florida district court of appeal "applies statewide," as that phrase is used in the Garn Act.

The court below concluded that a Florida district court decision restricting due-on-sale enforceability "applies statewide" because there are no conflicting district court or Supreme Court decisions on this issue.

Amici respectfully submit that the lower court misapprehended the intent of the Garn Act and the applicability of the window period provision in Florida. As clearly expressed in the Act and the congressional reports accompanying the Act, Congress did not intend to defer to intermediate appellate court decisions in jurisdictions such as Florida. The window period exception is only triggered by an intermediate appellate court decision rendered in a state in which the intermediate appellate court has statewide jurisdiction. That is, the limited number of states in which the intermediate appellate court serves as a statewide law-maker, authorized to create uniform, binding law which applies to all coordinate appellate courts and lower courts throughout the state.

Florida district courts of appeal are not vested with the authority to establish uniform law which is binding throughout the state. Rather, district courts in Florida can only establish the law within its own territorial appellate district. Consequently, Florida is not a window period state under the Garn Act.

ARGUMENT

I.

UNDER THE GARN-ST. GERMAIN DEPOSITORY INSTITUTIONS ACT OF 1982, A LENDER MAY EXERCISE ITS OPTION TO ENFORCE A DUE-ON-SALE CLAUSE CONTAINED IN A FLORIDA MORTGAGE, PURSUANT TO THE TERMS OF THE MORTGAGE, AS TO A TRANSFER OF A REAL PROPERTY LOAN OCCURRING AFTER OCTOBER 15, 1982.

A. Congress Preempted All State Restrictions On The Enforcement Of Due-On-Sale Clauses As To Transfers Occurring After October 15, 1982.

The authority of lenders to exercise a due-on-sale clause,2/ has recently been addressed and pervasively regulated by federal law. The federal preemption of state restrictions on the enforcement of due-on-sale clauses occurred in two steps. First, in June of 1982, the United States Supreme Court, in Fidelity Federal Savings and Loan Assoc. v. de la Cuesta, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982), held that a federal regulation permitting federally chartered savings and loan associations to exercise due-on-sale clauses according to

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2/ A due-on-sale clause is a contractual provision that permits the lender to declare the entire balance of a loan immediately due and payable if the property securing the loan is sold or otherwise transferred without the lender's prior written consent. See, e.g., 12 U.S.C. §1701j-3(a)(1); Fidelity Federal Savings and Loan Assoc. v. de la Cuesta, 458 U.S.141, 145, 102 S.Ct. 3014, 73 L.Ed 2d 664 (1982). The clause is usually contained within a mortgage or a deed of trust.

the terms of the loan contract, bars application of contrary state doctrine.3/

The second pervasive federal action, and the one germane to this case, is the recent congressional legislation enabling all other lenders to enforce due-on-sale clauses. While the Supreme Court was considering de la Cuesta, Congress was studying the conditions within the nation's financial system and preparing legislation aimed at revitalizing the housing industry by strengthening the financial stability of home mortgage lending institutions and ensuring the availability of home mortgage loans.4/ One aspect of the revitalization effort focused on the issue of the enforcement of due-on-sale clauses

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3/ The federal regulation held in de la Cuesta to preempt state law is a regulation issued in 1976 by the Federal Home Loan Bank Board, which provides in relevant part:

> [A federal savings and loan] association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instrument whereby the association may, at its option, declare immediately due and payable sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as [otherwise] provided in . . . this section . . ., exercise by the association of such an option (hereinafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the association and borrower shall be fixed and governed by that contract.
>
> 12 CFR §545.8-3(f) (1982).

4/ See S. CONF. REP. NO. 641, 97th Cong, 2d Sess. (1982), reprinted in 1982 U.S.CODE CONG. & AD. NEWS 3128, 3128 (hereinafter cited as S. CONF. REP.).

in home mortgages. In light of the various, disparate state restrictions on the enforcement of due-on-sale clauses, the Senate Banking, Housing and Urban Affairs Committee determined that there was a compelling need for Congress to address this issue in order to place all lenders on a more competitive footing and eliminate the uncertainty among homebuyers and sellers regarding the enforceability of due-on-sale clauses.5/ After eighteen months of congressional hearings and studies, Congress enacted the Garn-St. Germain Depository Institutions Act of 1982 (hereinafter "the Garn Act" or the "Act")6/, which was signed into law by President Reagan on October 15, 1982.

The Garn Act contains a section preempting all state laws and judicial decisions which restrict the enforcement of due-on-sale clauses with respect to real property loans. This broad preemptive provision reads:

> Notwithstanding any provision of the constitution or laws (including judicial decisions) of any State to the contrary, a lender may . . . enter into or enforce a contract containing a due-on-sale clause with respect to a real property loan.
>
> 12 U.S.C.§1701j-3(b)(1).

Under the Act, the lender's right to enforce the clause on transfer, and all rights and remedies of the parties with

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5/ See S. REP. NO. 536, 97th Cong., 2d. Sess.(1982), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3054, 3074-75 (hereinafter cited as S. REP.). Excerpts from the Senate Committee Report follow the conclusion of this brief as an annex.

6/ Pub. L. No. 97-320, Oct. 15, 1982, 96 Stat. 1469.

respect to the clause, are fixed and governed exclusively by the terms of the loan contract.7/ In exercising their rights to enforce due-on-sale clauses, lenders are encouraged to permit assumptions of real property loans either at the interest rate contained in the loan or at a blended rate (a rate at or below the average of the contract rate and market rate). 12 U.S.C. §1701j-3(b)(3).

The Act applies to all lenders (including individuals, state and federally chartered financial institutions, and national banks), to all types of real property loans, in all states, as to all transfers occurring subsequent to October 15, 1982, the date of enactment of the Garn Act.8/ Congress did, however, carve out a specific exception which postpones the effective date of the Garn Act provisions until October 15, 1985 in a limited number of states.

7/ 12 U.S.C. §1701j-3(b)(2). The Act restricts the ability of lenders to enforce due-on-sale clauses in nine specifically enumerated circumstances. These nine restrictions apply to all transfers effected after the date of enactment of the Act, regardless of the nature of the lender or the date the loan was originated. See 12 U.S.C. §1701j-3(d). See also S. CONF. REP. at 3112.

8/ 12 U.S.C. §1701j-3(a) and (b)(1). The Garn Act is silent as to whether it is to have retroactive effect as to transfers occurring prior to October 15, 1982 (the effective date of the Act). Several state courts have held that the Act does not apply to those transfers which occurred before the effective date of the Act, relying on the Act's silence on the issue. See Viereck v. Peoples Savings and Loan Assoc., 343 N.W.2d 30 (Minn. 1984); Home Savings Bank of Upstate New York v. Baer Properties, Ltd., 92 A.D. 98, 460 N.Y.S.2d 833 (N.Y. App. Div. 1983). The attempted transfer of the property in this case occurred after October 15, 1982. Therefore, this Court need not address or consider the issue of retroactive application of the Act as to transfers which occurred before October 15, 1982. Cf. de la Cuesta, 458 U.S. at 170 n.24.

The Limited "Window Period" Exception.

The "window period" exception is made applicable only to loans made or assumed

> during the period beginning on the date a State adopted a constitutional provision or statute prohibiting the exercise of due-on-sale clauses, or the date on which the highest court of such State has rendered a decision (or if the highest court has not so decided, the date on which the next highest appellate court has rendered a decision resulting in a final judgment if such decision applies State-wide) prohibiting such exercise.
>
> 12 U.S.C. §1701j-3(c)(1) (emphasis added).

The window period ends on October 15, 1982, the effective date of the Act. 12 U.S.C. §1701j-3(c)(1). As relevant to this case, the window period exception is made applicable only to those States which had, prior to October 15, 1982, a judicial decision restricting the exercise of due-on-sale clauses rendered by a court with statewide jurisdiction.9/

In those states that qualify for the window period exception, transfers involving window period loans (loans originated after a court with statewide jurisdiction restricted enforcement of due-on-sale clauses, but before October 15, 1982)10/ will be subject to applicable state due-on-sale restrictions for three years following the enactment of the Garn Act (until

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9/ See S. REP. at 3076. See also Home Savings Bank of Upstate New York v. Baer Properties, Ltd., 92 A.D.2d 98, 460 N.Y.S.2d 833, 835 (N.Y. App. Div. 1983).

10/ In states with judicial decisions (rendered by a court with statewide jurisdiction) which purport to retroactively restrict due-on-sale enforcement, the window period will not begin until the date of the judicial decision. S. REP. at 3076.

October 15, 1985), after which time the Garn Act's preemptive provisions will apply to all transfers.11/ However, the state legislature of a window period state may, during the three year period, otherwise regulate loans originated by state chartered financial institutions and private mortgagees.12/ 12 U.S.C.

11/ During the Act's three year grace period for "window period" states, lenders have the right to require transferees of a "window period" loan to meet customary credit standards applicable to loans secured by similar property, and may accelerate the loan if the transferee fails to meet the customary credit standards. 12 U.S.C §1701j-3(c)(2)(A).

12/ The Act specifically excludes application of the "window period" exception to loans originated by federal savings and loan associations and federal savings banks. 12 U.S.C. §1701j-3(c)(2)(C). Further, the legislature of a "window period" state is precluded from adopting modified regulations with respect to "window period" loans originated by national banks and federal credit unions. 12 U.S.C. §1701j-3(c)(1)(A). As to national banks and federal credit unions, the Act authorizes the Comptroller of the Currency and the National Credit Union Administrative Board, respectively, to issue regulations covering "window period" loans originated by these lenders. On November 8, 1983, the Comptroller of the Currency issued a final rule affirming the authority of national banks to enforce due-on-sale clauses in residential and commercial mortgages made or purchased by national banks, regardless of any state limitations. The rule, 12 C.F.R. Part 30, contains a special provision for residential mortgage loans originated or assumed in states which, prior to October 15, 1982, clearly limited the enforceability of due-on-sale clauses. In the eleven specifically enumerated "window period" states, of which Florida is not included, the rule shortens the Garn Act grace period from three years to 18 months (it ended on April 15, 1984, rather than October 15, 1985) and also permits the banks to increase the interest rate of "window period" loans upon transfer to a blended rate. The states declared to be affected by the rule's revised "window period" provisions are: Arizona, Arkansas, California, Colorado, Georgia, Iowa, Michigan, Minnesota, New Mexico, Utah and Washington. As to all other states, including Florida, the rule authorizes the enforcement of due-on-sale clauses in loans originated or acquired by national banks, regardless of any state limitations.

Lenders who are authorized to enforce due-on-sale clauses in "window period" loans by virtue of state legislative action or federal regulatory agency action promulgated after the enactment of the Garn Act, can only do so with respect to property transfers which occur after the passage of the Garn Act. 12 U.S.C. §1701j-3(c)(2)(A); S. REP. at 3078.

§1701j-3(c)(1)(A). States which do not have window periods (statewide state action restricting the enforcement of due-on-sale clauses adopted prior to October 15, 1982) cannot now promulgate, by legislative or judicial action, any restrictions on the enforcement of due-on-sale clauses; and States which do have window periods may not expand the type of loans to which the window period applies. S. REP. at 3077.

What must be decided in this case is whether Florida is a "window period" state under the Garn Act. Florida has no statutory or constitutional provision prohibiting the exercise of due-on-sale clauses. Further, this Court has not rendered a decision prohibiting such exercise. The window period issue in Florida, therefore, focuses on the role and jurisdictional authority of Florida district courts of appeal. Florida is a window period state only if, prior to the effective date of the Act, a decision rendered by a district court of appeal (the next highest appellate court) restricting the enforcement of such clauses "applies statewide," as that phrase is used in the Garn Act. 12 U.S.C. §1701j-3(c)(1).

The court below concluded that "Florida falls within the definition of a 'window period' state" under the Garn Act because decisions of district courts of appeal in Florida "have statewide application" and certain Florida district courts of appeal have restricted the enforcement of due-on-sale clauses. Weiman, 448 So.2d at 1129.

Amici submit that the court below misapplied the Garn Act's window period exception and, consequently, erroneously classified Florida as a window period state. Amici assert that Florida is not a window period state under the Garn Act because decisions rendered by Florida district courts of appeal do not "apply statewide," as that phrase is used in the Garn Act.

B. Florida Is Not A "Window Period" State Under The Garn Act.

Congress clearly articulated the intent and scope of window period exception in the Garn Act and the Senate Banking, Housing and Urban Affair Committee Report accompanying the Act. These primary reference sources of congressional intent provide the roadmap for analysis of the window period issue in Florida.

The Senate Report accompanying the Garn Act explains that, "the appellate court decision which applies statewide" exception was made a part of the Act to accommodate the unique appellate court structure of Michigan.

> The reference in the bill to decisions by the 'next highest appellate court . . . which applies statewide' was designated to address the unique situation of the State of Michigan where the Court of Appeals has acted, in a decision which applies throughout that State, to restrict the enforcement of due-on-sale clauses. Although the decision was not rendered by the Michigan Supreme Court, Michigan has been clearly recognized as a jurisdiction

> which prevents the unrestricted exercise of due-on-sale clauses, and therefore the Committee believes that the Michigan appellate decision should trigger the beginning of the Michigan window period.
>
> S. REP. at 3076-77.

As recognized, and consequently accommodated, by the Committee, Michigan designed a unique appellate court jurisdictional structure. The Court of Appeals in Michigan operates as a unitary appellate court.13/ The Michigan Constitution provides for one Court of Appeals consisting of judges elected from various districts in the state. Art. VI, §8 Mich. Const. The Michigan Court of Appeals sits to hear cases in Divisions (or panels) consisting of three judges.14/ Mich. Gen. Ct. Rules of 1963, Rule 800.1. A decision of one Division or panel of the appellate court constitutes a decision of the entire Court. Mich. Gen. Ct. Rules of 1963, Rule 800.4. Decisions of the Court of Appeals are final except as reviewed by the Supreme Court of Michigan on leave granted by the Supreme Court. Mich. Gen. Ct. Rules of 1963, Rule 800.4. "A decision by any panel of the court of

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13/ See Honigman, Appellate Practice - 1965, 43 Mich. St. B. J. 11, 13 (Nov. 1964).

14/ The Divisions of the Michigan Court of Appeals are not required to conform to the geographic districts from which the judges are elected. Further, cases are noticed for hearing at the place which is geographically nearest to the court from which the appeal emanated, unless otherwise stipulated by counsel or ordered by the Court. Mich. Gen. Ct. Rules of 1963, Rules 800.5; 816.1. See also Honigan, supra n. 13, at 13.

appeals is, therefore controlling statewide until contradicted by another panel of the Court of Appeals or reversed or overruled by this [the Michigan Supreme] Court." Tebo v. Havlik, 418 Mich. 350, 343 N.W.2d 181, 185 (1984). See also In the Matter of Hague, 412 Mich. 432, 315 N.W.2d 524 (1982); Hackett v. Kress, 1 Mich. App. 6, 133 N.W.2d 221 (1965).

The only other state recognized as a "window period" state under the Garn Act based upon a decision rendered by "a next highest appellate court which applies statewide" is Arizona. Like Michigan, the Arizona Court of Appeals is a single court with divisions. See §12-20, Ariz. Rev. Stat. A decision rendered by one division of the Court of Appeals in Arizona is binding on the other divisions of the Arizona Court of Appeals. Scappaticci v. Southwest Savings and Loan Assoc., 135 Ariz. 456, 662 P.2d 131, 136 (1983).

The Senate Committee Report specifically distinguishes the effect of an appellate court decision restricting due-on-sale enforceability rendered in states "such as New York and Florida," from that of Michigan. S. REP. at 3076 n.3, 3077. The key to Michigan's (and Arizona's) unique qualification as a window period state is that its intermediate appellate court has "statewide jurisdiction." S. REP. at 3076 n.3 (emphasis added). The Committee Report explains:

> In several states, such as New York and Florida, appellate courts whose jurisdiction

> is not statewide have imposed restrictions on due-on-sale clauses, but the window period in this bill is not triggered by lower court decisions.
>
> * * *
>
> Those states with judicial decisions which do not apply statewide, such as New York and Florida, will not be window period states.
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> S. REP at 3076 n.3, 3077 (emphasis added).

It is clear from the provisions of the Act and its legislative history that Congress severely restricted the Act's limited deference to contrary state judicial law. Congress expressly confined the window period exception to states which had adopted a statewide uniform law restricting due-on-sale enforceability. Accordingly, only appellate court decisions rendered by a court authorized by state law to establish binding, uniform laws throughout the entire state trigger the window period exception.

Florida is simply not one of those unique states that has structured its intermediate appellate courts to operate as a unitary court with statewide jurisdiction. Rather, the Florida Constitution provides for the establishment, by the Legislature, of several district courts of appeal, each serving one of the various appellate districts. Art. V, §§1 and 4(a)-(b), Fla. Const. By general law, the Florida Legislature has created five district courts of appeal and correspondingly divided the state into five distinct and territorial appellate court districts. §35.01-.043, Fla. Stat. (1983).

The unitary structure and jurisdiction of our Supreme Court and the segmented structure and jurisdiction of our five district courts of appeal has been recognized by this Court and by several of the district courts of appeal. As succinctly expressed by this Court in Morgan v. State, 337 So.2d 951 (Fla. 1976):

> In general 'a District Court of Appeal does not have authority to overrule a decision of the Supreme Court of Florida.' Within their sphere, however, District Courts of Appeal are courts of last resort.
>
> 337 So.2d at 953 n.6 (emphasis added and citations omitted).

The decisions of the Florida Supreme Court are clearly the authoritative expression of the law of this State. As to all Florida courts and all litigants, the decisions of the Supreme Court of Florida are binding and apply statewide.15/

15/ See also Hoffman v. Jones, 280 So.2d 431 (Fla. 1973):

> District Courts of Appeal do not have the authority to overrule a decision of the Supreme Court of Florida. In the event of a conflict between the decision of a District Court of Appeal and this Court, the decision of this Court shall prevail until overruled by a subsequent decision of this Court. 280 So.2d at 440.

Conversely, the decisions of the several district courts of appeal do not apply statewide. District court decisions "apply" only "within their sphere."16/ That is, the

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16/ Also see Overton, District Courts of Appeal: Courts of Final Jurisdiction with Two New Responsibilities - An Expanded Power to Certify Questions and Authority to Sit En Banc, 35 U. Fla. L. Rev. 80 (1983)(hereinafter referred to as "Overton, District Courts of Appeal"). Justice Overton's article addresses the 1980 amendments to the Florida Constitution authorizing district courts to sit en banc and to certify inter-district conflicts to the Supreme Court. In discussing the authority and role of the district courts in Florida, Justice Overton repeatedly refers to the district courts' special function of establishing law "within each district." For instance:

> The [1980] amendment also was intended to reinforce the district court's role as final appellate courts for most legal matters within each district, in accordance with their original function.
>
> * * *
>
> The en banc authority allows the district courts to clearly establish the law within each district.
>
> * * *
>
> The purpose of the en banc rule as adopted was to provide a means of assuring uniformity within each district. It was intended to provide litigants with a clear statement of the law within a given district and to eliminate the need for the Supreme Court to resolve intra-district conflict. The philosophy was based on the principle that, if district courts were to be courts of finality within their own districts, they should be able to resolve their own conflict.
>
> * * *
>
> The judges in a district must work together as a collegial whole to attain both finality and uniformity of the law within the district, and en banc authority provides the vehicle for fulfilling this goal.

Overton, District Court of Appeal, supra, at 82, 83, 90 and 91 (emphasis added).

district court's decisions are final and binding upon the particular litigants to whom they are addressed, the trial courts within the district court's appellate court territory, and other trial courts, unless their own district court or the Supreme Court has rendered a conflicting decision.17/

It is well-recognized, however, that a decision of one district court of appeal is not binding authority or stare decisis as to any other district court of appeal. Each district court of appeal is vested with the authority to independently establish the law within its district (except as to matters previously decided by this Court). Although district courts of appeal consider and often give great weight to the decisions of a sister district court of appeal passing upon cases involving the same points of law, each district court has the authority to disagree with and decide contrary to a prior decision of a sister district court of appeal.18/ As recognized by the district court in State v. Hayes, 333 So.2d 51, 53 (Fla. 4th DCA

17/ See Lake v. Lake, 103 So.2d 639 (Fla. 1958); Chapman v. Pinellas County, 423 So.2d 578 (Fla. 2nd DCA 1982); State v. Hayes, 333 So.2d 51 (Fla. 4th DCA 1976).

18/ The authority of each District Court of Appeal to independently create the law within its district (except as to matters previously decided by this Court) and to directly conflict with sister district court decisions, is precisely why this Court is vested with the discretionary authority to review any decision of a District Court of Appeal that "expressly and directly conflicts with a decision of another district of appeal or the supreme court on the same question of law." Art. V., §3(b)(3), Fla. Const. The conflicts jurisdiction of this Court promotes and effectuates this Court's role as the central law-making authority of the State, providing the uniformity and harmony of decisions necessary to give stability to the law of Florida and avoid confusion in the lower courts and among future litigants. See Lake v. Lake, 103 So.2d 639 (Fla. 1958). See also Overton, District Courts of Appeal, supra note 16, at 84.

1976), "[A]s between District Courts of Appeal, a sister district's opinion is merely persuasive." See also State v. Cruz, 426 So.2d 1308, 1308 (Fla. 2nd DCA 1983); Spencer Ladd's Inc. v. Lehman, 167 So.2d 731, 738 (Fla. 1st DCA 1964), modified on different grounds, 182 So.2d 402 (Fla. 1964).

Consequently, Florida's appellate court system is distinct from the appellate court systems of Michigan and Arizona -- the latter are the only two states which qualify as window period states under the Garn Act based upon a decision rendered by "a next highest appellate court which applies statewide." Unlike Florida, a decision rendered by one division of the Court of Appeals in Michigan or Arizona is binding on the other divisions of the Court of Appeals in those states. In light of the unitary structure and statewide jurisdictional authority of the next highest appellate courts of Michigan and Arizona, classification of those states as window period states is consistent with the language and intent of the Garn Act.19/

19/ The Senate Report accompanying the Garn Act specifically addresses and acknowledges the unique appellate court authority of the Michigan Court of Appeals and provides that Michigan is therefore a "window period" state based upon a restrictive due-on-sale decision rendered by a division of the Michigan Court of Appeals. S. REP. at 3076 n.3, 3077. The Comptroller of the Currency classified Michigan and Arizona as two of the eleven "window period" states under the provisions of the Garn Act and ruled that the window periods for Michigan and Arizona began as of the date of the decision rendered by their respective Courts of Appeals restricting due-on-sale enforceability. 12 CFR §30.1(b)(3)(i) and (vii); see also note 12, supra. Each of the other nine states determined to be "window period" states by the Comptroller were so classified based upon a state constitutional provision, a state statute or a decision rendered by the highest court of the state restricting the enforceability of due-on-sale clauses. 12 CFR §30.1(b)(3). See also S. REP. at 3076 n.2 & 3.

Conversely, classification of Florida as a window period state violates both the established jurisdictional structure and well-considered design of our appellate court system, and the intent of the Garn Act.

The court below erroneously reasoned that Florida is a window period state because the decision of the Second District Court of Appeal in First Federal Savings and Loan Assoc. v. Lockwood, 385 So.2d 156 (Fla. 2nd DCA 1980), has

> statewide application since there [are] . . . no conflicting Supreme Court or District Court of Appeals decisions on this point. See Chapman v. Pinellas County, 423 So.2d 578, 580 (Fla. 2nd DCA 1982); Dillon v. Chapman, 404 So.2d 354 (Fla. 5th DCA 1981); Stanfill v. State, 384 So.2d 141 (Fla. 1980); and State v. Hayes, 333 So.2d 51 (Fla. 4th DCA 1976).
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> Weiman, 448 So.2d at 1129.

The four authorities relied upon by the district court to support its conclusion that district court decisions "apply statewide," merely stand for the proposition that a trial court in a given district is obliged to follow the decisions of sister district courts, absent a conflicting decision rendered by its own district court or the Florida Supreme Court.20/ That

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20/ See Chapman, 423 So.2d at 580; Dillon, 404 So.2d at 359 (dictum); Hayes, 222 So.2d at 53. Cf. Stanfill, 384 So.2d at 143 (Holding that it was not unreasonable for a criminal defendant to rely on the decisions of several district courts, including a decision of its own district court, in responding to an indictment). But see Smith v. Venus Condominium Assoc., 343 So.2d 1284 (Fla. 1st DCA 1976), vacated on other grounds, 352 So.2d 1169 (Fla. 1977) (Trial court in the First District Court of Appeal will not be reversed for failing to follow a decision rendered by a sister district court. 343 So.2d at 1285).

proposition, however, does not serve to qualify Florida as a window period state. As established by Congress, for purposes of the Garn Act, the window period is triggered only by a decision of an intermediate appellate court which has statewide jurisdiction -- jurisdiction to establish uniform law binding on all courts (coordinate intermediate appellate courts and trial courts) throughout the state. The finality of Florida district court decisions as to the particular litigations and as to trial courts, absent conflicting precedent established by a trial court's own district court or the Florida Supreme Court, does not elevate Florida's district courts to the role of statewide law-makers.21/

Under Florida's appellate court system, this Court, as the highest state court is vested with the exclusive responsibility of maintaining doctrinal harmony and giving

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21/ Indeed, if this case had not reached this Court for review, next week the Third District Court of Appeal could hold that Florida is not a window period under the Garn Act, notwithstanding the Weiman decision of the First District Court of Appeal. In fact, even if Congress had not enacted the Garn Act, the Third District Court of Appeal, which has not decided any due-on-sale enforceability cases, could hold that due-on-sale clauses are unconditionally enforceable pursuant to the terms of the loan contract. In that event, the trial courts in the Third District Court of Appeal would be bound by its district court decision and required to permit enforceability of due-on-sale clauses, notwithstanding the Lockwood decision or any other district court decision restricting due-on-sale clause enforceability.

authoritative expression to the law of this State. As explained by Justice Overton:

> [T]he Florida Supreme Court's responsibility is to resolve conflict among the five district courts, provide uniform constitutional construction, make final determinations as to the validity of statutes, and establish or modify legal principles. Although the supreme court occupies the primary law-making role, the district courts are not totally removed from the law-making function. While the supreme court has stated that the district courts should refrain from changing existing law, they should not refrain from providing the supreme court with opportunities to make needed changes in the law or from suggesting innovations in the law. The district courts have the initial opportunity to determine the validity of statutes and to construe the constitution, and they exercise a law-making function when considering questions of first impression. The district courts may also influence the supreme court by the questions of public importance they certify for review, as well as by the accompanying opinions. With this new certification authority, the district courts now have a means for increased participation in the supreme court's law-making function.22/

Thus, a decision rendered by a Florida District Court of Appeal is binding authority and generally final as to the particular litigants and as to the trial courts within that district; a district court decision, however, is not binding authority as to (a) the Supreme Court, (b) sister district courts, or (c) trial courts outside the territorial limits of

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22/ Overton, District Courts of Appeal, supra note 16, at 84 (footnotes omitted).

the district court rendering that decision (if its own district court has not spoken upon the issue). The district courts in this State provide the critical and indispensable functions of creating uniform law within their territorial appellate districts and serving as the final appellate courts for the particular litigants in most cases. Nonetheless, as established by the Florida Constitution, Florida statutory law, and Florida judicial law, Florida district courts of appeal do not have statewide jurisdiction. Consequently, a Florida district court of appeal decision restricting the enforceability of due-on-sale clauses does not "apply statewide," as that phrase is used in the Garn Act. Accordingly, Florida is not a "window period" state under the Garn Act.

The question certified to this Court by the district court:

> IS A DUE-ON-SALE CLAUSE IN A FLORIDA MORTGAGE EXECUTED ON SEPTEMBER 8, 1980, TO A PRIVATE LENDER OR SELLER, ENFORCEABLE AS TO AN ATTEMPTED TRANSFER OCCURRING SUBSEQUENT TO OCTOBER 15, 1982, BUT BEFORE OCTOBER 15, 1985, WITHOUT A SHOWING THAT THE MORTGAGEE'S SECURITY WILL BE IMPAIRED BY THE TRANSFER?

must be answered in the affirmative, pursuant to the preemptive provisions of the Garn Act. As to all transfers of mortgaged property occurring subsequent to October 15, 1982, (the effective date of the Garn Act), the enforceability of a due-on-sale clause in a Florida mortgage, including the specific

mortgage extended by Petitioners to Respondents in this case, is governed exclusively by the terms of the loan contract. 23/

II.

ENFORCEMENT OF DUE-ON-SALE CLAUSES PRESERVES THE ECOMOMIC INTEGRITY OF THE LENDER-BORROWER RELATIONSHIP AND PROMOTES COMPETITIVE EQUALITY.

As a matter of policy, permitting the inclusion and exercise of due-on-sale clauses is advantageous, from both an economic standpoint and a concern for uniform comprehension and application of the law. Due-on-sale clauses are an economic and doctrinal necessity for several reasons.

First, as a result of the instability of the money market occasioned by inflation, and the associated steadily rising interest rates, the due-on-sale clause has become an essential vehicle to ensure the lender's position in the money market.24/ The due-on-sale clause is a mechanism that permits

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23/ Amici has reviewed the amicus brief submitted by the Federal Home Loan Mortgage Corporation ("FHLMC"). While there is a certain identity of interests between the MBA and FNMA and the FHLMC, the MBA and FNMA do not agree with the position of FHLMC suggesting that the Court should confine its decision in this case to private lenders. Such a decision would merely delay resolution of the important issue now before this Court and postpone the inevitable day of reckoning in which this issue will be decided as to state chartered financial institutions.

24/ See Comment, The Due-on-Sale Clause: Current Legislative Actions and Probable Trends, 9 Fla. St. L. Rev. 645, 648-50 (1981).

lenders to protect against cyclical swings in the money market, so that lenders are not locked into a long-term loan at a fixed rate.25/ When lenders are permitted to exercise prospectively this protective mechanism, lenders are encouraged to originate loans at favorable, current market interest rates. Conversely, when lenders are restricted from exercising a due-on-sale upon transfer of the property, they are subjected to a double risk. First, loan agreements frequently allow a borrower to prepay a loan before it is due; thus, if interest rates drop, the lender faces the risk that the borrower will prepay the loan in order to secure a loan elsewhere at a lower rate. Second, if the original loan was extended at a low, fixed rate with no mechanism for adjustment to meet the lender's increased cost of obtaining funds, the lender is deprived of the benefit of the later rise in market interest rates.26/ This Court is well aware of the adverse effect of these factors upon financial institutions (particularly savings and loan associations) located in Florida.

As recognized in the Senate Report accompanying the Garn Act, studies have concluded that restrictions on due-on-sale enforceability "may lead to the complete disappearance of

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25/ See O'Connell, The Due-On-Sale Clause in Florida: A Potential Battleground for Borrowers and Lenders, 31 U. Fla. L. Rev. 933, 944 (1979)(hereinafter cited as O'Connell, Due-On-Sale Clause in Florida).

26/ See O'Connell, supra note 25, at 938, citing to Cherry v. Home Federal Savings & Loan Assoc., 276 Cal.Rptr. 574, 579, 81 Cal.Rptr. 135, 138 (1969), disapproved in, Wellenkamp v. Bank of America, 148 Cal.Rptr. 379, 582 P.2d 970 (1978).

that traditional mainstay of American homeowners -- the long-term fixed mortgage."27/ S. REP. at 3075. Similarly, the Federal Home Loan Bank Board, found that "elimination of the due-on-sale clause will cause a substantial reduction of the cash flow and net income of Federal associations, and . . . to offset such losses it is likely that the associations will be forced to charge higher interest rates and loan charges on home loans generally."28/

New homebuyers are also disadvantaged by due-on-sale restrictions. As recognized in the Senate Report accompanying the Garn Act, restrictions on due-on-sale clauses provide an advantage for existing homebuyers at the expense of new homebuyers. When due-on-sale clauses are unenforceable, homesellers inflate the sale price of a home to reflect the value of the assumable loan or to recover losses associated with taking back a second mortgage at a lower than market interest rate. Lenders in states which restrict due-on-sale enforceability likewise charge a premium for new home loans to offset the lower earnings from older loans and the greater risks

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27/ The Due-on-Sale Task Force assembled by the Federal Home Loan Bank Board concluded that the imposition of due-on-sale restrictions nationwide could create, within two years, annual losses of $600 to $800 million for federal savings and loans and $1.0 to $1.3 billion dollars for all federal and state savings and loan associations. S. REP. at 3075.

28/ 41 Fed. Reg. 6283, 6285 (1976). As noted in note 3, supra, the Board adopted a regulation permitting federal savings and loan associations to enforce due-on-sale clauses, notwithstanding any state restrictions to the contrary. 12 CFR §545.8-3(f)(1982).

associated with originating an assumable loan without an enforceable due-on-sale clause. S. REP. at 3074-75.

Further, due-on-sale restrictions adversely affect the secondary loan markets, which rely on uniform, homogeneous mortgage documents to operate efficiently and provide mortgage money for lenders and homebuyers. S. REP. at 3075. Even though most mortgage instruments originated by state and federal financial institutions contain a due-on-sale clause,29/ if the enforceability of these clauses varies depending upon the law of the state in which it was originated and the classification of the lender (i.e., federal savings and loan association, federal savings bank, state savings and loan association, state savings bank, or otherwise), the marketability of loan instruments is severely constrained. The marketability of a mortgage in the secondary market is critical to the originating lender, for it thereby can sell existing mortgages to obtain funds to make new

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29/ As observed by the Court in de la Cuesta:

> As a practical matter, however, few mortgage instruments are written without due-on-sale clauses. The Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association, which purchase the bulk of mortgagees sold in the secondary mortgage market, both require, in the mortgages they buy, either a due-on-sale clause or a provision enabling the lender to demand payment of the loan in seven years.
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> 458 U.S. at 155 n.10.

home loans. de la Cuesta, 458 U.S. at 155 n.10. In short, saleability means liquidity to originating lenders, and saleability requires enforceability.

The uniform enforceability of due-on-sale clauses thus permits, and indeed, encourages, lenders to extend mortgage loans to the borrowers at competitive, fixed rates, and provides lenders access to the secondary mortgage market, thereby increasing the flow of new funds for residential loans. The combined effect of the Garn Act and the de la Cuesta decision is the preemption of all state restrictions on the enforcement of due-on-sale clauses for all types of lenders nationwide; this preserves the economic stability of the primary and secondary mortgage markets and eliminates the confusion among homebuyers and sellers and lenders surrounding the enforceability of due-on-sale clauses.

In addition, the new federal laws place all lenders on a more competitive footing, thereby fostering competitive equality in the dual (federal and state) system of financial institutions. Parity among the various financial institutions operating in Florida is a policy goal which our Legislature has specifically endorsed and promoted. Pursuant to Section 655.061, Florida Statutes (1983), the Department of Banking and Finance is authorized to issue rules empowering state financial institutions with the authority to make any loan or investment or exercise any power granted by federal law to federally chartered or regulated financial institutions of the same type. The Department is specifically directed to "consider the

importance of a competitive dual system of financial institutions." §655.061, Fla. Stat. (1983).30/

The Court's decision in this case will have far-reaching impact on the mortgage banking industry in Florida. If this Court holds that due-on-sale clauses are enforceable according to the terms of the contract, competitive equality among all lenders and homebuyers and sellers in Florida will be promoted. In misapplying the Garn Act, the district court's decision threatens to prejudice unfairly all state chartered financial institutions and private lenders. If the district court's decision is not reversed, federal savings and loan associations, federal saving banks, national banks, and perhaps also federal credit unions,31/ will be exempt from Florida's restrictions on the enforcement of due-on-sale clauses, while the state-based lenders (state chartered financial institutions, state credit unions and private lenders) will be restricted from enforcing the same due-on-sale provisions. This Court should not foster or tolerate irrational discrimination in the financial section any more than it should tolerate such discrimination in other sectors.

30/ Other examples of the Legislature's parity policy for the banking industry, include a provision authorizing all lenders and creditors to charge interest on loans at the maximum rate of interest permitted to be charged by other lenders or creditors on similar loans made in Florida, §687.12(1), Fla. Stat. (1983); and a provision conferring to International Banking Corporations doing business in Florida the same rights and powers granted to banks organized under Florida law (with a few exceptions), §663.02, Fla. Stat. (1983).

31/ See supra note 12.

CONCLUSION

Although the issue before the Court is presented in a new context -- application of the Garn Act in Florida -- the issue is not novel. The role and jurisdictional authority of Florida's district courts of appeal are well-established. Each of the five Florida district courts of appeal functions as a final appellate court for most legal matters within its discrete appellate district. As a result of the separate jurisdictional authority of each district court, a decision of one district court is not binding authority as to any other district court of appeal. Each district court is authorized to independently consider and establish the law within its district, absent a controlling decision rendered by this Court.

In the context of the Garn Act, the autonomy and separate jurisdictional authority of Florida district courts of appeal precludes Florida from being classified as a window period state based upon a decision rendered by a district court of appeal. Since Florida district courts do not have statewide jurisdiction -- the authority to create uniform law which is binding statewide -- Florida cannot qualify as a window period jurisdiction under the Garn Act. Consequently, pursuant to the preemptive provisions of the Garn Act, due-on-sale clauses in mortgages transferred after October 15, 1982, the effective date of the Garn Act, are enforceable. It is also apparent from the legislative history of the Garn Act that Congress felt and intended that Florida would not be a window period state.

It is respectfully submitted that the question certified to the Florida Supreme Court should be answered in the affirmative.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct coy of the foregoing Brief of Amici Curiae was mailed this 6th day of July, 1984 to Ray D. Helpling, Esq., Counsel for Petitioners, Scruggs & Carmichael, P. O. Drawer C, Gainesville, Florida 32602; H. Reynolds Sampson, Esq., Counsel for Respondents, P. O. Box 3457, Tallahassee, Florida 32315; Hume F. Coleman, Esq., Holland & Knight, Counsel for Amicus Curiae, Federal Home Loan Mortgage Corporation, P. O. Drawer 810, Barnett Bank Building, Tallahassee, Florida 32302; Maud Mater, Esq., Federal Home Loan Mortgage Corporation, 1776 G Street, Washington, D.C. 20006; and John Corrigan, Esq., Counsel for Amicus Curiae, Developers Diversified Ltd., P. O. Box 479, Jacksonville, Florida 32201.

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