No. 15-15233
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BOURNE VALLEY COURT TRUST, Appellee

v.

WELLS FARGO BANK, N.A., Appellant

BRIEF OF THE COMMUNITY ASSOCIATIONS INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING OR REHEARING EN BANC

On Appeal from the U. S. District Court for Nevada
No. 2:13-cv-00649-PMP-NJK, the Honorable Philip M. Pro

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Community Associations Institute is a national, nonprofit research and education organization. It does not have "any parent corporation" and is not a "publicly held corporation that owns 10% or more of its stock". Thus, there is no such corporation to which Rule 26.1 would apply.

s/ Marvin J. Nodiff

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STATEMENT OF INTEREST

Community Associations Institute ("CAI") respectfully submits this *amicus curiae* brief in support of Appellee's Petition for Rehearing or Rehearing En Banc to reconsider the divided panel's determination that Nevada's association non-judicial foreclosure statute was facially unconstitutional. *Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*[1] Pursuant to Federal Rules of Appellate Procedure ("FRAP") 29-2(a) and 29-2(e), and for the reasons discussed below, CAI urges this Court to grant Appellee's Petition.

Nevada's Section 116.3116 *et seq.* grants a limited lien priority for community associations ("Lien Statute"). The majority in *Bourne Valley* held the Lien Statute violates the Fourteenth Amendment's Due Process clause and, thus, was facially unconstitutional. The majority misconstrues and misapplies the case law for the following reasons: (1) no "state actor" is involved in non-judicial foreclosures under the Lien Statute and (2) even if a state actor were involved, the Lien Statute incorporates a state statutory provision requiring the association to provide written notice to a mortgage lender. In determining that the Lien Statute was facially unconstitutional, the divided panel conflicts with U.S. Supreme Court decisions and involves a question of exceptional importance because it creates a split with the Fifth Circuit. FRAP 35(b)(1)(B).

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[1] No. 15-15233, ___ F.3d ___, 2016 WL 4254983 (9th Cir. Aug. 12, 2016).

This case is of substantial importance, involving the ability of a community association to recover delinquent assessments through the Nevada statutory lien priority vis-à-vis loan servicers.

Beyond the parties here, this case affects homeowners in all community associations in the 21 states, the District of Columbia and Puerto Rico that have adopted state lien priority statutes similar to the Nevada statute; approximately half of those states have similar notice provisions. This approach to association lien priorities is modeled on the Uniform Condominium Act ("UCA"), Uniform Common Interest Ownership Act ("UCIOA"), and Uniform Planned Community Act ("UPCA"), all drafted by the Uniform Law Commission (formerly known as the National Conference of Commissioners on Uniform State Laws). This ruling may affect approximately 66.7 million Americans because over twenty percent (20%) of the U.S. population resides in a community association.

CAI submits this brief in keeping with its longstanding interest in promoting understanding regarding the operation and governance of community associations.

A. Common-Interest Communities.

Common-interest communities -- subdivisions (or "planned communities"), condominiums, and cooperatives – are similar in how they function: maintaining and insuring common ground, operating with financial stability, collecting assessments, enforcing restrictions, preserving architectural design, and other functions. The unique form of self-governance in community associations provides mandatory membership and authority to charge assessments to their homeowners for common services. Without effective collections, the financial burden of supporting the association would be transferred to other homeowners in the community. This increased burden would eventually cause the overall quality of the association and the property values of homeowners to decline.

B. Amicus Curiae CAI.

CAI is a national, nonprofit research and education organization formed in 1973 by the Urban Land Institute and the National Association of Home Builders to provide effective and objective guidance for the creation and operation of condominiums, cooperatives, and homeowner associations.

Nationally, members of CAI include associations, volunteer board members, managers, attorneys, accountants, lenders, vendors, insurers, and other professionals and service providers. CAI has 60 chapters across the country.

CAI's sister organization, the Foundation for Community Association Research ("Foundation"), in its Statistical Review for 2014, estimates that the number of community associations has grown nationally from 10,000 in 1970 to 333,600 in 2014.[2] The Foundation estimates approximately 66.7 million Americans

[2] Foundation for Community Association Research, Statistical Review 2014, National and State Data. http://www.cairf.org/foundationstatsbrochure.pdf. All industry data herein is contained in this study, unless specified otherwise.

live in 26.7 million housing units in community associations, *i.e.* 20.7% or *one of every five Americans lives* in a community association.[3]

The phenomenal growth of community associations is attributable to several important benefits. Community associations:

- Have assumed many functions historically provided by local governments, thus easing the financial burden of municipalities.
- Offer economies of scale in construction and operation, and provide lower-cost entry housing for many homebuyers.
- Maintain home values that protect lenders' security with corresponding tax benefits for local government.

Lenders and government-sponsored entities ("GSEs") like Fannie Mae and Freddie Mac benefit from associations' services.

C. Limited Lien Priority Across the Country.

Twenty-three jurisdictions have adopted a limited-lien priority: Alabama, Alaska, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, Oregon, Pennsylvania, Rhode Island,

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[3] The Foundation estimates that, in 2014: $70 billion in assessments were collected from homeowners, associations were responsible for $4.95 trillion in home values (4th quarter), $22 billion were contributed to reserves for repair and replacement of roofs and other components, and a value of $1.6 billion in services provided by volunteer directors and committee members.

Vermont, Washington, West Virginia, and Puerto Rico.[4]

The Nevada Supreme Court has held its Lien Statute grants the association a "true lien" which, upon foreclosure, extinguishes a first mortgage.[5] Nevada is not alone. The Rhode Island Supreme Court reached the same conclusion and stated, "Regardless of whether or not lenders choose to employ these safeguards, the bottom line is that 'statutory principles of priority, not the monetary value of the respective liens, control;'" thus, a foreclosure of the association's lien extinguishes the otherwise first-mortgage lien.[6]

D. Lien Priorities Balance the Interests of Associations and Lenders.

Each homeowner in a common interest community is obligated to pay assessments to the association, which relies on full and prompt payment to

[4] Foundation for Community Association Research, *Community Association Fact Book 2014*, http://www.cairf.org/research/factbook/introduction.pdf, at 32. Of these, approximately eleven states have notice provisions similar to Nevada: Alaska (34.08.470); Colorado (38-33.3-316); Florida (718.116); Hawaii (514B-146); Illinois (765 ILCS 605/9 (from Ch. 30, par. 309)); Maryland (11-110(2), (3)); Minnesota (Ch. 515B,3-116); Missouri (448.3-116.3); Pennsylvania (68 Pa.C.S. 3315); Washington, D.C. (42-1903.13); and West Virginia.

[5] *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408 (Nev. 2014).

[6] *Twenty Eleven, LLC v. Michael J. Botelho, et al.*, 127 A.3d 897 (R.I. 2015). *See also Drummer Boy Homes Ass'n, Inc. v. Britton*, 474 Mass. 17, 2016 Mass. LEXIS 189 (Mass. 2016); *Chase Plaza Condo. Ass'n Inc. v. J.P. Morgan Chase Bank, N.A.*, 98 A. 3d 166 (D.C. Ct. App. 2014); *Summerhill Village Homeowners Ass'n v. Roughley*, 270 P.3d 639 (Wash. Ct. App. 2012).

operate, maintain, repair and replace, and insure the common property.[7]

Recognizing the critical role of assessment revenue for community associations, the Massachusetts Appeals Court stated:

> [W]e acknowledge the legislative concern for prompt collection of common expense assessments. Failure… to pay… common expense assessments would have a serious financial impact on the stability of a condominium association.[8]

The inability of an association to collect assessments fully and promptly would result either in (a) reduced maintenance and repair, which would reduce property values and compromise the collateral of all lenders in the community or (b) increased assessments for the other owners who already are paying their fair share, which would also affect the ability of borrowers to repay loans to all lenders in the community.[9]

While either result would affect mortgage lenders with loans in the community, it must be noted that until a lender completes its foreclosure, it is not liable to pay assessments. Thus, as the association copes with loss of revenue, the lender gets a "free ride" on the backs of homeowners who are paying the assessments – at higher amounts – to maintain and insure buildings and common

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[7] Joint Editorial Board for Uniform Real Property Acts, *The Six-Month "Limited Priority Lien" for Association Fees Under the Uniform Common Interest Ownership Act* (June 1, 2013) ("*JEB Report*") at 1.
[8] *Blood v. Edgar's, Inc.*, 632 N.E.2d 419 (1994) (describing assessments as the "life's blood" of the association).
[9] *JEB Report* at 1.

property, directly benefiting the mortgagees that are not paying anything.

NRS §116.3116, modeled after UCIOA Section 3-116, strikes an equitable balance between the association's ability to collect delinquent assessments and the lender's interest in securing its asset.[10] The UCIOA drafters described the purpose of the uniform acts (dating back to the UCA in 1977) as follows:

> The 6 months' priority [in Nevada, 9 months] for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of mortgage lenders. As a practical matter, mortgage lenders will most likely pay the six months' assessments...rather than having the association foreclose on the unit.[11]

This approach realizes the association is an involuntary creditor required to advance services in return for a promise of future payments, and the owners' default in these payments could impair the association's financial stability and its practical ability to provide services.[12]

In Massachusetts, prior to amending its condominium act in 1992, "the first mortgagee had little incentive to initiate a foreclosure action against the unit owner because its security interest was not in jeopardy," but as amended in 1992, the law provides, "when a condominium association initiates a lien enforcement action, it can obtain the so-called 'super-priority' status over a first mortgagee for six months'

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[10] UCIOA § 3-116, cmt. 1; *JEB Report* at 1.
[11] *Id*.
[12] *Id*.

worth of common expenses."[13]

Accordingly, mortgagees are on notice of lien priorities in Nevada and numerous other states. Lenders may protect their security by paying the modest amount of the super-priority portion of the association's lien.

ARGUMENT

I. THE COURT ERRED IN FINDING STATE ACTION BECAUSE THE LIEN STATUTE DID NOT DEGRADE APPELLATE'S INTEREST AND NO STATE ACTOR WAS INVOLVED IN THE NON-JUDICIAL FORECLOSURE.

A cornerstone of the Due Process Clause under the Fourteenth Amendment is that only a State, or a private person acting in a manner that may be treated as that of the State, may deprive a person of a property interest within the protection of the Fourteenth Amendment.[14] The majority correctly notes that the non-judicial foreclosure sale did not constitute state action and that Bourne Valley, as buyer of property at such sale, was not a state actor.[15] Indeed, Parks Homeowners' Association ("HOA"), a private nonprofit corporation, was the party conducting the non-judicial foreclosure sale under the Lien Statute; the HOA's role is the same as a private bank foreclosing a mortgage loan, neither of which is a state actor.

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[13] *Drummer Boy Homes Ass'n, Inc. v. Britton*, 474 Mass. 17, 2016 Mass. LEXIS 189 (Mass. 2016) at 13.
[14] *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 (1978).
[15] *Bourne Valley*, ___ P.3d ___ at 6 (9th Cir. Aug. 12, 2016).

Unable to find the presence of either state action or a state actor, the majority stretches to reach the Due Process issue, stating "the enactment of the [Lien] Statute unconstitutionally degraded [Wells Fargo's] interest in the Property,"[16] which disregards timing and misconstrues the cases.

First, Wells Fargo's interest was not "degraded" for the reason that priority depends on timing; here, the facts belie the majority. The Lien Statute was adopted in 1991; although amended since then, the limited lien priority provisions were part of the original enactment. The HOA's governing documents create the HOA's lien and incorporate the Lien Statute's priorities, and were recorded prior to the original purchase mortgage loan. The deed of trust securing the mortgage loan was recorded in 2001, and Wells Fargo's interest was not acquired until 2006. Thus, Wells Fargo possessed no interest when the Lien Statute was adopted; based on the facts, this Court cannot conclude that the Lien Statute "degraded" that interest.

Second, the majority's finding of "degradation" misconstrues Due Process under U.S. Supreme Court cases. In *Lugar v. Edmondson Oil Co.*, the Supreme Court held that the conduct allegedly causing the deprivation of a federal right must be fairly attributable to the State."[17]

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[16] *Bourne Valley*, ___ P.3d ___ at 6 (9th Cir. Aug. 12, 2016).
[17] 457 U.S. 922, 937 (1982).

This Court, in *Apao v. Bank of New York*, rejecting an argument similar to the one Wells Fargo makes here, held that the statutory non-judicial foreclosure statute lacks any "overt official involvement" and that government regulation of the mortgage market "does not convert the private foreclosure procedures here into state action."[18]

Apao cites several cases in support of its conclusion: state action occurs where a court clerk issued a writ of replevin authorizing a sheriff to seize property[19], where a court clerk issued a summons at a creditor's request which allowed the creditor to garnish an individual's wages,[20] and where a sheriff sequestered property upon executing a creditor's petition for a writ of prejudgment attachment.[21]

Here, as the dissent correctly observes, the majority ignores the common theme in all these cases: a government actor must be overtly involved in some official action to meet the state action requirement, and self-help provisions delegated to private parties by state statute do not convert private conduct into state action.[22]

In cases involving a creditor's foreclosing a lien through a non-judicial

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[18] 324 F.3d 1091, 1092-03 (9th Cir. 2003).
[19] *Fuentes v. Shevin*, 407 U.S. 67, 70-71 (1972).
[20] *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337, 338-40 (1969).
[21] *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924-25 (1982).
[22] *Bourne Valley*, ___ P.3d ___ at 7-8 (9th Cir., Aug. 12, 2016).

sale – analogous to the instant case -- the Court has found insufficient state involvement to satisfy the requirement of state action, even though the creditor derived its power to conduct the sale from a state statute delegating "a portion of its sovereign monopoly power" to the creditor.[23] In *Apao*, this Court observed that *Flagg Bros.* held self-help provisions authorized by state statute are "not sufficient to convert private conduct into state action" because "the state has not compelled the sale of a [debtor's property], but has merely announced the circumstances under which its courts will not interfere with a private sale."[24] Applying Hawaii law, this Court found the facts in *Apao* analogous to *Flagg Brothers* and concluded that non-judicial foreclosure procedures lack any "overt official involvement."[25]

The majority failed to show "overt official involvement" as required by the Supreme Court's decisions in *Fuentes, Sniadach, Lugar,* and *Flagg Brothers*. It misstates this Court's decision in *Charmicor v. Deaner*, involving a pre-existing contractual relationship; *Charmicor* found the power of sale was conferred by statute, not contract, and there was "insufficient state involvement to attribute the foreclosure to the state itself."[26]

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[23] *Flagg Bros,* 436 U.S. at 152-53 (1978).
[24] *Apao*, 324 F.3d at 1094.
[25] *Id*. at 1095, quoting *Flagg Bros.*, 436 U.S. at 157.
[26] 572 F.2d 694, 695-96 (9^{th} Cir. 1978).

The majority's reliance on the Fifth Circuit's decision in *Small Engine Shop, Inc. v. Cascio*[27] is inapposite. *Small Engine* involved a Louisiana sheriff's sale which was clearly state action because a public official was involved, not analogous to Nevada's Lien Statute which provides for a non-judicial sale not conducted by a public official.

Judicial processes and non-judicial processes are apples and oranges. Where *Small Engine* avoided finding constitutional defects in a statute, the majority here finds constitutional defects, thus involving a question of exceptional importance because it creates a circuit split.

The more pertinent Fifth Circuit precedent is *Barrera v. Security Bldg. & Inv. Corp.*[28] where the court held that a trustee exercising a power of sale in a non-judicial foreclosure was not performing a governmental function and, thus, no state action existed.

On rehearing, this Court must find that the Lien Statute is not facially unconstitutional because there was no state action and no government actor involved in conducting the non-judicial foreclosure sale.

II. THE COURT ERRED IN FINDING THE LIEN STATUTE WAS FACIALLY UNCONSTITUTIONAL ON THE BASIS THAT IT DOES NOT REQUIRE NOTICE TO LENDERS.

[27] 878 F.2d 883 (5th Cir. 1989).
[28] 519 F.2d 1166 (5th Cir. 1975).

The second question presented to this Court is whether the Lien Statute is facially unconstitutional for lack of a provision requiring notice to lenders.[29] However, while authorizing interested parties to request notice, the Lien Statute also provides, in section 116.31168(1), that "the provisions of NRS 107.090 apply to the foreclosure of an association's lien as if the deed of trust were being foreclosed." The majority erred by treating the incorporation of NRS 107.090 as mere "surplusage" rather than apply a construction of the Lien Statute that would give meaning to the notice requirements of 107.090.

Under the Lien Statute, Wells Fargo's interest in the property was subject to the HOA's lien to the extent of the limited lien priority in the amount of nine months' delinquent assessments.[30]

Notice to lenders is required by the Lien Statute's incorporation by reference of NRS 107.090 providing affirmative notice to lenders. NRS 107.090 applies to deeds of trust, requiring the trustee or person authorized to record the notice of default to send notice by registered or certified mail to "each other person with an interest whose interest or claimed interest is subordinate to the deed of trust." By expressly incorporating NRS 107.090 by reference, the Lien Statute includes affirmative notice, applying the notice

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[29] *Bourne Valley*, ___ P.3d ___ at 4-5 (9th Cir. Aug. 12, 2016).
[30] *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408 (Nev. 2014).

requirement of NRS 107.090 not only to foreclosure of deeds of trust, but shall also "apply to the *foreclosure of an association's lien as if the deed of trust were being foreclosed*." (*Emph added*).

Thus, the term "deed of trust" in 107.090 means the HOA's lien in the Lien Statute, requiring the HOA to send a notice of default to "each other person" with a subordinate interest. Due process is satisfied as per *Mullane* because persons with an interest subordinate to the HOA receives "notice, reasonably calculated to apprise [them] of the pendency of the action.[31]

Contrary to the majority's decision here, the Nevada Supreme Court, in *SFR*, found that incorporation of 107.090 in the Lien Statute requires notice to junior lienholders.[32] The majority ignores the principle that federal courts construing state statutes must follow the rulings of that state's highest court.[33]

The majority disregards *SFR*, referring to the notice provisions as "peculiar," "opt-in," and "burden-shifting,"[34] and speculates "it is unclear" that the HOA and Wells Fargo "were even aware of each other's existence."[35] The originating lender, sophisticated and diligent, was familiar with the Lien Statute and had full access to the land records, specifically the HOA's CC&Rs,

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[31] *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).
[32] *SFR*, 334 P.3d 408, 411, 418, 422 (Nev. 2014).
[33] *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974).
[34] *Bourne Valley*, ___ P.3d ___ at 4, 5 (9th Cir. Aug. 12, 2016).
[35] *Id.* at 5.

the property's legal description, and the HOA's name and location.

However, subsequent transfers and assignments of the security, occurring after the original loan, are registered on the private Mortgage Electronic Registration Systems, Inc. ("MERS"), an opaque private system designed to save lenders the cost of recording such transfers and assignments, resulting in savings of millions of dollars.[36]

The absence of lenders' interests in the public records deprives HOAs, investors and other parties the opportunity to identify the current loan servicer. If statutory notice is given to MERS, the duty of MERS to deliver such notice to the loan servicer is uncertain. In short, the choice by the lending industry to use MERS in order to save money has created an impractical, unrealistic, and unreliable system for HOAs to identify and notify the current loan servicer at the time of lien foreclosure.

Thus, the majority does not properly apply *SFR* to the Lien Statute's notice provisions, and does not understand that Wells Fargo's argument with respect to notice is actually self-inflicted. The Lien Statute hardly shifts the burden: it is far easier for the sophisticated loan servicer to locate the HOA

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[36] Reiss, et al., *MERS Litigation – Brief of Amicus Curiae the Legal Services Center of Harvard Law School and Law Professors in Support of Appellee* (May 5, 2015), Brooklyn Law School, Legal Studies Paper No. 411, available at SSRN: http://ssrn.com/abstract=2602929.

than vice-versa.

When interpreting a statute, "every reasonable construction must be resorted to in order to save a statute from unconstitutionality."[37] The majority confronts rather than avoids a constitutional question, disregarding the long-standing judicial principle of constitutional avoidance.[38] It erred in finding section 107.090 was surplusage without considering the alternative construction that would give meaning to all notice provisions.

CONCLUSION

The majority in *Bourne Valley* misconstrues U.S. Supreme Court cases and creates a circuit split in its application of the Fourteenth Amendment's Due Process Clause. These are extremely important issues, appropriate for rehearing. *Amicus curiae* Community Associations Institute respectfully urges this Court to grant Appellee's Petition for Rehearing or Rehearing En Banc to preserve the rights and expectations of homeowners in Nevada's community associations as well as tens of millions of homeowners across the country.

Dated: September 6, 2016.

Respectfully Submitted,

Nodiff & Billy, The Community
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By: *s/ Marvin J. Nodiff*
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[37] *National Fed. of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2594 (2012).
[38] *United States v. Lovett*, 328 U.S. 303, 320 (1946).

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RULE 29(c)(5) STATEMENT

This brief in whole is authored by Marvin J. Nodiff, Esq. and Jaime K. Fraser, Esq., and no money was contributed by Community Associations Institute, Mr. Nodiff, Ms. Fraser or any other person to fund the preparation or submission of this amicus brief.

s/ Marvin J. Nodiff

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)-(d) and 32(a)(7)(C), the undersigned certifies the attached brief is proportionately spaced, using Microsoft Word in Times New Roman 14-point font, and contains 3,399 words, excluding the exempted portions as provided in Fed. R. App. P. 32(a)(7)(B)(iii). Pursuant to Fed. R. App. P. 32(a)(7)(C)(i), the undersigned has relied upon the word count of the word processing system used to prepare the attached brief.

Dated: September 6, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 6, 2016. The following participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system:

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