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BV Lending, LLC v. Jordanelle Special Service District : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

BV LENDING, LLC, an Idaho limited liability company, and BV JORDANELLE, LLC, an Idaho limited liability company, **Plaintiffs/Appellants,** **v.** **JORDANELLE SPECIAL SERVICE DISTRICT, a body corporate and politic, JORDANELLE SPECIAL SERVICE DISTRICT, UTAH SPECIAL IMPROVEMENT DISTRICT NO. 2005-2, a county improvement district, and W. JEFFERY FILLMORE, foreclosure trustee of Jordanelle Special Service District, Utah Special Improvement District No. 2005-2,** **Defendants/Appellees.**	**Appellate Case No. 20111089** **Oral Argument Requested**

REPLY BRIEF OF APPELLANTS

Appeal from a Final Order of the Fourth Judicial District Court
for Wasatch County, Judge Derek P. Pullan Presiding
Civil No. 100500444

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The claims dismissed by the District Court for BV's alleged lack of standing address the fundamental issue of whether the Utah and/or United States Constitutions require that a mortgagee receive written notice of a proposed assessment affecting property in which the mortgagee has a protected property interest. At the time of the proposed special assessment[1] on the Talisman area, BV Lending was the beneficiary of a deed of trust (i.e., mortgage) secured by certain property within the Talisman area. There is no dispute that BV Lending's property interest was a legally protected property interest under the Due Process Clause. Accordingly, the underlying question in this case is whether the proposed assessment triggered the requirement for JSSD to provide notice reasonably calculated, under all circumstances, to apprise BV Lending of the proposed assessment and afford BV Lending an opportunity to present its objections. In other words, was BV Lending entitled to written notice of the proposed assessment before it was imposed, particularly given that the proposed assessment would prime BV Lending's perfected lien? The answer to this question is an unequivocal yes.

The United States Supreme Court has stated that "prior to taking action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment, a State must provide 'notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Mennonite Bd. v. Adams*, 462 U.S. 791, 798

[1] A "special assessment" is "[t]he assessment of a tax on property that benefits in some important way from a public improvement." Black's Law Dictionary 125 (8th ed. 2004).

(1983) (*quoting Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). In *Mennonite*, Justice O'Connor in dissent accurately described the majority ruling as follows: "Today, the Court departs significantly from its prior decision and holds that before the State conducts *any* proceeding that will affect the legally protected property interests of *any* party, the State must provide notice to that party by means certain to ensure actual notice as long as the party's identity and location are 'reasonably ascertainable.'" *Mennonite*, 462 U.S. at 800-01 (O'Connor, J., dissenting). As the majority stated, "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party . . . ." *Id.* at 800.

Here, there can be no genuine dispute that the assessment adversely affected BV Lending's property interest. The assessment lien, which now purportedly exceeds $29 million, primed BV Lending's perfected interest in the Subject Property (and every other mortgagee's interest as well) and became a lien on par with a statutory property tax lien. Accordingly, under *Mennonite*, BV Lending was entitled to written notice of the proposed assessment before it was imposed—written notice that it never received. *Id.*

Appellees contend that notice is required only where the government action might result in the property interest being immediately and drastically diminished. The *Mennonite* decision was not so limited. Nevertheless, even if a court were to apply the more stringent (and incorrect) legal standard suggested by Appellees, there is no question that the proposed Assessment in this case might have resulted in BV Lending's property interest being immediately and drastically diminished. In fact, in this case, the immediate

and drastic diminishing of BV Lending's property interest has arguably already been proven as the District Court just recently ruled below that BV Jordanelle is obligated to pay the entire Assessment for the Talisman area in order to clear the assessment from its own property. In other words, although BV Jordanelle owns less than half of the property within Talisman—having acquired the property from its affiliate BV Lending—it is now required to pay the assessment for the entire Talisman property in an amount in excess of $29 million in order to keep its property. An owner who owns less than ten percent of the Talisman area likewise may be liable for the entire assessment. The day before the assessment was enacted BV Lending had a property interest in a portion of Talisman by virtue of its $7 million loan and its recorded trust deed, secured by property having an equivalent value. But when the assessment was enacted the next day, an assessment lien in an amount more than double what BV's property was allegedly worth and based on improvements to property that BV Lending had no interest in and received no benefit from primed BV Lending's interest. "Immediate" and "drastic" are apt descriptions of the impact of the assessment on BV Lending and the other mortgagees' respective interests in Talisman. Consequently, even under Appellees' incorrect standard, BV Lending was entitled to actual notice.

The Utah Assessment Area Act (the "Assessment Act"), the Act under which the assessment at issue in this case was established, currently does not require the government to provide written notice to a mortgagee of a proposed assessment. Rather, the only persons entitled to notice under the statute are property owners. This omission is unconstitutional and BV's Notice Claims seek, in part, such a ruling from Utah's courts.

All of this background information on BV's Notice Claims, including Judge Pullan's recent decision that BV Jordanelle is responsible for the assessment lien on the entire Talisman area even though BV Jordanelle owns less than half of that property, is significant to the question of standing for numerous reasons. First, BV Lending has traditional standing. Because the Notice Claims stem from core constitutional violations, including a violation of BV Lending's due process rights, the District Court's denial of BV Lending's standing based on an alleged inability to redress BV Lending's injury was clear error. Not only do courts apply a less strict standard for redressability when addressing a procedural due process violation, but the District Court also failed to acknowledge that BV Lending may be entitled to monetary damages—even if nominal—or other relief not involving any specific performance with respect to the property or the assessment lien. BV Lending has a "stake" in this case separate from the ownership of the property. Moreover, even if BV Lending lacks standing, which it does not, then BV Jordanelle should be allowed to assert BV Lending's claims under the third-party standing doctrine.

In any event, the intimate relationship between the BV entities—sister companies in which BV Jordanelle was created for the special purpose of holding the property at issue—and the BV entities long and continuing history with the property in question unequivocally demonstrates that the BV entities have a real and personal interest to fully and zealously advocate their position in this case. In other words, the BV entities clearly satisfy all policies underlying traditional standing. To the extent that the Court finds that BV Lending lacks traditional standing based on the District Court's alleged

inability to redress its injuries, however, BV Lending and BV Jordanelle respectfully request that the Court simply allow BV Jordanelle twenty days from the Court's ruling to transfer the property back to BV Lending. The simplicity of this process, however, suggests to the BV entities that traditional standing in this case cannot be so narrowly construed, and that form cannot be elevated over substance.

Second, the issues raised in this case create a classic scenario where alternative standing is warranted. As noted above and as recognized by the District Court below, BV Jordanelle is clearly an appropriate party to assert these claims. Furthermore, the issues sought to be raised in this case involve core constitutional rights affecting numerous private landowners in Utah, and are therefore of sufficient public importance to support alternative standing. BV is seeking a ruling that the Assessment Act is unconstitutional on its face because mortgagees are entitled to written notice of a proposed assessment before it is imposed. Such a determination is to be made by the judicial branch, and only the judicial branch. Appellees' arguments that the judicial branch is not best suited to address BV's alleged due process violations and the constitutionality of the Assessment Act defies logic and is contrary the very foundation of the separation of powers. John Marshall, the author of *Marbury v. Madison*, 5 U.S. 37 (1803), must be rolling over in his grave. Moreover, Appellees' suggestion that "sufficient public importance" is limited only to the specific facts of a few cases also is incorrect as such an argument ignores the underlying purpose of that prong for alternative standing. The resolution of the constitutional issues raised by BV may have

an impact on property rights and government practices beyond the confines of this case, and that is undoubtedly a sufficient public importance to confer alternative standing.

I. BV LENDING HAS TRADITIONAL STANDING.

The alleged defect defeating BV Lending's "traditional" standing to assert the Notice Claims is that BV Lending transferred the property to its affiliate, BV Jordanelle. According to the District Court, this transfer of the property "eliminated any stake [BV Lending] may have had in the outcome of these proceedings" and, thus, the District Court is allegedly unable to redress the constitutional violations claimed by BV Lending.[2] This ruling was in error, and Appellees have provided the Court with no basis to support this ruling.

The District Court's ruling on BV Lending's alleged lack of traditional standing has a fundamental flaw. The District Court and Appellees incorrectly assume that BV Lending has no "stake" in this case separate from the ownership of the property. This simply is not true. An individual's procedural due process rights are not contingent on that individual's continued "ownership" of the protected interest implicating those rights. For example, in *Copelin-Brown v. New Mexico State Personnel Office*, the facts showed that the terminated employee alleging a violation of her right to procedural due process would not have been eligible for continued employment with the government office. 399

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[2] As correctly recognized by the District Court, BV Lending satisfies the first two elements of traditional standing: injury and causation. (R. 1892.) The strained arguments by Appellees that BV Lending was somehow not injured when a priming lien supplanted its property interest without BV Lending having notice or the opportunity to be heard, or that BV Lending's request to strike the Area Act as unconstitutional is not causally connected to the due process claims (Appellees' Br. at 29-30) defies law and logic.

F.3d 1248, 1254 (10th Cir. 2005). Accordingly, the New Mexico State Personnel Office argued that "a favorable ruling from the court would fail to redress her injury." *Id.* at 1254. The Tenth Circuit rejected this argument, explaining that "even if Ms. Copelin-Brown's dismissal was justified on the merits, her right to procedural due process entitles her to at least nominal damages." *Id.* (*citing Carey*, 435 U.S. at 266); *see also Citizens for Better Forestry v. U.S. Dept. of Agric.*, 341 F.3d 961, 976 (9th Cir. 2003) (finding that redressability requirement was met in the context of an injury for lack of notice under NEPA where plaintiff arguably could have influenced the decision of the United States Department of Agriculture had plaintiff been given an opportunity to be heard). In other words, even though Ms. Copelin no longer had a "stake" in her employment with the government office, that fact did not mean she no longer had standing to assert her claim for violation of her procedural due process rights.

The same is true here. Although BV Lending no longer "owns" the property that was unlawfully assessed, BV Lending, like Ms. Copelin, still has the ability to assert its procedural due process claims in this case. This conclusion is further supported by the general proposition that a more relaxed standard of "redressability" is applied to claims for procedural due process violations. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992) ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."); *Carey v. Piphus*, 435 U.S. 247, 266-67 ("Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized

society that procedural due process be observed, we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury.") (internal citation omitted); *see also Brody v. Vill. of Port Chester*, 345 F.3d 103, 112 (2d. Cir. 2003) ("In a procedural due process challenge, the question before the court is whether the process affording the plaintiff an opportunity to participate in governmental decision-making before being deprived of his liberty or property was adequate, not whether the government's decision to deprive the plaintiff of such liberty or property was ultimately correct."); *Citizens for Better Forestry*, 341 F.3d at 976 (finding that the redressability requirement was met in the context of an injury for lack of notice under NEPA where the plaintiff arguably could have influenced the decision of the United States Department of Agriculture had plaintiff been given an opportunity to be heard). BV Lending was entitled to notice of the proposed Assessment Ordinance and was entitled to be heard on the matter. BV Lending, like Citizens for Better Forestry, arguably could have influenced the Wasatch County Council had it been notice and an opportunity to be head.

Appellees recognize that "a person's right to due process may be actionable even when there are ***nominal damages***" but contend that BV does not seek nominal damages and that the relief requested "far exceeds the nominal damages purportedly allowed in the absence of actual injury . . . ." (Appellees' Br. at 31.) This argument is unpersuasive. First, Appellees appear to concede that BV Lending has standing to at least obtain nominal damages on its claims. Although BV Lending has not expressly requested "nominal damages" in its Complaint, it does request "such other and further relief as the

Court determines just and proper," which would clearly include nominal damages. *See Calhoun v. Detella*, 319 F.3d 936, 941 (7th Cir. 2003) ("[N]ominal damages 'are not compensation for loss or injury, but rather recognition of a violation of rights.'" (*quoting Redding v. Fairman*, 717 F.2d 1105, 1119 (7th Cir. 1983)). Indeed the *Calhoun* Court recognized that "[a]lthough Calhoun does not specifically request nominal damages—as he did compensatory and punitive damages and injunctive and declaratory relief—his amended complaint contains a prayer for 'such other relief as it may appear plaintiff is entitled.' . . . Under these circumstances, Calhoun's prayer for 'such other relief' can be reasonably viewed as a request for nominal damages." *Id.* at 943; *see also Hynix Semiconductor Inc. v. Rambus Inc.*, 527 F. Supp. 2d 1084, 1100 n.5 (N.D. Cal. 2007) ("Rambus also argues that Hynix and Nanya did not request nominal damages in their prayer for relief. Both Hynix and Nanya request 'such other and further relief as the Court may deem appropriate.' This general prayer suffices here to provide for nominal damages, if proven at trial."). Accordingly, BV Lending has traditional standing.

Second, Appellees ignore the fact that BV has requested a declaratory judgment that the Assessment Act is unconstitutional. Third, the vindication of BV Lending's due process rights alone satisfies the "redressability" prong for traditional standing. *See, e.g., Carey*, 435 U.S. at 266-67 ("Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable for

nominal damages without proof of actual injury.") (internal citation omitted).[3] In short, BV Lending has traditional standing to assert the Notice Claims.

Notwithstanding the foregoing, if this Court still believes that BV Lending's transfer of the property to BV Jordanelle precludes BV Lending from having traditional standing, BV Lending and BV Jordanelle respectfully request that the Court simply allow BV Jordanelle twenty days from the Court's ruling to transfer the property back to BV Lending. That apparently is all that is required to satisfy the District Court's redressability concerns.

II. BV LENDING AND BV JORDANELLE SATISFY THE REQUIREMENTS OF TRADITIONAL STANDING.

The traditional standing test serves the purpose of avoiding potentially poor advocacy and avoiding unnecessary decisions of constitutional issues by parties who do not have sufficient incentive to fully develop the record and litigate the claims. 2006 UT 74, ¶ 20. Currently before the Court is the party that owned the property at the time of the assessment and was harmed by the priming lien (BV Lending), and the related party that currently owns the property and must pay the assessment or risk foreclosure (BV Jordanelle). BV Lending and BV Jordanelle, both individually and collectively, have every incentive in the world to prosecute their claims with vigor, and to protect their substantial economic investment. As such, both satisfy the requirements for traditional standing.

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[3] To the extent BV Lending needs to amend its claims to expressly request nominal damages in order to have standing, which it should not have to do, it is willing and capable to do so as the parties are only in the early stages of discovery in the underlying action.

Appellees attempt to argue that the purposes of standing are not met here because "[n]either party has a real or personal interest in the dispute or any incentive to fully develop all of the material and factual issues." (Appellees' Br. at 42.) Appellees argue that BV Jordanelle was not in existence at the time of the creation of the Assessment Ordinance and is thus not able to fully develop all the material facts, (*id.* at 39) and because "BV Lending no longer has an interest in the property and does not owe the assessment amounts, it is unable to fully develop all material facts related to the current amounts due and owing pursuant to the assessment lien" (*id.*). This argument, however, ignores the obvious fact that BV Lending and BV Jordanelle are sister companies with the same principles, decision-makers, office, coffee mugs, etc. Furthermore, the procedural history of this case, both in the underlying action and on appeal, should demonstrate both the motivation and the means of these entities to fully and zealously advocate their position in this case. Indeed, BV currently has over 29,000,000 reasons to vindicate their rights.[4]

III. BVJ HAS TRADITIONAL STANDING.

BVJ has traditional standing under the "third-party standing" doctrine. *See, e.g., Hodak v. City of St. Peters*, 535 F.3d 899, 904 (8th Cir. 2008), *cert. denied,* 129 S. Ct. 1352 (2009) ("Third-party standing is an exception to the general rule that a plaintiff may only assert his own injury in fact and permits a litigant who lacks a legal claim to assert

[4] Appellees also attempt to argue that the policy considerations for standing are not met in this case because the issues should not be resolved by the courts but should be left to another branch of government. (*Id.* at 39-40.) As explained in more detail below, this argument is misplaced and ignores the very basis of BV's claims—the unconstitutionality of the Assessment Act.

the rights of a third party."); *see also Powers v. Ohio*, 499 U.S. 400, 410 (1991) (recognizing that a litigant may bring actions on behalf of third parties where the litigant has suffered an injury in fact, have a close relationship to the third party, and the third party has some hindrance to its ability to protect its own interests); 13A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3531.9 (3d ed. 1998) ("The most common form of statement is that the rule against asserting the rights of others is a prudential rule that can be relaxed when the purposes of standing doctrine are served.").

Appellees attempt to argue that the third-party standing rule does not apply because "BV Lending is a party to the lawsuit" and allegedly has no practical barrier in asserting its own rights. (Appellees' Br. at 35.) Once again, this argument ignores the obvious. If there was no barrier to BV Lending litigating its rights, then this discussion would be moot. However, according to the District Court and Appellees, BV Lending lacks the ability to assert its own claims in this case by virtue of its alleged lack of standing. The lack of standing is the "barrier" that satisfies that requirement under the third-party standing rule.

Furthermore, Appellees' arguments based on *Kemmerer Coal Company v. Brigham Young University*723 F.2d 54, 57 (10th Cir. 1983) are also misplaced. (*Id.* at 35-36.) *Kemmerer* states the general rule that a litigant may only assert his own constitutional rights or immunities. *Kemmerer*, 723 F.2d 54, 57 (10th Cir. 1983.) Appellees apparently ignore the fact that the third-party standing rule is an exception to this general rule. *See Hodak*, 535 F.3d at 904 ("Third-party standing is an exception to

the general rule that a plaintiff may only assert his own injury in fact and permits a litigant who lacks a legal claim to assert the rights of a third party."). *Kemmerer* is simply inapplicable. In any event, the parties in *Kemmerer* lacked the close relationship that exists here, where BV Lending and BV Jordanelle are closely related affiliates. If BV Lending lacks traditional standing in this case, then BV Jordanelle should have standing to assert BV Lending's claims under the third-party standing rule.

Appellees also appear to suggest in their brief that BV's remedy in this case is not to sue them, but rather to obtain recovery from Old Republic Title Company, BV Lending's title insurer, for its failure to notice the Creation Resolution or disclose the existence of that resolution to BV Lending prior to the making of the loan to PWJ. (Appellees' Br. at 38.) BV has made demand upon Old Republic for defense and indemnity related to Old Republic's failure to discover or disclose the Creation Resolution in BV Lending's title policy. However, as of the date of this brief, Old Republic has flatly refused to provide BV with either a defense or indemnity, asserting that, pursuant to *Vestin Mortgage, Inc. v. First Am. Title Ins. Co.*, 2006 UT 34, 139 P.3d 1055 (2006), neither the creation of a special improvement district nor the recordation of a notice of intention to create a special improvement district in the public records creates a defect, lien or encumbrance on title. Thus, the position of Old Republic—and the position of the Utah Supreme Court to the extent that Old Republic has accurately characterized the *Vestin* case—is diametrically opposed to Appellees' position on page 41 of their brief that the recordation of the Creation Resolution in 2005 was really the act that led to the imposition of the assessment here. (*See* Appellees' Br. 41.)

IV. BVJ HAS ALTERNATIVE STANDING.

A party may "qualify for alternative standing if the party is (1) an appropriate party to bring suit and (2) the issue being presented is one of 'sufficient public importance to balance the absence of traditional standing criteria.'" *City of Grantsville v. Redevelopment Agency of Tooele City*, 2010 UT 38, ¶ 16, 233 P.3d 461 (*quoting Sierra Club*, 2006 UT 74, ¶ 41). Here, there is no genuine dispute that BV Jordanelle is an appropriate party to assert the Notice Claims. The District Court found that "BVJ is an appropriate party as the obligor under the assessment ordinance and has the interest necessary to develop the legal and factual issues presented in this case . . . ." (R. 1889.) Appellees provide no persuasive arguments otherwise. Accordingly, the only question before the Court concerning alternative standing is whether the issues sought to be raised by BV in their Notice Claims are of sufficient public importance and should be addressed by the judicial branch. They are, and BV should be allowed to assert those claims.

A. The Constitutional Issues Sought to be Raised are of Sufficient Public Importance.

This case is about the protection of property and due process rights under the Utah and United States Constitutions. Specifically, the claims dismissed by the District Court address the fundamental issue of whether the Utah and/or United States Constitutions require that a mortgagee receive written notice of a proposed assessment affecting property in which the mortgagee has a protected property interest before the assessment is imposed. BV Lending's interest in its property within Talisman was a legally protected property interest under the Due Process Clause at the time of the proposed Assessment

Ordinance. However, BV Lending was not provided with written notice of the proposed Assessment Ordinance, and was not provided with an opportunity to be heard regarding the assessment. Appellees essentially argue that there is nothing for this Court or the District Court to address because Appellees allegedly complied with the Assessment Act in providing notice of the proposed assessment to those identified in the Assessment Act as requiring written notice; i.e., only property owners. (*See, e.g.,* Appellees' Br. at 48.) Appellees, however, apparently misunderstand the fact that BV's Notice Claims are primarily premised on the argument that the Assessment Act is unconstitutional for the very reason that mortgagees and lienholders are not entitled to written notice under the statute.

In determining whether the Assessment Act is unconstitutional, a court must determine whether the proposed assessment triggered the requirement for JSSD to provide notice reasonably calculated, under all circumstances, to apprise BV Lending of the proposed assessment and afford BV Lending an opportunity to present its objections prior to the assessment being imposed. As explained above, BV Lending was entitled to written notice under the standard outlined in *Mennonite*, as well as under the more stringent (and incorrect) standard argued by Appellees. (*See* Appellees' Br. at 46-47 (relying on *New Iberia.*) The question of the Assessment Act's constitutionality is not currently before the Court. However, the question is relevant to standing in that it demonstrates that the issues raised are of sufficient public importance to warrant alternative standing for BV.

As noted in *Trustees for Alaska v. State of Alaska*, a case completely ignored by Appellees in their brief, the mere fact that BV's dismissed claims are constitutional claims may, in and of itself, satisfy the "sufficient public importance" prong of the test. 736 P.2d 324, 329 (Alaska 1987) ("[T]he case in question must be one of public significance. *One measure of significance may that that specific constitutional limitations are at issue . . . That is not an exclusive measure of significance, however, as statutory and common law questions may also be very important.*") (emphasis added). The issues raised by BV here involve core constitutional rights centered on notice and an opportunity to be heard.

Furthermore, the resolution of BV's Notice Claims may have a significant impact on every local government and landowner in the entire State of Utah. If BV prevails on their Notice Claims and the Assessment Act is found to be unconstitutional on its face for failure to require written notice to be sent to mortgagees, then the natural consequence is that the Assessment Act will need to be amended by the Utah Legislature to require written notice in conformance with due process. In other words, such a resolution would affect every special assessment to be levied by every governmental entity in the State of Utah.[5] Such a far-reaching impact is certainly important to the public, especially in Utah where property rights and due process rights are held in such high esteem. *See* Utah Const. Art. I, Sec. 1 ("All men have the inherent and inalienable right to enjoy and defend

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[5] Curiously, Appellees argue that the Notice Claims raise only a "narrow issue dealing with a single landowner" and that the "issues do not truly impact land owners and local governments . . . ." (Appellees' Br. at 46.) Again, Appellees either misunderstand BV's claims and their request to strike the Assessment Act as unconstitutional or are simply choosing to ignore the obvious implications of this case.

their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right."); *see also Sloan v. Greenville Cnty.*, 606 S.E.2d 464, 468 (S.C. 2004) (noting that "the issue in the present case is of sufficient public importance to confer standing. Resolution of the issues in this case will likely have an impact on government practices beyond the confines of the case itself.").[6]

Ignoring these cases and constitutional provisions, Appellees attempt to limit the type of claims that are of "significant public importance" to actions where "they challenge industries that pose potential environmental and health-related harms to citizens of a county, for example the storage of hazardous waste." (Appellees' Br. at 44.) Such a limitation is unwarranted. Indeed, the District Court and the Appellees provide no

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[6] Although a ruling in favor of BV on their Notice Claims may have implications, Appellees' suggestion that "to deem the Act unconstitutional would undermine the very purpose of the Act, which is to allow counties to establish special improvement districts for the benefit of the citizenry," is just not true. (Appellees' Br. at 40.) BV simply contends that mortgagees and other reasonably ascertainable individuals holding a protected property interest should be provided written notice of a proposed assessment, a result that could be effectuated by simply amending the Assessment Act to require written notice be sent to those of record as identified through a simple title report. Further, a ruling in favor of BV on the merits of their Notice Claims would not undermine or vitiate the many assessments that have been imposed by other governmental entities under the Assessment Act in other jurisdictions at other times and under other circumstances. As noted by the Utah Supreme Court in *Exxon Corp. v. Utah State Tax Comm'n*, 2010 UT 16, ¶10, 228 P.3d 1246, when a court "finds a statute unconstitutional or provides the correct interpretation or rule of law," it has "the equitable power to determine whether the new rule will be applied retroactively or prospectively and in doing so [will] 'seek a blend of what is necessary, what is fair and what is workable.'" (quoting *Rio Algom Corp. v. San Juan County*, 681 P.2d 184, 196 (Utah 1984)).

explanation as to why the constitutional issues raised in the Notice Claims—issues which impact the rights of property owners and numerous government bodies--are somehow of lesser weight than the cases cited in the Order. As was stated in BV's initial brief, if the violation of a party's due process rights resulting in the loss of property and admittedly impacting the rights of countless other private property owners in the State of Utah is not an issue of "sufficient weight" or "sufficient public importance," it is hard to contemplate an issue that would ever rise to that level.

The protection of property rights against government action in violation of the Utah and United States Constitution is of sufficient public importance to warrant alternative standing. Thus, the District Court should be reversed, and BVJ should be allowed to pursue the Notice Claims.

B. The Notice Claims Are Best Addressed by the Judicial Branch.

Perhaps the most obvious conclusion in this case is that the judicial branch, and only the judicial branch, should address the issues raised in the Notice Claims. *See Sierra Club*, 2006 UT 74, ¶ 36 (recognizing that a party asserting alternative standing must demonstrate that the issues are not more appropriately addressed by another branch of government pursuant to the political process.

BV is asking Utah's courts to determine whether their due process and other constitutional rights were violated in connection with the enactment of the Assessment Ordinance. As part of their Notice Claims, BV seeks a declaration from the Court that the Assessment Act is unconstitutional, primarily because it does not provide notice and an opportunity to be heard to mortgagees. Such an issue is to be addressed by the judicial

branch, and only the judicial branch. *See, e.g., Marbury v. Madison*, 5 U.S. 37 (1803).

Appellees contend that "[t]he Utah Legislature has already determined the procedure a governmental entity must follow in creating a special improvement district and adopt an assessment lien." (Appellees' Br. at 48.) Thus, according to Appellees, BV's remedy lies with the Utah Legislature, and BV should simply petition the Legislature to amend the Assessment Act because the Legislature apparently is the branch of government that gets to decide what process is due and to whom. (*Id.*) This position is flawed. First, as recognized by Appellees, the Utah Legislature has already determined what it believes is appropriate notice under the Assessment Act. In other words, it is highly unlikely that BV or any other party will find any success in going directly to the Utah Legislature. Second, and more importantly, the judicial branch, not the legislative branch, is the body to determine the constitutionality of the laws. That has been the well-settled rule in this country for over 200 years. *See Marbury v. Madison*, 5 U.S. 37 (1803). BV has asserted claims challenging the constitutionality of the Assessment Act, and these claims are to be addressed by the judicial branch. The issues could not be more appropriately addressed by another branch of government.

For the reasons stated above, BV Jordanelle has alternative standing to assert the Notice Claims in this case, even if the Court does not find traditional standing. The District Court, therefore, must be reversed.[7]

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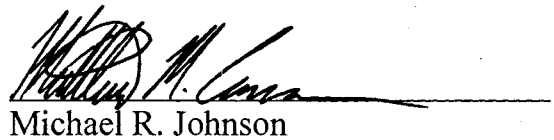
[7] Finally, Appellees' arguments that BV's claims are barred for failure to contest the Assessment Ordinance within thirty days after it became effective, and that the Court therefore should affirm on the alternative ground of lack of subject matter jurisdiction, ignores the very basis of BV's due process claims and the undisputed allegations that

CONCLUSION

For the foregoing reasons, this Court should reverse the Order, and hold that BV Lending and BV Jordanelle have traditional standing, or at least BV Jordanelle has alternative standing, to assert the Notice Claims, and it should direct the District Court to address those claims on their merits.

DATED this 10th day of July 2012.

RAY QUINNEY & NEBEKER P.C.



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BV had no notice of the Assessment Ordinance until well-over thirty days after it was enacted. (*See* Appellees' Br. at 49-50 (asserting the specious argument that, despite BV's lack of notice of the Assessment Ordinance that forms the basis of their due process claims, BV are somehow barred from raising their constitutional claims because Utah Code Ann. § 11-42-106 bars claims raised more than thirty-days after the effective date of the assessment ordinance)). Judge Pullan was not persuaded by this nonsensical argument below, and this Court should not be persuaded by it either.

CERTIFICATE OF COMPLIANCE

Word Count

Pursuant to Utah R. App. P. 24(f)(1)(B), I certify that the brief is proportionally spaced and contains 5,819 words. I relied on my word processor, Microsoft Word, to obtain the count. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTION

I hereby certify that a copy of the foregoing **REPLY BRIEF OF APPELLANTS** was submitted in Digital Form via the Court's ECF system, in an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Symantec Endpoint Protection with virus definitions dated July 10, 2012 r3, and, according to the program, is free of viruses. In addition, I certify that all privacy redactions have been made.

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANTS** were mailed, postage prepaid, on this 10th day of July 2012, to:

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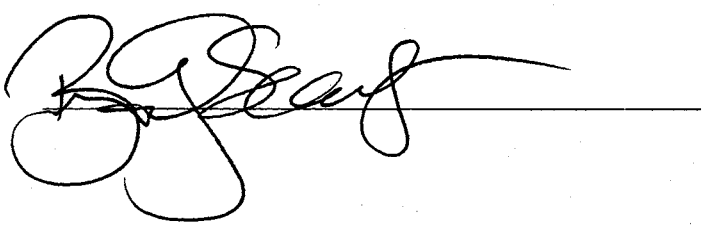

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