THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Carol A. Tolen, Special Referee
Trial Court Case No. 2012-CP-20-00132
Appellate Case No. 2018-000230

Supreme Court Case No. 2021-000149

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S.C. SUPREME COURT

ArrowPointe Federal Credit Union, ...Respondent,

v.

Jimmy Eugene Bailey; Laura Jean Bailey; and U.S. Bank National Association not in its individual capacity but solely in its capacity as Indenture Trustee for WVUE 2015-1, ... Defendants,

Of which U.S. Bank National Association not in its individual capacity but solely in its capacity as Indenture Trustee for WVUE 2015-1, ...Petitioner.

AMICUS CURIAE BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION AND THE PALMETTO LAND TITLE ASSOCIATION

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INTEREST OF *AMICI CURIAE*

The American Land Title Association ("ALTA") is a national trade association that represents the title insurance industry. ALTA has an interest in this Court's deliberations in this case because the recognition or rejection of the replacement mortgage doctrine will have a significant effect on the title insurance industry's assessment of risk within South Carolina. Moreover, an *amicus curiae* brief from ALTA is desirable because ALTA is knowledgeable about the application of the replacement mortgage doctrine in other states, as well as similar doctrines, and this information may be helpful to the Court in deciding this case. ALTA will also address the expected implications of either recognizing or rejecting the replacement mortgage doctrine.

The Palmetto Land Title Association ("PLTA") is a South Carolina-based non-profit organization established in 1977. PLTA members include individuals and organizations involved in the title insurance industry and the real estate field, and many real estate attorneys. Among the objects and purposes of PLTA are (1) to promote the safe and efficient transfer of ownership and interest in real property within the free enterprise system; (2) to provide information and education to consumers, to those who regulate, supervise, or enact legislation affecting the land title evidencing industry, and to its members; (3) to maintain liaison with users of the products and services provided by its members and with government; and (4) to maintain high professional standards and ethics. PLTA is interested in this case because the adoption or rejection of the replacement mortgage doctrine, and its application if adopted, will have a significant impact on the practice of real estate law in South Carolina. PLTA has knowledge of the South Carolina real estate industry and how real estate law impacts industry participants. Accordingly, input from

PLTA will be helpful in the Court's consideration of the matters at issue in this case.

STATEMENT OF ISSUE ON APPEAL[1]

1. Should this Court recognize the Replacement Mortgage doctrine as the law of South Carolina?

[1] The issues on appeal are slightly reformulated by the *amici curiae* to address only whether this Court should adopt the Replacement Mortgage doctrine.

ARGUMENT OF *AMICI CURIAE*[2]

This Court should expressly adopt the doctrine of mortgage modification and replacement (generally referred to as "Replacement Mortgage") because South Carolina's equity jurisprudence has long recognized similar equitable doctrines and expressly adopting Replacement Mortgage harmonizes recent South Carolina precedents within this equitable tradition.

South Carolina's equity jurisprudence has recognized the equitable concept of subrogation and/or assignment since at least the 19th century. Equitable subrogation in the modern mortgage market has been recognized for nearly 100 years. Courts in this state have adopted consistent legal principles to new facts over time, which makes this Court the proper decision maker whether to adopt Replacement Mortgage.

These equitable doctrines have developed alongside South Carolina's race-notice recording act statute, which, although amended, has been materially the same since 1876. Equitable subrogation and equitable assignment principles have determined priority for certain mortgages despite occurring later in time under essentially the same recording act in place today. Given this long history of equity and subrogation developing alongside the recording act, Replacement Mortgage does not conflict with South Carolina's current recording act.

Finally, other cases around the country and policy concerns highlighted by various commentors support adopting Replacement Mortgage here.

[2] The parties have set forth fully the statement of the case and the standard of review. Rule 213, SCACR. ("The brief shall be limited to argument of the issues on appeal as presented by the parties and shall comply with the requirements of Rules 208(b) and 211.").

A. REPLACEMENT MORTGAGE FITS WITHIN SOUTH CAROLINA'S HISTORY OF EQUITABLE JURISPRUDENCE AND SHOULD BE ADOPTED BY THIS COURT.

This case squarely presents whether to adopt Replacement Mortgage after recent cases clarified how this Court views equitable subrogation and a lender refinancing its own mortgage. *Compare Matrix Fin. Servs. Corp. v. Frazer*, 394 S.C. 134, 138, 714 S.E.2d 532, 534 (2011) ("We do not decide whether a lender that refinances its own debt could attain priority under the theory of replacement and modification illustrated in section 7.3 of the Restatement (Third) of Property (Mortgages).")[3] *with Dedes v. Strickland*, 307 S.C. 155, 159, 414 S.E.2d 134, 136 (1992) (no equitable subrogation for lender refinancing its own mortgage) *and Dodge City v. Jones*, 317 S.C. 491, 495, 454 S.E.2d 918, 921 (Ct. App. 1995) (lender allowed subrogation to a different lender's first lien and its own second lien). Accordingly, now is the time for this Court to adopt Replacement Mortgage by tailoring the Restatement approach to fit within established South Carolina jurisprudence. Replacement Mortgage is analogous to the existing equitable subrogation doctrine, it harmonizes this Court's cases with respect to a refinancing lender without distinction to whether the refinancing lender is the existing lender or a third party, and equity and judicial public policy support adopting Replacement Mortgage. Moreover, deciding how to apply equitable principles in the courts of South Carolina is properly a decision for this Court rather than the General Assembly, which is illustrated by the history of this Court's equitable subrogation jurisprudence.

[3] The Restatement (Third) of Property (Mortgages) is hereinafter described as the "Restatement."

1. This Court should adopt Replacement Mortgage under the Restatement and conform it to existing South Carolina precedents.

Replacement Mortgage under the Restatement, as proposed in this case and discussed by the Court of Appeals, *see ArrowPointe Fed. Credit Union v. Bailey*, 432 S.C. 373, 378, 852 S.E.2d 473, 475 (Ct. App. 2020), sets forth elements that are compatible with existing South Carolina law:

> (a) If a senior mortgage is released of record and, as part of the same transaction, is replaced with a new mortgage, the latter mortgage retains the same priority as its predecessor, except
>
> > (1) to the extent that any change in the terms of the mortgage or the obligation it secures is materially prejudicial to the holder of a junior interest in the real estate, or
> >
> > (2) to the extent that one who is protected by the recording act acquires an interest in the real estate at a time that the senior mortgage is not of record.

ArrowPointe Fed. Credit Union, 432 S.C. at 379, 852 S.E.2d at 475 (citing Restatement § 7.3).

By definition, a party asserting Replacement Mortgage *has a lien* before the refinance or modification (modification is not presented in this case), so a same-transaction requirement fits within the equitable subrogation cases, which are various single transactions to satisfy a pre-existing lien, as explained in detail below.

Additionally, the exceptions noted in the Restatement fit within South Carolina law. Specifically, the recording act exception for a creditor without notice during a period where there is no mortgage of record follows South Carolina's current recording act, which by its express terms would operate to protect a subsequent creditor without notice.

Moreover, the "material prejudice" exception is analogous to the "no injustice" element of equitable subrogation. South Carolina courts have addressed prejudice/injustice concerns for junior lienholders that would apply equally whether the superior lien is refinanced by an existing

lienholder or a third party. First, courts have consistently recognized junior lienholders are not prejudiced by continuing to be junior lienholders. *See Enter. Bank v. Fed. Land Bank,* 139 S.C. 397, 404, 138 S.E. 146, 148 (1927) ("it worked no hurt to the Enterprise Bank, and, if it should be allowed subrogation, the Enterprise Bank would be in no worse condition than it was before, holding a mortgage subject to the Phinney mortgages"); *accord. United Carolina Bank v. Caroprop,* 316 S.C. 1, 4, 446 S.E.2d 415, 417 (1994) ("our holding imposes no injustice upon [the junior lienholder], it having knowingly taken a second mortgage from [the borrower]") *and Dodge City v. Jones*, 317 S.C. 491, 495, 454 S.E.2d 918, 921 (Ct. App. 1995) ("No injustice is worked upon Dodge City because it is in essentially the same position as it was at the time the Judgment was filed.").

Second, South Carolina courts have avoided prejudice to junior lienholders by allowing priority only to a proportionate amount of a new loan when the new loan satisfies a prior loan and advances additional funds greater than the existing loan amount. *See Meaders Bros. v. Skelton,* 234 S.C. 134, 139, 107 S.E.2d 1, 4 (1959) ("[the third-party lender] is subrogated to the mortgage of [the existing lienholder] to the extent of this payment, and to that extent its mortgage constituted a first mortgage lien superior to the mortgage of the plaintiff on this lot"); *accord. Dodge City*, 317 S.C. at 495, 454 S.E.2d at 921 ("[lienholder] was subrogated to that percentage of the outstanding balance of the [new mortgage] as the percentage which the amount of the loan proceeds used to satisfy the First Mortgage and the Second Mortgage represented of the total loan proceeds").

South Carolina courts have not considered a change in the terms (duration and/or interest rate) of the paid-off lien in the equitable subrogation context, likely because of the proportion analysis in *Meaders* and *Dodge City*. Other courts consider a change in the terms (duration and/or

interest rate) as part of the "material prejudice" analysis. *See generally* Restatement (Third) of Property (Mortgages) § 7.3 (1997 & June 2020 Update) (discussing in comments). Whether these items should be considered is not foreclosed in the equitable subrogation cases, and it perhaps should be left to the facts and circumstances of each case to weigh the equities between two lienholders competing for priority.

2. The history of equitable doctrines affecting lien priority in South Carolina supports applying ancient principles to new factual iterations in the marketplace.

South Carolina courts have developed equitable doctrines similar to Replacement Mortgage that are broadly called "subrogation" or "equitable assignment," the older name for the doctrine now called "equitable subrogation." At least by 1867, the courts of this state recognized a surety had a right in equity to be subrogated to the rights of the creditor where the surety paid the debt of his principal. *See Norton v. Sitton*, 11 S.C. 593, 596 (1867) (*citing Ferguson v. Coleman*, 37 S.C.L. 99 (3 Rich. 99) (1846) *and Stinson v. Brennan*, 25 S.C.L. 15 (Chev. 15) (1839)) ("It is now well settled, that upon payment of the debt by the surety, he may have his action against the principal without the aid of this court. Such aid is only necessary when he seeks to be subrogated to the rights of the creditor whose debt he has satisfied—to stand in his place, or avail himself of his securities.").

This equitable doctrine started to expand at least by 1886, where the Supreme Court recognized the doctrine of equitable assignment. *See Sutton v. Sutton*, 26 S.C. 33, 37 (1886) ("But why may not William E. Sutton set up the judgment to secure the money actually advanced by him, to 'make assurance doubly sure' as to the compromise? It strikes us that he has a strong equity to do so; that the circumstances make a case for the application of *the doctrine of equitable*

assignment.") (emphasis added). *Sutton* favorably quoted *Pomeroy's Equity Jurisprudence* in support of the doctrine of equitable assignment:

> Under some circumstances, the payment of the amount due on a mortgage and judgment, when made by certain classes of persons, is held in equity to operate as an assignment of the mortgage. By means of the payment, the mortgage is not satisfied and the lien destroyed; but equity regards the person making the payment as thereby becoming the owner of the mortgage, at least for some definite purposes, and the mortgage as being kept alive, and the lien preserved for his benefit and security. This equitable result follows, ***although no actual assignment, written or verbal, accompanied the payment, and the securities themselves were not delivered over to the person making payment, &c***. This equitable doctrine, which is a particular application of the broad principle of subrogation, is enforced whenever the person making the payment stands in such relation to the premises or to the other parties, that his interests, recognized either by law or equity, can only be fully protected and maintained by regarding the transaction as an assignment to him, &c. This doctrine is not admitted in favor of every person who pays off a mortgage. * * * The payment must be made by or on behalf of a person who had some interest in the premises, or some claim against other parties, which he is entitled in equity to have protected. A mere stranger, therefore, who pays off a mortgage as a purely voluntary act, can never be an equitable assignee. In general, where any person having a subsequent interest in the premises, and who is, therefore, entitled to redeem for the purpose of protecting such interest, and who is not the principal debtor primarily liable for the mortgage debt, pays off the mortgage, he thereby becomes an equitable assignee thereof, and may keep alive and enforce the lien so far as may be necessary in equity for his own benefit; ***he is subrogated to the rights of the mortgagee to the extent necessary for his own equitable protection.***

Sutton, 26 S.C. at 38 (citing 3 POMEROY'S EQUITY JURISPRUDENCE, §§ 1211, 1212 (1st ed. 1881)).

By 1921, at least one justice of the South Carolina Supreme Court, Justice Cothran, understood equitable subrogation to require essentially the same elements required by the doctrine today. *See Prudential Inv. Co. v. Connor*, 120 S.C. 42, 112 S.E. 539 (1921) (Cothran J., dissenting from the denial of a petition for rehearing).[4] *Prudential Investment Company* presented a

[4] *Compare Indep. Nat'l Bank v. Buncombe Prof'l Park, LLC*, 411 S.C. 605, 608, 769 S.E.2d 663, 665 (2015) (a party seeking equitable subrogation must show "(1) it paid the original first

procedural question whether a master's judgment was res judicata to certain actions after a foreclosure judgment by a master. *Prudential Inv. Co.*, 120 S.C. at 45, 112 S.E. at 540. The Court unanimously agreed to return it to the trial court. *Id.* On a petition for rehearing, however, Justice Cothran changed his opinion about the underlying merits. *Id.* Justice Cothran pointed out that a mortgagor who conveyed his interest to a third party in a complex series of facts and then paid off senior liens on that same property could (and should) be subrogated to the rights of the mortgagee. *Id.* at 58, 112 S.E. at 544. In support of his position on subrogation, he pointed again to prominent equity commentators:

> *The right of subrogation is essentially a creation of the Court of equity*, which delights to do substantial justice. Its applicability to a given state of facts depends upon the distribution of substantial justice between parties, based upon well-established rules. It is the equity by which a person who is secondarily liable for a debt, upon paying the debt, assumes by the law the place of the creditor whose debt is paid, and becomes entitled to the securities and remedies of the creditor for his relief against the debtor primarily liable.

Id. at 56, 112 S.E. at 544 (*quoting* 2 STORY'S EQUITY JURISPRUDENCE § 707 (14th Ed.)) (emphasis added). He further noted, "*the doctrine has become broad enough to include every person* who, not being a volunteer or intermeddler, pays a debt or discharges an obligation which in justice,

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mortgage; (2) it was not a volunteer, but had a direct interest in the discharge of that mortgage; (3) it was secondarily liable for that mortgage; (4) no injustice would be done to [the junior lienholder] by the allowance of equitable subrogation; and (5) it did not have actual notice of [the junior lienholder's] mortgage") *with Prudential Inv. Co.*, 120 S.C. at 57, 112 S.E. at 544 (Cothran J. dissenting) ("It follows that the party claiming the right of subrogation must establish: (1) That he had paid the debt; (2) That he was not a volunteer, but had a direct interest in the discharge of the debt or lien; (3) That he was secondarily liable for the debt or for the discharge of the lien; (4) That no injustice will be done to the other party by the allowance of the equity."). *Indep. Bank* adds the element of no actual notice, but this element traces back to *Enter. Bank v. Fed. Land Bank*, 139 S.C. 397, 402, 138 S.E. 146, 148 (1927).

equity and good conscience ought to be paid or discharged by another." *Id.* at 57, 112 S.E. at 544 (1921) (internal quotation omitted) (emphasis added).

Shortly thereafter, in 1927, the Supreme Court decided the seminal equitable subrogation case of *Enter. Bank v. Fed. Land Bank*, 139 S.C. 397, 401, 138 S.E. 146, 147 (1927). *Enterprise Bank* addressed a dispute "solely between the Enterprise Bank and the Federal Land Bank as to priority over the proceeds of sale of the 50-acre tract." *Id.* In essence, Federal Land Bank paid off and satisfied first lien mortgages (all recorded November 10, 1919, or earlier) in exchange for a new first lien mortgage recorded on November 18, 1921. *Id.* However, before the Federal Land Bank mortgage was recorded, Enterprise Bank recorded on February 9, 1921, a mortgage dated as of January 23, 1920. *Id.* On these facts, Federal Land Bank had constructive notice of the Enterprise Bank mortgage because it recorded afterwards. *Id.* The trial court recognized the Enterprise Bank mortgage provided constructive notice and held that Federal Land Bank made a "voluntary" loan so that the doctrine of subrogation would not apply. *Id.* at 402, 138 S.E. at 148. Enterprise Bank, as respondent on appeal, cited the recording act in support of its position, following the lower court. *Id.* at 398, 138 S.E. at 146 ("[attorneys] for respondent, cite: Recording of mortgage sufficient . . .").

On appeal, the Court first noted that Federal Land Bank, as appellant, conceded it had constructive notice of the Enterprise Bank mortgage under the recording act. *Id.* at 402, 138 S.E. at 148.[5] Despite the recording act, the Court considered whether Federal Land Bank obtained

[5] Justice Cothran, now author of the Court's unanimous opinion in *Enterprise Bank*, noted there was an argument not advanced in the case that the Enterprise Bank mortgage (called the "Talley" mortgage after the initial mortgagee) might not have imparted constructive notice because a deed that was part of the transaction for the Talley mortgage was never recorded. *Enter. Bank*, 139 S.C.

priority over Enterprise Bank under the doctrine of subrogation. *Id.* Citing Justice Cothran's dissent from the denial of the petition for rehearing in *Prudential Investment Company*, the Court set forth the elements of equitable subrogation. *Enter. Bank*, 139 S.C. at 402, 138 S.E. at 148. The Court held Federal Land Bank satisfied these elements and was entitled to equitable subrogation to maintain priority of the paid off liens. *Id.* The Court relied in part upon *S. Cotton Oil Co. v. Napoleon Hill Cotton Co.*, 158 S.W. 1082, 1083 (Ark. 1913), where a third-party advanced money used to pay off certain liens and the third party was subrogated to rights of the paid off liens with priory over an intervening judgment creditor. *Id.* The Court in particular quoted a portion of the Arkansas opinion, stating "since its security failed to constitute a first lien because of the judgment of appellee, of which appellant was ignorant at the time of taking its mortgage, *we see no reason why equity should not treat it as an assignee of the first mortgages discharged with the money advanced by it and under its doctrine of equitable assignment and effectuate the agreement with the lender that its security should be a first lien*." *Id.* at 407–08, 138 S.E. at 150 (*quoting S. Cotton Oil Co.*, 158 S.W. at 1083) (emphasis added). What the Arkansas court called "the doctrine of equitable assignment and subrogation," *see S. Cotton Oil Co.*, 158 S.W. at 1085, by 1927 the South Carolina Supreme Court called "subrogation." *Enter. Bank*, 139 S.C. at 404, 138 S.E. at 148. Noting the origins of the doctrine in equity, the Court adopted a statement from an old legal treatise:

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at 402, 138 S.E. at 148 ("Speaking for himself alone, the writer of this opinion is very far from conceding the controlling effect of those decisions, which in several aspects are distinguishable from the case at bar, in view of the object of the recording statute to give notice of prior liens and the utter impossibility, in the present case, of a discovery of the Talley mortgage, the deed from Chastain to Maud Talley never having been placed upon record.").

> The doctrine of subrogation is said to be '*one of equity and benevolence, and the basis is the doing of complete, essential, and perfect justice between all the parties without regard to form, and its object is the prevention of injustice*. The right does not necessarily rest on contract or privity, but upon principles of natural equity.'

Id. (*quoting* 37 CYCLOPEDIA OF LAW AND PROCEDURE 363 (1911)) (emphasis added). Accordingly, by 1927, equitable subrogation and/or assignment reached essentially its modern form in South Carolina, noting along the way that the equity would seek perfect justice "*without regard to form."*

The South Carolina courts continued to follow *Enterprise Bank* in the mortgage refinancing context. *See, e.g., James v. Martin*, 150 S.C. 75, 92, 147 S.E. 752, 758 (1929) (*quoting Enter. Bank*, 139 S.C. at 404, 138 S.E. at 148) ("One satisfying a lien note at the request of the property owner, upon the understanding that he is to have new security upon the property released, acting in ignorance of a second mortgage lien upon the property, although it is on record, is entitled to subrogation to the rights of the first lien holder."); *see also Watson v. Fowler*, 165 S.C. 288, 295, 163 S.E. 640, 643 (1932) (subrogating junior creditor that paid lien of senior creditor). Equitable subrogation continued to be available to mortgagors who convey to third parties and then pay off a mortgage on the same property. *See, e.g., Dunn v. Chapman*, 149 S.C. 163, 170, 146 S.E. 818, 820 (1929) (citing *Sutton*, *Prudential Investment Company*, and *Enterprise Bank*). Classic examples of equitable subrogation in the surety context returned to this Court from time to time. *See, e.g., Am. Sur. Co. v. Hamrick Mills*, 191 S.C. 362, 373, 4 S.E.2d 308, 314 (1939) (bond company for surety bond successfully claimed rights of a creditor whose debt it paid under equitable subrogation).

Equitable subrogation continues to develop as a doctrine principally in the mortgage financing context, and this Court's equitable subrogation cases often arise from mortgage

financing. In 1959, this Court decided *Meaders Bros. v. Skelton*, which followed *Enterprise Bank* and determined an equitable ratio for the amounts given priority when the refinancing lender lends more than what is paid off under the pre-existing lien. *See Meaders Bros. v. Skelton*, 234 S.C. 134, 139, 107 S.E.2d 1, 4 (1959) (subrogation ratio of 8,535.00 (the amount paid off) to $ 9,300.00 (the amount advanced)). In 1988, the South Carolina Court of Appeals followed *Enterprise Bank* and held a refinancing lender was equitably subrogated to the position of a satisfied first lien. *Pee Dee State Bank v. Prosser*, 295 S.C. 229, 238, 367 S.E.2d 708, 713 (Ct. App. 1988) (*overruled on other grounds by United Carolina Bank v. Caroprop*, 316 S.C. 1, 4, 446 S.E.2d 415, 417 (1994)). More recently, *Indep. Nat'l Bank v. Buncombe Prof'l Park, LLC*, 411 S.C. 605, 608, 769 S.E.2d 663, 665 (2015), clarified that a lender is not charged with the actual notice of its agent where the lender itself lacks actual notice of an intervening lien.

South Carolina's courts have continued to tweak the doctrine to meet the facts of appropriate circumstances as earlier courts did when equitable subrogation expanded from its strict application for sureties. For example, *Pee Dee State Bank* and *Caroprop* each addressed a similar equitable subrogation concept as to whether a mortgagor could pay off a mortgage on property he owns and be subrogated to the paid off lien's position. The Court of Appeals said "no" in *Pee Dee State Bank*, but this Court looked back to older surety law in *Caroprop* and held a co-tenant who pays an entire mortgage pays half of the mortgage as a surety, thus equitably subrogating the co-tenant to half of the lien amount. *Caroprop*, 316 S.C. at 4, 446 S.E.2d at 417 (citing *Stokes v. Hodges*, 32 S.C. Eq. 135 (11 Rich. Eq. 135) (1859)). Notably, *Caroprop*, following the flexible history of South Carolina's equity jurisprudence in this context, looked past the legal technicality that the co-tenant was obligated on the entire note at law but only secondarily liable for one half

of the lien amount as an equitable matter. *Id*. at 3, 446 S.E.2d at 417 ("he is jointly and severally and, therefore, primarily liable at law for the full amount of the mortgage; however, he contends that, in equity, he is only secondarily liable for Atlantic's share. We agree.") (emphasis original).

Similarly, in *Dedes v. Strickland*, this Court was first asked to apply equitable subrogation to maintain the priority of a satisfied lien where the refinancing lender was also the original lienholder. *Dedes v. Strickland*, 307 S.C. 155, 159, 414 S.E.2d 134, 136 (1992). This Court rejected the argument by existing lienholder First Federal that it should be entitled to equitable subrogation because 1) "First Federal paid itself [the borrower]'s outstanding debt by refinancing the balance owed"; 2) "[t]here is no showing of any direct interest necessitating discharge of the debt or lien;" and 3) "[t]he record is silent as to what secondary liability First Federal could have had for [the borrower]'s debt secured by its own first mortgage lien," and thus did not meet the necessary elements of equitable subrogation. *Id*.[6]

Shortly after *Dedes*, the Court of Appeals decided *Dodge City v. Jones*, which allowed the lender to replace its lien and retain priority in addition to being subrogated to another parties' lien. *See Dodge City v. Jones*, 317 S.C. 491, 495, 454 S.E.2d 918, 921 (Ct. App. 1995). *Dodge City* addressed the wrinkle in *Dedes*, where a lender tried to replace its own mortgage, and reached a different outcome. *Id*. at 495, 454 S.E.2d at 921 ("The Second Mortgage, however, merits separate

[6] In *Matrix*, of course, a majority of this Court described *Dedes* as "controlling South Carolina precedent" "for the proposition that a lender that refinances its own debt is not entitled to equitable subrogation." *Matrix Fin. Servs. Corp. v. Frazer*, 394 S.C. 134, 138, 714 S.E.2d 532, 534 (2011); *but see Matrix Fin. Servs. Corp.*, 394 S.C. at 142 n.3, 714 S.E.2d at 536 (J. Pleicones dissenting) ("It appears that the lender in *Dedes v. Strickland*, 307 S.C. 155, 414 S.E.2d 134 (1992) was denied equitable subrogation because it failed to present evidence that its refinancing was conditioned upon the repayment of the first loan.").

treatment because the Second Mortgage was held by [the existing lender] itself."). Like *Dedes*, *Dodge City* recognized "[the existing lender] was not liable on the Second Mortgage in the sense that it could somehow sue itself had the mortgage not been paid"; however, *Dodge City* departed from *Dedes* by recognizing "[the existing lender] was obligated to the Mortgagors for the satisfaction of the Second Mortgage." *Dodge City*, 317 S.C. at 495, 454 S.E.2d at 921. Accordingly, *Dodge City* allowed "equitable subrogation" for a lender to replace its own lien.

In 2011, *Matrix* addressed without resolving the problem presented in *Dedes* and *Dodge City*, with this Court expressly rejecting equitable subrogation for an existing lienholder (following *Dedes*) and refusing to consider Replacement Mortgage because it was not raised. *Matrix Fin. Servs. Corp. v. Frazer*, 394 S.C. 134, 138, 714 S.E.2d 532, 534 (2011). *Matrix* acknowledged the Restatement distinguished the doctrines of equitable subrogation and Replacement Mortgage, but the Court expressly stated it would not consider whether to adopt the Restatement's application of Replacement Mortgage. Accordingly, *Dedes*, *Dodge City*, and *Matrix* leave to this case the next development in South Carolina's equitable lien priority jurisprudence.

3. Adopting Replacement Mortgage harmonizes previous decisions of this Court contemplating the ability of an existing lienholder to replace or modify and maintain its priority.

As the *Matrix* court recognized, refusing to allow a lender to subrogate to its own debt "seems to yield the proper result, as opposed to the mangled logic that comes about when reasoning that a lender refinancing the original debt owed to it cannot prove secondary liability or a direct interest in discharging the debt." *Matrix Fin. Servs. Corp.*, 394 S.C. at 138, 714 S.E.2d at 534. However, this logical problem, which arises because under a strict view of "subrogation" principles a lender cannot become liable to itself, is overcome by Replacement Mortgage and the

equitable maxim of looking to the substance over the form of a transaction. *See, e.g.*, *Enter. Bank v. Fed. Land Bank*, 139 S.C. 397, 404, 138 S.E. 146, 148 (1927) (describing subrogation as "one of equity and benevolence, and the basis is the doing of complete, essential, and perfect justice between all the parties *without regard to form*, and its object is the prevention of injustice") (emphasis added).

To illustrate, the Replacement Mortgage would conform the outcomes of *Dedes* and *Dodge City*,[7] where this Court and the Court of Appeals considered claims—with different outcomes—for a lender to maintain priority after satisfying and replacing its own mortgage. *Compare Dedes v. Strickland*, 307 S.C. 155, 159, 414 S.E.2d 134, 136 (1992) (lender was not subrogated to its own debt) *with Dodge City v. Jones*, 317 S.C. 491, 495, 454 S.E.2d 918, 921 (Ct. App. 1995) (lender was subrogated to its own debt). The *Dedes* lender had priority and refinanced the debt at a lower principal amount by executing new notes and mortgages. *Dedes*, 307 S.C. at 159, 414 S.E.2d at 136. However, *Dedes* could not fit the lender's new mortgage into equitable subrogation, though the Court denied relief without stating expressly that an existing lender never could do so. *Id.*

Conversely, *Dodge City* allowed the lender to replace its lien and retain priority. *See Dodge City*, 317 S.C. at 495, 454 S.E.2d at 921 ("The Second Mortgage, however, merits separate treatment because the Second Mortgage was held by [the existing lender] itself."). Like *Dedes*, *Dodge City* recognized "[the existing lender] was not liable on the Second Mortgage in the sense that it could somehow sue itself had the mortgage not been paid"; however, *Dodge City* departed

[7] The outcome of *Matrix* of course would not have changed because the Court held the mortgage was unenforceable due to the unclean hands of the lender. *Matrix Fin. Servs. Corp.*, 394 S.C. at 138, 714 S.E.2d at 534.

from *Dedes* by recognizing "[the existing lender] was obligated to the Mortgagors for the satisfaction of the Second Mortgage." *Id*.

Dodge City and *Dedes* presented essentially the same facts and reached different outcomes because of the form of the existing equitable subrogation jurisprudence. In substance, *Dodge City* and *Dedes* do not differ from *Enterprise Bank* and its progeny—a refinancing lender is seeking first lien priority. The logical problem identified by *Matrix* based on the form of equitable subrogation elements should not establish a public policy bar to Replacement Mortgage when Replacement Mortgage simply provides an equitable alternative "without regard to form" in the mortgage loan refinance context. Both Replacement Mortgage and equitable subrogation maintain the bargained-for priority of liens, even after a party satisfies one, and prevents a junior creditor from the windfall of "fortuitous circumstances, not brought about by anything it did or refrained from doing . . . a purely accidental circumstance, involving no possible equity in its favor." *Enter. Bank*, 139 S.C. at 403, 138 S.E. at 148.

4. This Court generally decides how ancient equitable principles apply to new circumstances—like Replacement Mortgage—not the General Assembly.

As set forth above, the story of equitable lien-priority jurisprudence in South Carolina is the story of applying consistent equitable principles to changing factual circumstances in the lending marketplace, with development in the doctrines over time to achieve "perfect justice between all the parties without regard to form." *See Enter. Bank*, 139 S.C. at 401, 138 S.E. at 147; *see also Prudential Inv. Co. v. Connor*, 120 S.C. 42, 56, 112 S.E. 539, 544 (1921) (Cothran J. dissenting) ("The right of subrogation is essentially a *creation of the Court of equity*, which delights to do substantial justice.") (emphasis added).

In 1873, this Court was able to state, "It is not to be denied that the doctrine of subrogation, however limited and restrained its application in the earlier cases in which it was accepted as a principle properly appertaining to the relation between principal and surety, has in more recent times been extended to cases where the nature and character of the transaction clearly brought it within the justice and equity of the doctrine, of which the Court had already taken cognizance between principal and surety." *Spratt v. Pierson*, 4 S.C. 301, 303 (1873). In 1886, *Sutton v. Sutton* anticipated the expansion of equitable subrogation from principal and surety to a mortgage lender (like a bank) paying off a prior debt in exchange for a new security. *See Sutton v. Sutton*, 26 S.C. 33, 37 (1886) (quoting 3 POMEROY'S EQUITY JURISPRUDENCE §§ 1211, 1212 (1st ed. 1881)) ("In general, where any person having a *subsequent interest in the premises*, and who is, therefore, entitled to redeem for the purpose of protecting such interest, and who is not the principal debtor primarily liable for the mortgage debt, *pays off the mortgage, he thereby becomes an equitable assignee thereof*, and may keep alive and enforce the lien so far as may be necessary in equity for his own benefit."). A surety of course was bound on the obligation from the making of the loan and could step into the creditor's shoes if the surety paid off the loan. *See, e.g., Norton v. Sitton*, 11 S.C. 593, 596 (1867) ("It is now well settled, that upon payment of the debt by the surety, he may have his action against the principal without the aid of this court. Such aid is only necessary when he seeks to be subrogated to the rights of the creditor whose debt he has satisfied—to stand in his place, or avail himself of his securities."). *Sutton* recognized as a principle that one not bound on the debt at the time of its creation, as a surety would normally be, could step in to pay a debt and be bound to do so. *Enterprise Bank* then held that principle applied in the modern mortgage lending context—a lender paying off an existing debt for new debt could step into the shoes of the

paid off debt and maintain the priority of the old lien, having become secondarily liable to pay the debt.

More recently, *Caroprop* looked past the form of a transaction that on its face presented a similar problem to *Dedes* when applying equitable subrogation. *Caroprop*, 316 S.C. at 4, 446 S.E.2d at 417 (1994). *Caroprop* noted a co-tenant in common that gave a note and mortgage was primarily obligated on the entire debt at law. *Id.* at 3, 446 S.E.2d 417 ("he is jointly and severally and, therefore, primarily liable at law for the full amount of the mortgage; however, he contends that, in equity, he is only secondarily liable for Atlantic's share. We agree.") (emphasis original). Ostensibly, the party seeking equitable subrogation was *primarily* liable, and on the face of it, he paid off a debt that was enforceable against him. *Id.* However, the Court, looking back to older surety cases, recognized the equitable remedy would not be defeated by the legal formality when in equity he was only secondarily liable for one half of the lien amount. *Id.* Again, the Court was willing to apply principles to facts in equity cases and allowed subrogation for half of the debt.

Accordingly, this Court is the proper forum to decide whether Replacement Mortgage will be part of South Carolina's equity jurisprudence.

B. THE RECORDING ACT HAS NOT BEEN A BAR TO EQUITABLE LIEN-PRIORITY DOCTRINES IN SOUTH CAROLINA LAW AND DOES NOT BAR EQUITABLE SUBROGATION OR REPLACEMENT MORTGAGE NOW.

At various times, South Carolina's courts have addressed the recording act and equity without the recording act overruling equity and vice versa. As the cases show, recording acts and equity achieve different but interlocking goals with respect to lien priority. *See, e.g.*, *Enter. Bank v. Fed. Land Bank*, 139 S.C. 397, 401, 138 S.E. 146, 147 (1927); *Indep. Nat'l Bank v. Buncombe Prof'l Park, LLC*, 402 S.C. 514, 520, 741 S.E.2d 572, 575 (Ct. App. 2013) (Lockemy, J.) (reversed

on other grounds); *Regions Bank v. Wingard Props*., Inc., 394 S.C. 241, 255, 715 S.E.2d 348, 356 (Ct. App. 2011).

1. South Carolina courts have addressed whether to apply the recording act to bar equitable doctrines and rejected it.

Enterprise Bank rejected the argument that the recording act barred equitable subrogation where the junior lienholder raised the recording act as a bar. *Enter. Bank* 139 S.C. at 401, 138 S.E. at 147 (1927). The trial court recognized that the junior Enterprise Bank mortgage, recorded first in time, provided constructive notice to the party seeking equitable subrogation. *Id.* at 402, 138 S.E. at 148. Enterprise Bank, as respondent, cited the recording act in support of its position on appeal. *Id.* at 398, 138 S.E. at 146 ("[attorneys] for respondent, cite: Recording of mortgage sufficient . . ."). However, this Court began the opinion by noting the party seeking equitable subrogation conceded it had constructive notice of the Enterprise Bank mortgage under the recording act. *Id.* at 402, 138 S.E. at 148. Despite the recording act, the Court held that Federal Land Bank obtained priority over the Enterprise Bank mortgage under the doctrine of subrogation. *Id.*

The recording act argument was rejected more recently. In *Independence National Bank*, this Court reiterated that constructive notice, in that case from a prior recorded mortgage as well as from actual knowledge of an agent (the closing attorney), did not defeat equitable subrogation. *Indep. Nat'l Bank v. Buncombe Prof'l Park, LLC*, 411 S.C. 605, 608, 769 S.E.2d 663, 665 (2015). If constructive notice, which the recording act provides, does not defeat equitable subrogation, then such a holding implicitly rejects the argument that priority is set by the recording act. However, the recording act argument was explicitly raised to the Court of Appeals in *Independence National Bank* and rejected as a basis to establish priority. *See Indep. Nat'l Bank v. Buncombe*

Prof'l Park, LLC, 402 S.C. 514, 520, 741 S.E.2d 572, 575 (Ct. App. 2013) (Lockemy, J.) (reversed on other grounds) ("Appellants first argue the Master erred in giving priority to [third party lender]'s mortgage because it is clear that [the junior] mortgage was filed first in time, and therefore is superior."). Despite the clear assertion of the recording act, the Court of Appeals recognized equitable doctrines may still affect lien priority and gave short shrift to the recording act argument. *Id.* ("We agree that section 30-7-10, read without reference to any other doctrine or statute, indicates [the junior] lien is superior to [the third-party lender]'s lien. However, we examine whether the Master was correct in finding [the third-party lender] had the superior lien pursuant to reformation of the mortgage and/or the doctrine of equitable subrogation."). This argument was not noted as error in the petition for certiorari and not addressed by this Court thereafter. *Cf. Indep. Nat'l Bank*, 411 S.C. at 608, 769 S.E.2d at 665.

Furthermore, *Regions Bank*, an equitable lien case rather than an equitable subrogation or Replacement Mortgage case, illustrates the interplay of equity and the recording act. *See Regions Bank v. Wingard Props*., Inc., 394 S.C. 241, 255, 715 S.E.2d 348, 356 (Ct. App. 2011). In that case, the bank made a loan with knowledge of a prior unrecorded interest. *Id.* Addressing an argument that the recording act barred the equitable lien, the court held, "[t]he intervention of equity [did] not impugn the integrity of the recording statute" where the court considered "whether equity should intervene only as between [the bank] and [the known prior creditor], not any other person or creditor potentially impacted by the recording statute." *Id.* Rather, knowledge of the prior interest by the subsequent creditor made the recording act inapplicable, and equity applied. *Id*.

These cases show why the recording act never comes into play—only a subsequent creditor *without notice* is protected. Both *Independence National Bank* and *Enterprise Bank* address fact patterns where 1) an existing lienholder has priority, with a recorded mortgage, 2) a junior lienholder has a subordinate, recorded mortgage, and 3) the priority mortgage is paid off and a new mortgage recorded with the payor having actual knowledge of the junior lien. The senior mortgage is recorded when the junior lienholder records, so the statute does not protect the junior lienholder because it has constructive notice of the senior lien. Likewise, the new mortgage does not fall within the recording act—the party satisfying the senior mortgage has constructive notice of the junior lien when it records. Neither lienholder falls within the recording act as a subsequent creditor *without notice*, so the statute never applies. But remove one fact—if the junior lienholder's mortgage were not recorded, then the recording act would make the new mortgage entitled to priority because it would not have constructive notice of the junior lien. In this situation—an unrecorded prior mortgage—there would be no need to seek or apply equitable subrogation.

2. The history of the Recording Act in South Carolina makes clear that it exists to impart notice and protect subsequent creditors without notice, not bar the application of equitable doctrines where the statute does not apply.

South Carolina's recording acts and broader equitable doctrines of subrogation and assignment have developed and expanded alongside of each other in South Carolina law since at least 1876. The history of the recording act supports the analysis in *Regions Bank v. Wingard Props.*, Inc., 394 S.C. 241, 255, 715 S.E.2d 348, 356 (Ct. App. 2011). Rather than equity creating an "exception" to the recording act, the statute only provides a right for a certain class of persons—generally described as subsequent purchasers and creditors without notice. A subsequent creditor is not given a remedy by the statute if 1) a prior interest is recorded, *see, e.g., Enter. Bank v. Fed.*

Land Bank, 139 S.C. 397, 402, 138 S.E. 146, 148 (1927) (mortgage valid but subordinate in equity), or 2) the subsequent creditor is aware of the unrecorded interest, *see, e.g.*, *Regions Bank*, 394 S.C. at 255, 715 S.E.2d at 356 (unrecorded interest valid because subsequent creditor aware of the unrecorded interest). *Cf ArrowPointe Fed. Credit Union v. Bailey*, 432 S.C. 373, 378, 852 S.E.2d 473, 475 (Ct. App. 2020) ("One exception to our race-notice statute is the doctrine of equitable subrogation.").

Since at least 1843,[8] mortgages have been subject to a race-notice recording act in South Carolina. *See, e.g.*, S.C. Statutes at Large § 2890 (1843) (An Act to Amend the Law in Relation to Recording Mortgages, and to Regulate the Lien thereof).[9] The 1843 Act provided in pertinent part:

> that no mortgage, or other instrument of writing in the nature of a mortgage, of real estate *shall be valid, so as to affect the rights of subsequent creditors or purchasers for valuable consideration without notice*, unless the same shall be recorded in the office of the Register of Mesne Conveyance for the District wherein such real estate lies within sixty days from the execution thereof.

S.C. Statutes at Large § 2890 (1843) (quoted in *Williams v. Beard*, 1 S.C. 309, 321 (1870)) (emphasis added). The 1843 Statute, by its terms, only applied to mortgages. Absolute

[8] South Carolina appears to have been a race jurisdiction earlier in its history. *See, e.g., Williams v. Beard*, 1 S.C. 309, 321 (1870) (citing *Steele vs. Mansell*, 40 S.C. L. 437, 6 Rich. 437) ("The Courts of this State have certainly held, in regard to instruments executed before the Act of 1843, (which will be hereinafter referred to,) that the registry laws of force in the State are the result of the joint operation of the Act of 1698, (2 Stat., 137,) and the 45th Section of the County Court Act of 1785, (7 Stat., 232,) and have, accordingly, given effect to *the conveyance first recorded, without regard to the time, as against creditors and subsequent purchasers for valuable consideration without notice*.") (emphasis added).

[9] A copy of this statute is located in THE STATUTES AT LARGE OF SOUTH CAROLINA (Vol. XI) (1873). A copy of the printed statutes at large from 1873 can be accessed online at https://babel.hathitrust.org/cgi/pt?id=hvd.hl3grn&view=1up&seq=283&q1=without%20notice. Links to most superseded codes and individual statutes are compiled and accessible digitally at the University of South Carolina Law School Law Library's fine website compiling these sources: https://guides.law.sc.edu/SCLegalResources/superseded_statutes.

conveyances—deeds—were handled separately from mortgages in the statutes until 1876, when the General Assembly addressed all interests in land in a single recording act. *See* S.C. 16 Stat. 92 (1876); *Epps v. McCallum Realty Co.*, 139 S.C. 481, 497, 138 S.E. 297, 302 (1927) ("In 1876 the General Assembly passed an Act (16 St. at Large, p. 92), entitled, 'An Act to provide an uniform registry law for all deeds and other instruments in writing required to be recorded.'"). This same statute was carried forward in the revised code of 1882 known as the "General Statutes":

> All deeds of conveyance of lands, tenements, or hereditaments, either in fee simple or for life; all deeds of trust, or instruments in writing, conveying either real or personal estate, and creating a trust or trusts in regard to such property, or charging or encumbering the same; all mortgages or instruments in writing, in the nature of a mortgage of any property, real or personal; all marriage settlements, or instruments in the nature of a settlement of marriage; all leases or contracts in writing made between landlord and tenant for a longer period than twelve months; all statutory liens on buildings and lands for labor furnished or performed on them; all statutory liens on ships and vessels; all certificates of renunciation of dower; and, generally, all instruments in writing now required by law to be recorded in the office of Register of Mesne Conveyances, or in the office of the Secretary of State, delivered or executed on and after the first day of January, in the year of our Lord one thousand eight hundred and seventy-seven, shall be valid, so as to affect, from the time of such delivery or execution, the rights of subsequent creditors or purchasers for valuable consideration without notice, only when recorded within forty days from the time of such delivery or execution in the office of Register of Mesne Conveyances of the County where the property affected thereby is situated, in the case of real estate; and in the case of personal property, of the County where the owner of said property resides, if he reside within the State, or, if he resides without the State, of the County where such personal property is situated at the time of the delivery or execution of said deeds or instruments: *Provided, nevertheless,* That the above mentioned deeds or instruments in writing, if recorded subsequent to the expiration of said period of forty days, shall be valid to affect the rights of subsequent creditors and purchasers for valuable considerations without notice only from the date of such record.

S.C. G. S. § 1776 (1882).[10] Since 1882, the recording act has principally been amended to 1) change the date of priority and 2) to expand the list of documents to which the recording act applies. For instance, the older recording acts allowed priority to be determined as of the date of execution *if* the instrument were recorded in however so many days thereafter. *Compare* S.C. Statutes at Large § 2890 (1843) ("within sixty days from the execution thereof") *with* S.C. G. S. § 1776 (1882) ("within forty days from the time of such delivery or execution"). Additionally, various instruments have been added throughout the years. *See, e.g., Epps v. McCallum Realty Co.*, 139 S.C. 481, 497, 138 S.E. 297, 302 (1927) (discussing addition of contracts of sale for real estate in 1925 Act). By the time of the 1952 Code, one court noted, "[t]he [Recording] Act provide[d] no grace period for recording; therefore, the instrument should be recorded promptly upon execution to assure its validity against subsequent liens." *See S.C. Nat'l Bank v. Guest*, 232 S.C. 367, 372, 102 S.E.2d 215, 217 (1958).

The Recording Act in the 1952 Code provided:

> All deeds of conveyance of lands, tenements or hereditaments, either in fee simple or for life, all deeds of trust or instruments in writing conveying either real or personal estate, creating a trust in regard to such property or charging or encumbering it, all mortgages or instruments in writing in the nature of a mortgage of any property, real or persona, all marriage settlements or instruments in the nature of a settlement of a marriage, all leases or contracts in writing made between landlord and tenant for a longer period than twelve months, all statutory liens on buildings and lands for materials or labor furnished on them, all statutory liens on ships and vessels, all certificates of renunciation of dower, all contracts for the purchase and sale of real property, all assignments, satisfactions, releases and contracts in the nature of subordinations, waivers and extensions of landlords' liens, laborers' liens, sharecroppers' liens or other liens on real or personal property, or both, created by law or by agreement of the parties and generally all instruments

[10] A digital copy of the 1882 Code is accessible online at archive.org: https://archive.org/details/generalstatutesc00sout/page/522/mode/1up.

> in writing required by law to be recorded in the office of the register of mesne conveyances or clerk of court in those counties where the office of register of mesne conveyances has been abolished or in the office of the Secretary of State delivered or executed on or after August 1 1934, except assignments and satisfactions of conditional sale contracts securing the purchase money of motor vehicles or refrigerators, shall be valid so as to affect the rights of subsequent creditors (whether lien creditors or simple contract creditors) or purchasers for valuable consideration without notice only from the day and hour when they are recorded in the office of the register of mesne conveyances or clerk of court of the county in which the property affected is situated, in the case of real estate or in the case of personal property, in which the owner of such property resides, if he resides within the State, or, if he resides with- out the State the county in which such personal property is situated at the time of the delivery or execution of such deed or instrument.
>
> But chattel mortgages or instruments in the nature thereof, securing payment of the purchase price or any portion thereof of household furniture and furnishings, appliances, refrigerators, radios, and musical instruments, shall be valid against he lien of a landlord for rent when so recorded within five days from the date of the execution thereof.

S.C. Code Ann. § 60-101 (1952); *see generally S.C. Nat'l Bank v. Guest*, 232 S.C. 367, 370, 102 S.E.2d 215, 216 (1958). The Recording Act was amended in 1958 to add the following paragraph:

> But in case of a subsequent purchaser of real estate, or in the case of a subsequent lien creditor on real estate or personal property or both, for valuable consideration without notice, the instrument evidencing such subsequent conveyance or subsequent lien must be filed for record in order for its holder to claim under this section as a subsequent creditor or purchaser for value without notice, and the priority shall be determined by the time of filing for record.

S.C. Code Ann. § 60-101 (1952) (Supp. 1960)[11]; *see also Atlas Supply Co. v. Davis*, 273 S.C. 392, 394-95, 256 S.E.2d 859, 860 (1979) (explaining the purpose of the 1958 amendment).

[11] A 1960 amendment appears to have also modified the language slightly. *Compare* S.C. Code Ann. § 60-101 (1952) (Supp. 1960) ("But in case of a subsequent purchaser . . .") *with Atlas Supply Co.*, 273 S.C. at 394, 256 S.E.2d at 860 ("Provided, however, that in case of a subsequent purchaser . . .").

As explained in *Atlas Supply*, the 1958 amendment was intended to reverse the holding in *S.C. Nat'l Bank v. Guest*, 232 S.C. 367, 373, 102 S.E.2d 215, 218 (1958). *See Atlas Supply Co.*, 273 S.C. at 395, 256 S.E.2d at 860. *Guest* granted priority to a subsequent creditor without notice who 1) obtained its lien after a prior creditor and 2) recorded after prior creditor. *Guest*, 232 S.C. at 373, 102 S.E.2d at 218. Specifically, a Greenville bank obtained a mortgage[12] from a borrower on the morning of January 5, 1955. *Id. at* 369, 102 S.E.2d at 216. A Greenwood bank obtained a mortgage from the same borrower on the same property the same afternoon. *Id.* The Greenville bank recorded its mortgage on the morning of January 7, 1955. *Id.* The Greenwood bank recorded after the Greenville bank on January 7, 1955. *Id. Guest* noted that the "Recordation Acts . . . were an outgrowth of efforts to protect 'subsequent purchasers and creditors' from 'secret liens[,]'" which contrasted with the common law where a prior mortgage was good against the world. *Id.* at 370, 102 S.E.2d at 217. Accordingly, under the 1952 version of the Recording Act, the Greenwood bank prevailed because it was the subsequent creditor without notice of the Greenville bank loan. *Id.* The 1958 Amendment reverses the result in *Guest* because it would have determined whether the Greenwood bank was a subsequent creditor without notice from the time it recorded, and from recording the Greenwood bank would not have been a subsequent creditor without notice under the facts in *Guest*. *Compare* S.C. Code Ann. § 60-101 (1952) (Supp. 1960) *with Guest*, 232 S.C. at 370, 102 S.E.2d at 217 (the Greenwood bank obtained its loan second in time and recorded its loan second in time).

[12] The *Guest* mortgages are chattel mortgages on the same car, but given the language of the recording act, the reasoning would apply to real estate mortgages if the Recording Act were not amended.

Atlas Supply further explained the 1958 amendment was not a blanket requirement that priority for all instruments be determined as of the date of filing. *Atlas* considered an argument that specific language added in the 1958 amendment, "the priority shall be determined by the time of filing for record," actually reversed the decision of *Prudential Ins. Co. v. Wadford*, 232 S.C. 476, 481, 102 S.E.2d 889, 892 (1958). *Wadford* followed a long line of cases since *Carraway v. Carraway*, 27 S.C. 576, 5 S.E. 157, 159 (1888), holding that a judgment lien holder would take subject to an after recorded mortgage where the mortgage lien was created before the judgment was recorded. *Wadford*, 232 S.C. at 481, 102 S.E.2d at 892; *see also Atlas Supply*, 273 S.C. at 395, 256 S.E.2d at 860 (discussing *Wadford*). *Atlas Supply* rejected the argument that the addition of "the priority shall be determined by the time of filing for record" did anything other than reverse *Guest*. *Id.* ("We agree with the trial judge that the 1958 amendment was an attempt to correct the result reached in the *Guest* case, where two mortgages which were created the same day and recorded on a subsequent day resulted in a ruling in favor of the second mortgagee although the first bank had recorded first; and did not alter 'the basic concept and structure of the recordation statute as protecting subsequent creditors rather than one whose original debt was antecedent in time to the mortgage obligation.'").

The recording act maintained the same language and section after the 1958 and 1960 amendments into the 1962 Code. *See* S.C. Code Ann. § 60-101 (1962). The code section but not

the language was amended in 1976. *See* S.C. Code Ann. § 30-7-10 (1976). An amendment in 1988[13] revised the recording act to essentially its language today[14]:

> All deeds of conveyance of lands, tenements, or hereditaments, either in fee simple or for life, all deeds of trust or instruments in writing conveying estate, creating a trust in regard to the property, or charging or encumbering it, **all mortgages or instruments in writing in the nature of a mortgage of any real property**, all marriage settlements, or instruments in the nature of a settlement of a marriage, all leases or contracts in writing made between landlord and tenant for a longer period than twelve months, all statutory liens on buildings and lands for materials or labor furnished on them, all statutory liens on ships and vessels, all certificates of renunciation of dower, all contracts for the purchase and sale of real property, all assignments, satisfactions, releases, and contracts in the nature of subordinations, waivers, and extensions of landlords' liens, laborers' liens, sharecroppers' liens, or other liens on real property created by law or by agreement of the parties and generally all instruments in writing conveying an interest in real estate required by law to be recorded in the office of the register of deeds or clerk of court in those counties where the office of the register of deeds has been abolished or in the office of the Secretary of State delivered or executed after July 31, 1934, except as otherwise provided by statute, **are valid so as to affect the rights of subsequent creditors (whether lien creditors or simple contract creditors), or purchasers for valuable consideration without notice**, only from the day and hour when they are recorded in the office of the register of deeds or clerk of court of the county in which the real property affected is situated. In the case of a subsequent purchaser of real estate, or in the case of a subsequent lien creditor on real estate for valuable consideration without notice, the instrument evidencing the subsequent conveyance or subsequent lien must be filed for record in order for its holder to claim under this section as a subsequent creditor or purchaser for value without notice, and the priority is determined by the time of filing for record.

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[13] S.C. Code Ann. § 30-7-10 (1988 Supp.) (The notes to the Supplement provide, "The **1988** amendment made grammatical changes, deleted all references to personal property, changed "on or after August 1, 1934" to "after July 31, 1934", added the phrase "except as otherwise provided by statute", deleted a reference to conditional sales contracts securing the purchase money of motor vehicles and refrigerators, deleted a reference to Chapter 19 of title 56, and deleted the final paragraph which pertained to chattel mortgages.") (emphasis original).

[14] In 1997, the General Assembly, through 1997 Act No. 34, § 1, directed the Code Commissioner to change all references to "Register of Mesne Conveyances" to "Register of Deeds" wherever appearing in the 1976 Code of Laws.

S.C. Code Ann. § 30-7-10 (emphasis added). The current recording act, like it has done since at least the act of 1876, flips the common law rule and protects subsequent purchasers and creditors without notice of unrecorded liens. *See Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 255, 715 S.E.2d 348, 355 (Ct. App. 2011) ("The purpose of the recording statute is to protect a subsequent buyer without notice."); *Atlas Supply Co. v. Davis*, 273 S.C. 392, 394–95, 256 S.E.2d 859, 860 (1979) (describing "'the basic concept and structure of the recordation statute as protecting subsequent creditors"); *S.C. Nat'l Bank v. Guest*, 232 S.C. 367, 373, 102 S.E.2d 215, 218 (1958) ("Recordation Acts . . . were an outgrowth of efforts to protect subsequent purchasers and creditors from secret liens") (internal punctuation omitted); *Epps v. McCallum Realty Co.*, 139 S.C. 481, 498, 138 S.E. 297, 302 (1927) ("While intending to protect subsequent creditors and purchasers for value without notice, it is manifest that the recording acts invest the grantor or incumbrancer with power to defeat a previous conveyance or incumbrance, if not recorded as provided, by a subsequent conveyance or incumbrance to one who has no actual notice of such previous conveyance or incumbrance."); *Summers v. Brice*, 36 S.C. 204, 210, 15 S.E. 374, 376 (1892) ("The sole value of recording is to give notice."); *King v. Fraser*, 23 S.C. 543, 568 (1885) ("It seems clear to us that the principal object of the registry act was to require notice, and that it proceeds on the theory that recording is notice, whether made in or out of time.").

In sum, the history of the recording act in South Carolina shows the recording act exists to impart notice and protect subsequent creditors without notice, not bar the application of equitable lien priority doctrines where the statute does not apply.

C. PUBLIC POLICY CONSIDERATIONS SUPPORT ADOPTING REPLACEMENT MORTGAGE.

South Carolina has looked to other states and commentators through the development of its equity jurisprudence, and persuasive case law from other jurisdictions—those jurisdictions that align with South Carolina's own legal tradition—support adopting Replacement Mortgage. *See, e.g., Enter. Bank v. Fed. Land Bank*, 139 S.C. 397, 407–08, 138 S.E. 146, 150 (1927) (*quoting S. Cotton Oil Co. v. Napoleon Hill Cotton Co.*, 158 S.W. 1082, 1083 (Ark. 1913)); *see also Sutton*, 26 S.C. at 38 (citing 3 POMEROY'S EQUITY JURISPRUDENCE §§ 1211, 1212 (1st ed. 1881)).

The Court of Appeals in this case considered arguments from an economic perspective for broad subrogation and Replacement Mortgage doctrines in Grant S. Nelson & Dale A. Whitman, *Adopting Restatement Mortgage Subrogation Principles: Saving Billions of Dollars for Refinancing Homeowners*, BYU L. Rev. 305, 308 (2006) ("This Article argues that the doctrine of subrogation, properly understood and applied, has the potential to eliminate or greatly reduce the expense of proof of title to mortgage lenders in refinancing transactions.") (cited in *ArrowPointe Fed. Credit Union v. Bailey*, 432 S.C. 373, 379, 852 S.E.2d 473, 475 (Ct. App. 2020)). This commentator, arguing for a more efficient mortgage loan refinance market, recognized the subrogation/replacement distinction addressed in *Matrix* and suggested that Replacement Mortgage is the general approach to a lender refinancing its own loan:

> The replacement transaction is usually not governed by subrogation principles. This is because subrogation cannot be involved unless the second loan is made by a different lender than the holder of the first mortgage; one cannot be subrogated to one's own previous mortgage. Rather, a different body of law, employing principles similar to subrogation, is usually applied.

Grant S. Nelson & Dale A. Whitman, *Adopting Restatement Mortgage Subrogation Principles: Saving Billions of Dollars for Refinancing Homeowners*, BYU L. Rev. 305, 324–25 (2006). In

economic substance, same lender and third-party lender mortgage refinancing transactions are the same. *Id.*

Perhaps the most prominent "commentator" on property matters today is the Restatement, which clearly supports the Replacement Mortgage doctrine and considers it analogous to equitable subrogation. The reporter's comments to § 7.3 of the Restatement identify cases from other states that follow the Replacement Mortgage doctrine:

> *Replacement mortgages, Comment b.* Courts routinely adhere to the principle that a senior mortgagee who discharges its mortgage of record and takes and records a replacement mortgage, retains the predecessor's seniority as against intervening lienors unless the mortgagee intended a subordination of its mortgage or "paramount equities" exist. *See, e.g., Stephens Wholesale Bldg. Supply Company, Inc. v. Birmingham Fed. Sav. and Loan Ass'n*, 585 So.2d 870 (Ala.1991); *Bay Minette Production Credit Ass'n v. Citizens' Bank*, 551 So.2d 1046 (Ala.1989); *Home Federal Savings & Loan Association v. Citizens Bank of Jonesboro*, 861 S.W.2d 321 (Ark.Ct.App.1993); *Farmers & Merchants Bank v. Riede*, 565 So.2d 883 (Fla.Dist.Ct.App.1990); *Rebel v. National City Bank*, 598 N.E.2d 1108 (Ind.Ct.App.1992); *Jackson & Scherer, Inc. v. Washburn*, 496 P.2d 1358 (Kan.1972); *Financial Acceptance Corp. v. Garvey*, 380 N.E.2d 1332 (Mass. Ct. App. 1978); *Guleserian v. Fields*, 218 N.E.2d 397 (Mass.1966); *Piea Realty Co. Inc. v. Papuzynski*, 172 N.E.2d 841 (Mass.1961); *Greenfield v. Petty*, 145 S.W.2d 367 (Mo. 1940); *Mackiewicz v. J.J. & Associates*, 514 N.W.2d 613 (Neb.1994); *Nebraska State Bank v. Pedersen*, 452 N.W.2d 12 (Neb.1990); *Commercial Fed. Sav. & Loan Ass'n v. Grabenstein*, 437 N.W.2d 775 (Neb.1989); *Commerce Sav. Lincoln, Inc. v. Robinson*, 331 N.W.2d 495 (Neb.1983); *Houston Lumber Co. v. Skaggs*, 613 P.2d 416 (N.M.1980); *Resolution Trust Corp. v. Barnhart*, 862 P.2d 1243 (N.M.Ct.App.1993) ("where a senior mortgagee discharges its mortgage of record and contemporaneously takes a new mortgage, the senior mortgagee's lien is not subordinated to intervening liens in the absence of (1) evidence of an intent to subordinate, or (2) paramount equities in favor of junior lienholders that justify subordinating the senior mortgagee's lien."); *Norstar Bank v. Morabito*, 607 N.Y.S.2d 426 (N.Y.App.Div. 1994); *Kellogg Bros. Lumber v. Mularkey*, 252 N.W. 596 (Wis.1934); *Marine Bank Appleton v. Hietpas, Inc.*, 439 N.W.2d 604 (Wis.Ct.App.1989) ("It is a well-accepted rule that a new mortgage that secures an old debt does not extinguish the original lien absent evidence of the parties' intent to do so or of paramount equities that would require that result"); *In re Earl*, 147 B.R. 60 (Bankr.N.Y.1992); Kratovil & Werner, Mortgage Extensions and Modifications, 8 Creighton L. Rev. 595, 600-

> 603 (1975); Lloyd, Refinancing Purchase Money Security Interests, 53 Tenn. L. Rev. 1 (1985); Annots., 98 A.L.R. 843 (1935); 33 A.L.R. 149 (1924). Of course, a loss of priority is even more unlikely where the original mortgage is not discharged of record. *See Hummel v. Hummel*, 896 P.2d 1203 (Okla.Ct.App. 1995); *Skaneateles Savings Bank v. Herold*, 376 N.Y.S.2d 286 (N.Y.App. Div.1975), aff'd, 359 N.E.2d 701 (N.Y. 1976).

See Restatement (Third) of Property (Mortgages) § 7.3 (1997 & June 2020 Update) (citing *Home Fed. Sav. & Loan Ass'n v. Citizens Bank*, 861 S.W.2d 321, 324 (Ark. App. 1993)). Of course, these state courts and others developed their own equity jurisprudence over many years, and the precedents both follow and diverge from South Carolina law on various points. Moreover, recording acts are idiosyncratic across the states and impact equity in different ways. Thus, these cases can help illustrate certain factual scenarios and how similar doctrines might apply to different facts, but cases around the country often turn on various items specific to a given state's law.

It is worth noting, however, that Arkansas's equity jurisprudence, to which this Court looked in *Enterprise Bank*, has long recognized what today we call Replacement Mortgage. *See, e.g., Home Fed. Sav. & Loan Ass'n v. Citizens Bank*, 861 S.W.2d 321, 324 (Ark. App. 1993) ("It has long been the rule in Arkansas that, where a senior mortgagee in good faith and without culpable negligence satisfied the lien of his mortgage on the record in ignorance of the existence of an intervening mortgage on the same premises and took a second mortgage as a substitute, equity will restore the lien of the first mortgage, provided it can be done without working hardship or injustice on innocent parties.") (*citing Wooster v. Cavender*, 155, 15 S.W. 192 (Ark. 1891) *and Stephenson v. Grant*, 931, 271 S.W. 974, 976 (Ark. 1925)). Following Arkansas's similar equity jurisprudence in this case, like this Court did in *Enterprise Bank*, would result in adopting Replacement Mortgage.

CONCLUSION

For these reasons, this Court should adopt Replacement Mortgage in accordance with existing South Carolina equity jurisprudence.

Respectfully submitted,

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