No. 18-___

IN THE

Supreme Court of the United States

SFR INVESTMENTS POOL 1, LLC,

Petitioner,

v.

FEDERAL HOME LOAN MORTGAGE CORPORATION, FEDERAL HOUSING FINANCE AGENCY, FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Fannie Mae and Freddie Mac (the Enterprises) buy residential mortgages, holding a small portion on their own books and securitizing the rest. In 2008, Congress authorized the Federal Housing Finance Authority (FHFA) to take the Enterprises into conservatorship, which it did. A provision of the statute provides that "[n]o property of the [FHFA] shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Agency." 12 U.S.C. § 4617(j)(3). As applied to mortgages kept by the Enterprises on their own accounts, the provision affected relatively few properties. In this case, however, the Ninth Circuit held that this foreclosure bar also applies to the millions of properties whose mortgages the Enterprises hold merely as trustees for security holders. Because FHFA has made clear it will not consent to any foreclosure, the result is a pervasive bar against foreclosures to enforce tax and other senior liens on millions of properties across the United States and invalidation of vast numbers of prior sales. And because securitized mortgages generally are not recorded in the Enterprises' name, it is nearly impossible to determine when the bar applies. The Questions Presented are:

1. Does 12 U.S.C. § 4617(j)(3) apply to foreclosures of properties for which FHFA holds a securitized mortgage solely as trustee for the security holders?

2. Is a foreclosure sale in violation of 12 U.S.C. § 4617(j)(3) void in its entirety (such that an unknowing purchaser can seek to unwind the deal) or does the statute only prevent extinguishment of Fannie Mae and Freddie Mac's liens?

RULE 29.6 STATEMENT

The parent corporation of SFR Investments Pool 1, LLC is SFR Investments, LLC. No publicly held corporation owns 10% or more of the stock of SFR Investments Pool 1, LLC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner SFR Investments Pool 1, LLC, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is published at 893 F.3d 1136. The opinion of the district court (Pet. App. 30a-49a) is not published in the *Federal Supplement* but is available at 2016 WL 2350121.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2018. Pet. App. 1a. On September 12, 2018, the Chief Justice extended the time to file this petition through November 22, 2018. No. 18A248. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 4617 of Title 12 of the U.S. Code provides in relevant part:

* * *

(b) Powers and duties of the Agency as conservator or receiver

* * *

(2) General powers

(A) Successor to regulated entity

The Agency shall, as conservator or receiver, and by operation of law, immediately succeed to—

(i) all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity; and

(ii) title to the books, records, and assets of any other legal custodian of such regulated entity.

(B) Operate the regulated entity

The Agency may, as conservator or receiver—

(i) take over the assets of and operate the regulated entity with all the powers of the shareholders, the directors, and the officers of the regulated entity and conduct all business of the regulated entity;

(ii) collect all obligations and money due the regulated entity;

(iii) perform all functions of the regulated entity in the name of the regulated entity which are consistent with the appointment as conservator or receiver;

(iv) preserve and conserve the assets and property of the regulated entity; and

(v) provide by contract for assistance in fulfilling any function, activity, action, or duty of the Agency as conservator or receiver.

* * *

(19) General exceptions

* * *

(B) Mortgages held in trust

(i) In general

Any mortgage, pool of mortgages, or interest in a pool of mortgages held in trust, custodial, or agency capacity by a regulated entity for the benefit of any person other than the regulated entity shall not be available to satisfy the claims of creditors generally, except that nothing in this clause shall be construed to expand or otherwise affect the authority of any regulated entity.

(ii) Holding of mortgages

Any mortgage, pool of mortgages, or interest in a pool of mortgages described in clause (i) shall be held by the conservator or receiver appointed under this section for the beneficial owners of such mortgage, pool of mortgages, or interest in accordance with the terms of the agreement creating such trust, custodial, or other agency arrangement.

(iii) Liability of conservator or receiver

The liability of the conservator or receiver appointed under this section for damages shall, in the case of any contingent or unliquidated claim relating to the mortgages held in trust, be estimated in accordance with the regulations of the Director.

* * *

(j) Other Agency exemptions

(1) Applicability

The provisions of this subsection shall apply with respect to the Agency in any case in which the Agency is acting as a conservator or a receiver.

(2) Taxation

The Agency, including its franchise, its capital, reserves, and surplus, and its income, shall be exempt from all taxation imposed by any State, county, municipality, or local taxing authority, except that any real property of the Agency shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed, except that, notwithstanding the failure of any person to challenge an assessment under State law of the value of such property, and the tax thereon, shall be determined as of the period for which such tax is imposed.

(3) Property protection

No property of the Agency shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Agency, nor shall any involuntary lien attach to the property of the Agency.

(4) Penalties and fines

The Agency shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due.

* * *

STATEMENT OF THE CASE

The Ninth Circuit held in this case that a provision of the Housing and Economic Recovery Act of 2008 bars state and local taxing authorities, homeowner associations, and others senior lienholders from foreclosing on any property if Fannie Mae or Freddie Mac (the Enterprises) at some point purchased and securitized a mortgage on the property, even if the foreclosing party's lien is senior to that mortgage. Given the Enterprises' central role in the secondary mortgage market, that means that millions of properties are now subject to this Foreclosure Bar. And although the statute allows the Federal Housing Finance Authority (FHFA or the Agency) to consent to sales subject to the Bar, the Agency has declared that it will not, refusing even to create a formal process for requesting such consent. The result is a moratorium on the exercise of basic property rights by vast numbers of lien holders for the foreseeable future, and the retroactive invalidation of unknown numbers of sales that have taken place over the past decade in violation of the statute as now interpreted by the Ninth Circuit. Indeed, hundreds, if not thousands of cases challenging title to such properties are currently pending.

Other circuits, confronting the identical provision in an earlier statute, have held that such a suspension of basic lienholder rights would likely violate the Takings Clause if extending more than a couple of years. FHFA's conservatorship has now dragged on for more than a decade with no end in sight.

To make matters worse, the Enterprises generally do not record their purchases of mortgages in local land records in their own names, making it nearly

impossible for those who would foreclose on a property, or those who would participate in the sale, to know whether the sale is lawful. In this case, for example, petitioner purchased several properties at foreclosure auctions in Nevada, having no reason to believe that Fannie Mae or Freddie Mac were involved. Years later, FHFA sued, alleging that the sale was invalid because at some point after the initial loans closed, Fannie and Freddie purchased and securitized the mortgages.

Magnifying the unfairness, the Ninth Circuit has held that a sale in violation of the provision is not void in its entirety (such that the purchaser could seek to unwind the transaction and get its money back), but instead simply fails to extinguish the Enterprises' interest in the property. As a consequence, buyers are left with properties worth substantially less than they reasonably believed them to be at the time of sale, and possibly worth nothing at all (if the mortgage exceeds the property's market value).

All of this – the harm to taxing authorities and other senior lienholders, the cloud cast on the title of properties purchased years ago in good faith, the constitutional doubt thrown upon the statute – could have been minimized by a more modest interpretation of the Foreclosure Bar's reach. The Court should grant certiorari in this case to correct that misreading and preempt the chaos the Ninth Circuit's decision promises to sow.

I. Legal Background

A. Law Governing Priority Of Liens

State law permits lenders, homeowners' associations, taxing authorities, repairmen, and others to secure payment by recording a lien on the debtor's real property. When the debt is defaulted, the lienholder may foreclose on the property, causing it to be sold. The distribution of the proceeds is determined by the priority of the liens, which is established by state law. If the sale produces less money than is needed to satisfy all the creditors, the junior lienholders may not be paid. *See, e.g.*, Grant S. Nelson et al., *Real Estate Finance Law* § 7:20 (6th ed. 2014).

A foreclosure sale also ordinarily extinguishes all liens junior to the lien being foreclosed upon, but leaves intact any senior liens. *See Real Estate Finance Law* § 7:20; Restatement (Third) of Property (Mortgages) § 7.1 cmt. a (1997). This allows the purchaser to take title to the foreclosed property free and clear of the junior liens, thereby removing a practical impediment to the foreclosure remedy's effectiveness.

B. Homeowner Association Superpriority Liens

In many communities, services that would otherwise be provided by the government and paid for through property taxes – like trash collection, street maintenance, etc. – are undertaken by a homeowners' association (HOA). In order to finance these services, homeowners are required to pay fees to the HOA. If the fees are not paid, many States permit the HOA to put a lien on the homeowner's property. *See* Ryan Prsha, Note, *Are Non-Judicial Sales Unconstitutional?*

The Super-Priority Lien and Its Influence on State Foreclosure Statutes, 81 Mo. L. Rev. 917, 920 (2016).

When homeowners experience financial distress, they may stop paying HOA fees, often in conjunction with falling behind on their mortgage payments. Particularly during tough economic times, the default can lead to cascading effects throughout the community – the HOA must increase dues for paying members to make up the deficit (thereby risking default by other, similarly distressed homeowners) or reduce services (thereby decreasing home values even further and possibly putting members under water on their mortgages). *See* 81 Mo. L. Rev. at 920. To be sure, the HOA could record a lien on the property for the unpaid assessments. But so long as the HOA lien was junior to the mortgage, there often would be no point. Particularly in a down market, if the lender foreclosed, the sale often would not cover much more than the mortgage itself, leaving nothing for the HOA as a junior lienholder. And, indeed, if prices were suppressed sufficiently, the lender might prefer to wait to foreclose until market conditions improved. At the same time, if the HOA foreclosed as the junior lienholder, it would be forced to sell the property with the mortgage lien still attached (an unattractive proposition for most potential buyers) or pay off the mortgage before, or as part of, the sale (which might cost more than the sale price).

In response, a number of States enacted statutes to provide HOA's with a "superpriority lien" for a portion of back dues. *See* 81 Mo. L. Rev. at 921 ("Twenty different states have . . . creat[ed] a super-priority lien status for association dues."). In Nevada, for example, Section 116.3116 of the Nevada Revised

Statutes gives an HOA's lien priority over even a first mortgage for an amount equal to nine months of common assessments, plus nuisance-abatement and/or maintenance changes.[1] The Nevada Supreme Court, consistent with the decisions of other courts construing similar statutes, has held that the HOA superpriority lien operates like any other senior lien – when the HOA forecloses, all junior lienholders are entitled to any proceeds in excess of the amount of the HOA's superpriority lien but the junior liens are extinguished. *See SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408, 411-14 (Nev. 2014).[2] Accordingly, just as a foreclosure initiated by the holder of a first mortgage can extinguish a second mortgage, an HOA foreclosure will extinguish the lien held by a bank with a first mortgage or deed of trust on the property. *Id*. at 419.

Of course, the mortgage holder or its servicer can avoid this result by paying off the relatively modest HOA debt, or by participating in the foreclosure sale, an intended incentive of the regime.

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[1] For purposes of expediency, while the HOA has one lien with two parts, this brief refers to the portion of the lien given priority as a "superpriority lien."

[2] *See also Chase Plaza Condo. Ass'n v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166, 172-78 (D.C. 2014); *Summerhill Vill. Homeowners Ass'n v. Roughley*, 289 P.3d 645, 648-49 (Wash. Ct. App. 2012).

C. The Federal Role In The Secondary Mortgage Market

1. The Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Corporation (Freddie Mac) are government-sponsored enterprises that acquire residential mortgages in the secondary market. They hold a few of the loans in their own portfolios on their own account.[3] They bundle the rest into pools, place the pools in trusts with the Enterprises serving as trustees, and sell securities that guarantee the buyers a portion of the loan proceeds.[4]

2. During the last housing crisis, Congress enacted the Housing and Economic Recovery Act of 2008 (HERA), Pub. L. No. 110-289, 122 Stat. 2654 (codified as amended at 12 U.S.C. § 4501 *et seq.*). Among other things, the statute established the FHFA and assigned it responsibility for regulating Fannie Mae and Freddie Mac. 12 U.S.C. § 4511. The statute

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[3] *See* Hous. Fin. Policy Ctr., Urban Inst., *Housing Finance at a Glance: A Monthly Chartbook* 24 (Sept. 2018), https://www.urban.org/sites/default/files/publication/99043/september_chartbook_1.pdf (*Monthly Chartbook*) (Enterprises presently holding approximately $465 billion in mortgages in own portfolios); *id*. at 7 (Fannie Mae and Freddie Mac administering $2.8 trillion and $1.8 trillion respectively of outstanding mortgage-backed securities).

[4] *See* Pet. App. 7a. The Enterprises guarantee the underlying securitized mortgages, funding that guarantee through assessments charged to the loan seller (and, ultimately, rolled into the cost of the loan to the home buyer). *See* FHFA, *Fannie Mae and Freddie Mac Single-Family Guarantee Fees in 2015* 2-3 (Aug. 2016), https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/GFee_Report_FINAL.pdf.

also gave FHFA the power to place the Enterprises under conservatorship, *id*. § 4617(b)(2)(D), which it did, Pet. App. 10a.

HERA included a so-called "Federal Foreclosure Bar," under which "[n]o property of the Agency [*i.e.*, the FHFA, *see* 12 U.S.C. § 4502(2)] shall be subject to . . . foreclosure[] or sale without the consent of the Agency." *Id.* § 4617(j)(3). HERA also addresses what constitutes the "property of the Agency" that is subject to protection by the Federal Foreclosure Bar. The statute declares that FHFA shall "by operation of law, immediately succeed to . . . all rights, titles, powers, and privileges of the regulated entity . . . with respect to [the Entity's] assets." *Id.* § 4617(b)(2)(A)(i). However, "General [E]xceptions" to FHFA's power as conservator provide that "[a]ny mortgage . . . held in trust . . . by a regulated entity for the benefit of any person other than the regulated entity shall not be available to satisfy the claims of creditors generally," *id.* § 4617(b)(19)(B)(i), but instead "shall be held by the conservator . . . for the beneficial owners of such mortgage . . . in accordance with the terms of the agreement creating such trust." *Id.* § 4617(b)(19)(B)(ii).

Accordingly, the statute directs that the FHFA shall succeed to the property of the Enterprises *generally*, but that the Enterprises' securitized mortgages shall be held in trust by the FHFA. The first question in this case is whether those securitized mortgages, held in trust on behalf of the investors in the securities, are "property of the Agency" within the meaning of the Foreclosure Bar. 12 U.S.C. § 4617(j)(3).

D. FHFA's Evolving Position On The Federal Foreclosure Bar

For the first six years after HERA was enacted, the FHFA gave no indication that it believed the Foreclosure Bar applied to prevent foreclosure on properties with mortgages the Enterprises had securitized. As of 2011, Fannie Mae's Servicing Guide specifically noted state laws that "provide[] for up to six months of delinquent regular condo assessments to have lien priority over the mortgage lien."[5] Rather than assert that the Foreclosure Bar precluded enforcement of those liens, Fannie Mae instead directed servicers to pay the charges "if necessary to protect the priority of Fannie Mae's mortgage lien."[6]

However, in December 2014, FHFA reversed course. It filed an action asserting for the first time that an HOA foreclosure sale violated the Foreclosure Bar and, therefore, had failed to extinguish Fannie Mae's secured interest in the property. *See Skylights LLC v. Byron*, 112 F. Supp. 3d 1145, 1159 (D. Nev. 2015). Shortly thereafter, FHFA issued a press release reiterating that position and vowing to "aggressively" take action to "void foreclosures that purport to extinguish Enterprise property interests" in violation of the Foreclosure Bar.[7] It likewise noted its

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[5] Fannie Mae, *Fannie Mae Single Family 2011 Servicing Guide* 302-2 (June 10, 2011), https://www.fanniemae.com/content/guide/svc061011.pdf.

[6] *Id*.

[7] FHFA, Statement of the Federal Housing Finance Agency on Certain Super-Priority Liens (Dec. 22, 2014), https://www.fhfa.gov/

objection to state laws giving priority to certain tax liens arising from a program intended to encourage home owners to improve the energy efficiency of their houses.[8] Four months later, it issued another press release, stating that "it has not consented, and will not consent in the future, to the foreclosure or other extinguishment of any Fannie Mae or Freddie Mac lien" in connection with foreclosure of an HOA superpriority lien.[9]

Concerned about this abrupt and consequential change in FHFA policy, members of Congress sent a letter to FHFA, urging it to solicit and consider public comments before implementing its new policy.[10] FHFA refused.

Instead, as discussed next, the agency expanded its position, with either it, the Enterprises, or a purported servicer filing suit in this case and others like it in which Fannie Mae or Freddie Mac never even held the mortgage on their own books, but had securitized the loan and sold the securities to third parties.

Media/PublicAffairs/Pages/Statement-of-the-Federal-Housing-Finance-Agency-on-Certain-Super-Priority-Liens.aspx.

[8] *Id.*

[9] FHFA, Statement on HOA Super-Priority Lien Foreclosures (Apr. 21, 2015), https://www.fhfa.gov/Media/PublicAffiars/Pages/Statement-on-HOA-Super-Priority-Lien-Foreclosures.aspx.

[10] *See* Letter from Mass. Cong. Delegation to Hon. Mel Watt, Director, FHFA (May 12, 2016), https://www.warren.senate.gov/files/documents/2016-5-12_MA_delegation_ltr_to_FHFA.pdf.

II. Factual And Procedural History

This case concerns four properties located in Las Vegas, Nevada and a fifth located in Henderson, Nevada. Each of the original property owners obtained mortgages that were acquired in 2006 by either Fannie Mae or Freddie Mac, securitized, and placed in trusts for which Fannie or Freddie is the trustee. Pet. App. 6a. Fannie and Freddie did not record the transaction in the local land records in their own names. *Id.* 23a-24a.

During the housing crisis, the homeowners fell into default on their HOA dues, leading the HOAs to foreclose on their liens. Because Fannie and Freddie had not recorded their interest in the properties in their own names, Pet. App. 24a, neither the HOAs nor the prospective purchasers were on notice that HERA's Foreclosure Bar applied.[11] Nor was there any formal process available for seeking FHFA's consent to the sale even if the parties had known of its involvement. *See id.* 25a-26a.

The HOAs thus did not seek FHFA's consent before foreclosing on the lien, and neither FHFA nor the Enterprises participated in the foreclosure sale. Instead, petitioner purchased the properties at auctions held between 2012 and 2014, believing that it had obtained the properties free and clear of any junior liens. *See* Pet. App. 11a.

After waiting one to three years after the sales closed, FHFA, Freddie Mac, and Fannie Mae filed suit

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[11] FHFA also had not yet taken the position that the Foreclosure Bar precluded a purchaser in petitioner's position from taking title to the property free and clear. *See supra* pp. 11-13.

against petitioner, seeking declaratory relief, quiet title, and a permanent injunction regarding the properties. They claimed that because FHFA had not consented to the foreclosure, the sale did not validly extinguish Freddie and Fannie's security interests. The district court agreed and granted summary judgment for the plaintiffs. Pet. App. 48a-49a.

The Ninth Circuit affirmed. It first held that the FHFA "succeed[ed] to" the securitized mortgages pursuant to 12 U.S.C. § 4617(b)(2)(A)(i). Pet. App. 13a-17a. The court acknowledged that the provision declaring that the FHFA would "succeed to" the property rights of Fannie Mae and Freddie Mac was in a section of the statute labeled "General [P]owers." And it recognized that a different provision, in a section denominated as "General [E]xceptions" to those general powers, provided that securitized mortgages held in trust by the Enterprises shall "be held in trust" by the FHFA. But it nonetheless concluded that "General [E]xception" provision did not, in fact, create any exception to the "General [R]ule" of succession. *Id*. Instead, the court believed, the exception "confer[red] *additional* protections upon the Enterprises' securitized mortgage loans." *Id*. 15a.

The court of appeals then concluded that because FHFA had succeeded to the mortgages at issue, the Federal Foreclosure Bar required the HOAs to have sought FHFA's consent before foreclosing on their liens. Pet. App. 17a-18a. The failure to obtain that consent, the court held, did not invalidate the sale, but

instead precluded state law from extinguishing the Enterprises' liens. *Id.*[12]

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's interpretation of the HERA Foreclosure Bar effectively prohibits enforcement of basic property rights – including by taxing authorities, HOAs, and other senior lien holders – in millions of properties for the foreseeable future. Even worse, there frequently is no way to know whether the Bar applies because mortgages purchased by Fannie and Freddie generally are not recorded in local land records in the Enterprises' names. As a consequence, the decision casts a shadow on *every* foreclosure sale in the western United States. To top it all off, the Ninth Circuit's precedent imposes these effects retroactively, leaving petitioner and similarly situated buyers with properties worth dramatically less than they reasonably valued them at the time of sale, with no ability to unwind the transaction. Indeed, hundreds (if not thousands) of such cases have already been filed.

In construing the identical foreclosure bar in the FHFA's predecessor statute, the Third and Fifth Circuits held that suspension of foreclosure rights for more than a year or two would likely violate the Takings Clause. The FHFA's suspension of core property rights is now in its second decade, with no end in sight.

The Ninth Circuit should have avoided this untenable (and almost certainly unconstitutional)

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[12] The court of appeals further held that petitioner was not denied due process. Pet. App. 18a-27a.

situation through a straight-forward interpretation of the statute, limiting the Foreclosure Bar to mortgages actually owned by Fannie Mae or Freddie Mac, and not to those mortgages merely held by FHFA as trustee. At the very least, it should have held that a sale violating the Foreclosure Bar is void in its entirety – thereby allowing innocent purchasers to unwind the transaction – as the Fifth Circuit has construed the identical language in HERA's predecessor statute.

The Ninth Circuit's failure to do either has thrown state foreclosure law into an unsustainable disarray that only this Court can remedy.

I. The Ninth Circuit's Decision Dramatically Redefines Basic Property Rights, Casts A Cloud On A Multitude Of Real Estate Transactions, And Precludes Enforcement Of HOA And Tax Liens On Millions Of Homes For The Foreseeable Future.

The breathtaking scope and destabilizing consequences of the Ninth Circuit's decision call for this Court's immediate review.

First, the Ninth Circuit's decision has massively expanded the scope of the Foreclosure Bar. As applied to the Enterprises' own holdings, the bar affects relatively few properties – at present, the two Enterprises hold less than $250 billion each on their own account.[13] In contrast, the Enterprises have ***$4.6 trillion*** in outstanding mortgage-backed securities,

[13] *See supra* n.3.

accounting for ***more than 40%*** of the value of all outstanding mortgages.[14]

This number will only increase over time – after the housing crash, the private market for securitization withered, leaving government-sponsored enterprises, like Fannie Mae and Freddie Mac, with a 95% market share for new securities issued today.[15] In 2018, the Enterprises are expected to issue more than $1.2 trillion in new securities.[16] Every one of those properties will be immune from foreclosure, even for delinquent taxes, under the decision in this case, absent FHFA's consent.

Second, FHFA will not provide that consent. It has adopted a blanket policy of refusing to consent to any HOA foreclosures,[17] and from all that can be determined, applies the same policy to tax sales and any other foreclosure subject to the bar.[18] That is why

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[14] *Monthly Chartbook*, *supra*, at 6 (total value of all outstanding mortgages is $10.7 trillion); *id*. at 7 (Enterprises' outstanding securitized mortgages total $4.6 trillion); *see also* Jim Parrott & Mark Zandi, *GSE Reform Is Dead – Long Live GSE Reform!* 8 n.4 (May 2018), https://www.urban.org/sites/default/files/publication/98433/gse_reform_is_dead_long_live_gse_reform_11.pdf.

[15] *Monthly Chartbook*, *supra*, at 10. This figure includes mortgages securitized by the Government National Mortgage Association (Ginnie Mae).

[16] *Id.* at 11.

[17] *See* FHFA, Statement on HOA Super-Priority Lien Foreclosures (Apr. 21, 2015), https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-on-HOA-Super-Priority-Lien-Foreclosures.aspx.

[18] *See* FHFA, Statement of the Federal Housing Finance Agency on Certain Super-Priority Liens (Dec. 22, 2014),

FHFA provides no formal procedure for seeking its consent. *See* Brief for Amicus Curiae FHFA at 6, *Saticoy Bay LLC Series 9641 Christine View v. Fed. Nat'l Mortg. Ass'n*, No. 69419 (Nev. June 23, 2016) ("[T]he lack of any formal procedure manifests FHFA's firm and unwavering refusal to consent to such extinguishment of the property interests of the Enterprises.").

Third, as a consequence, the Ninth Circuit's decision prevents vast numbers of senior lienholders from exercising their longstanding state property right to enforce their liens and recover debts duly owed them. As this case illustrates, such senior lienholders include homeowners' associations in the approximately 20 States that have enacted HOA superpriority lien statutes.[19]

Even more pervasively, it includes state and local governments throughout the Nation, whose tax liens generally take priority over every other lien, including mortgages.[20] *See Berezovsky v. Moniz*, 869 F.3d 923, 928 (9th Cir. 2017) (holding that on "its face, the Federal Foreclosure Bar applies to any property for which the [FHFA] serves as conservator and immunizes such property from any foreclosure

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https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-the-Federal-Housing-Finance-Agency-on-Certain-Super-Priority-Liens.aspx.

[19] *See* Cmty. Ass'ns Inst., *Priority Lien for Collecting Delinquent Assessments*, https://www.caionline.org/Advocacy/StateAdvocacy/PriorityIssues/PriorityLien/Pages/default.aspx (last visited Nov. 19, 2018).

[20] *See, e.g.*, *Priority of Mortgage and Tax Liens*, 10 Real Est. Ctr. 1110, 1110 (1996) (rev. Oct. 2005), https://assets.recenter.tamu.edu/documents/articles/1110.pdf.

without Agency consent"); *id*. at 928-29 (Bar is not "limited to tax liens," noting that the provision "includes no language limiting its general applicability provision to taxes alone"). Indeed, the Ninth Circuit's interpretation would seem to prevent tax foreclosures by the Federal Government as well, given the lack of any exception for federal tax liens in the Foreclosure Bar provision.

The bar also applies when one of the Enterprises holds a second mortgage, preventing foreclosure by the first mortgage holder.[21]

Fourth, it is extraordinarily difficult for an HOA, taxing authority, or a potential purchaser to determine whether a particular mortgage has been purchased by one of the Enterprises. Securitized mortgages are generally not recorded in local land records in the Enterprises' names. Pet. App. 23a-24a. Instead, the Enterprises hire third parties to service the loans and "the servicer ordinarily appears in the land records as the mortgagee to facilitate performance of the servicer's contractual responsibilities. . . ." *Servicing Guide: Fannie Mae Single Family* § A2-1-03, *supra* n.21; *see also* Pet. App. 24a; *Berezovsky*, 869 F.3d at 932. Because the Enterprises employ many different servicers, and

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[21] The Enterprises' servicing guides indicate that both have second mortgages in their portfolios. *See* Fannie Mae, *Servicing Guide: Fannie Mae Single Family* § E-3.2-03 (Nov. 14, 2018), https://www.fanniemae.com/content/guide/svc111418.pdf; Freddie Mac, *Single-Family Seller/Servicer Guide Snapshot* § 54.1 (Dec. 16, 2015), http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/121615Guide.pdf.

because those servicers (often major banks and lenders themselves) generally do not work exclusively for the Enterprises, learning the name of the servicer from the land records provides no insight into whether the Foreclosure Bar might apply.[22]

Indeed, in this case, to prove it held mortgages on the properties in this case, FHFA was forced to submit affidavits from Fannie Mae and Freddie Mac employees, who based their claims on their review of the Enterprises' internal, nonpublic databases. *See, e.g.*, C.A. Supp. E.R. 4-6.

Fifth, the Ninth Circuit has magnified the harm of its decision by holding that sales in violation of the Foreclosure Bar do not extinguish the Enterprises' liens but are otherwise binding. That selective preemption of state law leads to unfairness that neither the States nor Congress could have contemplated, including the possibility that a family will pay hundreds of thousands of dollars for a home that is ultimately worth less than the surviving liens.

Sixth, that unfairness is already unfolding en masse. This case in only one of legions already pending in the lower courts. Indeed, FHA represented to the Ninth Circuit below that the decision in this case would affect "hundreds, if not thousands of similar cases pending" in state and federal court.[23]

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[22] *See, e.g.*, Francis Monfort, *Top Commercial, Multifamily Servicers Revealed in Midyear Ranking*, Mortg. Prof'l Am. (Sept. 4, 2018), https://www.mpamag.com/news/top-commercial-multifamily-servicers-revealed-in-midyear-ranking-110432.aspx (top servicers for Enterprises include, *e.g.*, Wells Fargo and PNC/Midland).

[23] C.A. Doc. 57, at 9 (July 23, 2018) (internal quotation marks omitted).

And there is nothing to prevent FHFA from filing similar litigation against thousands of others who bought properties at HOA auctions or tax sales at any point over the last ten years, not realizing that the Enterprises held undisclosed interest in the properties.

Finally, this untenable situation will endure for the foreseeable future. FHFA's conservatorship has now dragged on for more than a decade, with no indication it will end any time soon. *See* Diana Olick, *Back from the Brink: 10 Years On—Decades After Housing Crash Fannie Mae and Freddie Mac Are Uncle Sam's Cash Cows*, CNBC (Sept. 6, 2018).[24] The conservatorship's longevity may have something to do with the fact that the arrangement has proven immensely profitable for the Government. Shortly after Fannie and Freddie were put in conservatorship, the FHFA reached an agreement with the Treasury Department for an infusion of cash in exchange for issuing Treasury preferred stocks. *Id*. FHFA has now paid the Treasury back the entirety of the money provided, plus tens of billions more. *Id.* It will continue to make billions in payments to the Government until the conservatorship ends. *See id*.

* * *

The decision in this case thus imposes an extraordinary invasion into the traditional state domain of property law. At the same time, it casts a cloud on the title of countless properties sold at foreclosure since the conservatorship began. And the

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[24] https://www.cnbc.com/2018/09/05/fannie-mae-freddie-mac-are-uncle-sams-cash-cows-a-decade-after-crash.html.

risk the decision places on foreclosure buyers – who may find their purchases rendered worthless years after the fact when FHFA emerges from the shadows to announce its hidden interest in the foreclosed property – will inevitably undermine further the utility of the foreclosure remedy to enforce fundamental property rights even in cases where the Foreclosure Bar does not apply.

II. The Ninth Circuit's Interpretation Conflicts With The Plain Text Of The Statute And The Decisions Of Other Circuits.

The Ninth Circuit's decision is as wrong as it is consequential, conflicting with the text and purposes of the statute as well as other circuits' construction of the identical language in HERA's predecessor statute.

A. Securitized Mortgages Are Not "Property Of The" FHFA Within The Meaning Of The Foreclosure Bar.

The Foreclosure Bar protects any "property of the Agency" from foreclosure or sale. 12 U.S.C. § 4617(j)(3). The Ninth Circuit erred in holding that "property of the Agency" includes securitized mortgages held by the Enterprises exclusively in their capacity as trustees.

1. HERA directly addresses FHFA's relationship to the property owned or held by the Enterprises prior to conservatorship. The relevant provision begins by setting out FHFA's "General [P]owers" as conservator. 12 U.S.C. § 4617(b)(2)(A) (heading title). There, it provides that the "Agency shall, as conservator or receiver, and by operation of law, immediately succeed to . . . all rights, titles, powers, and privileges of the

regulated entity . . . and the assets of the regulated entity." *Id*. § 4617(b)(2)(A)(i). It further provides the conservator broad powers over the disposition of the property to which it succeeds. It may, for example, "transfer or sell any asset . . . without any approval, assignment, or consent with respect to such transfer or sale." *Id*. § 4617(b)(2)(G). It may then use the proceeds of such sales to pay the Enterprises' creditors. *Id*. § 4617(b)(2)(H).

These provisions make perfect sense with respect to the mortgages the Enterprises own. One would expect those assets could be sold to satisfy the Enterprises' creditors. But selling off *securitized* mortgages to satisfy the Enterprises' debts – when those mortgages were simply held in trust by the Enterprises for the benefit of the holders of the securities – would have been quite remarkable and destabilizing. When a bank, for example, is put under a conservator, no one expects that trust accounts will be emptied to pay off the bank's creditors. Regardless of who technically holds title to those funds, no one thinks of the money as property of the bank in the context of arranging for payment of the bank's debts. And violating that basic understanding in the case of the Enterprises would disastrously impair their ability ever again to create and sell mortgage-backed securities.

Accordingly, Congress specially legislated the status of securitized mortgages in a provision setting out "General [E]xceptions" to the general powers of FHFA as conservator and receiver. *See* 12 U.S.C. § 4617(b)(19) (title). The exception provides that mortgages "held in trust . . . by a regulated entity for the benefit of any person other than the regulated

entity shall not be available to satisfy the claims of creditors generally," *id.* § 4617(b)(19)(B)(i), but instead "shall be held by the conservator or receiver . . . for the beneficial owners of such mortgage . . . in accordance with the terms of the agreement creating such trust," *id*. § 4617(b)(19)(B)(ii).

This text and structure makes clear that the general succession provision, Section 4617(b)(2)(A), does not apply to securitized mortgages; that property is governed exclusively by the exception provision, Section 4617(b)(19)(B).

The general exception provision, in turn, does not provide that securitized mortgages become the "property of the" FHFA, as required to trigger the Foreclosure Bar. Instead, it provides that such mortgages "shall be held" "in trust." 12 U.S.C. § 4617(b)(19)(B). In normal discourse, one does not think of property held in trust as property *of the trustee*, any more than one thinks of a car as property of the valet.

FHFA has nonetheless argued that the securitized mortgages are its own property because a common law trustee holds legal title to the property in the trust. But that assumes that Congress's reference to "property of the Agency" was intended to include property for which the Agency held nothing more than technical legal title as trustee. Saying that the trustee has "title" to the property does not resolve the question because the beneficiaries also have "title" to the property in the trust. *See* Restatement (Third) of Trusts § 2 cmt. d (2003) (explaining that the "trust beneficiaries have equitable title, [while] a trustee's title to trust property may be either legal or equitable"). HERA's phrase "property of" is not a legal

term of art, much less one with an established meaning that gives precedence to legal over equitable title in trust property.

Indeed, the non-technical phrase "property of the Agency" much more naturally connotes property that is *owned* by the Agency. And the Restatement on Trusts specifically distinguishes between a property's trustee and its owner, explaining that an "owner" is someone who holds title to property for her "own benefit," as opposed to holding it for the benefit of others (*i.e.*, as a trustee). *See* Restatement (Third) of Trusts § 2 cmt. d.

The commonsense understanding that trust property is not "property of" the trustee for purposes of the Foreclosure Bar is reinforced by the statute's purposes. By directing that securitized mortgages should be managed in accordance with their original trust documents, Congress evinced its intent to leave those mortgages outside the special regime it had created for the Enterprises' own assets. Congress would have understood, moreover, that the existing regime for securitized mortgages already provided ample protection for trust assets. For example, in the years following HERA's enactment, Fannie Mae's Servicing Guide explained that "[p]art of a servicer's responsibility" was "protecting the priority of Fannie Mae's lien on a property securing a mortgage Fannie Mae has purchased or securitized" by maintaining "accurate records on the status of taxes . . . and other assessments" and "paying the related bills if it maintains an escrow deposit account for that purpose." Fannie Mae, *Fannie Mae Single Family 2011 Servicing Guide* 302-1 (June 10, 2011), https://www.fanniemae.com/content/guide/svc061011.

pdf.[25] The Guide further directed that servicers must "protect the priority of Fannie Mae's mortgage lien" by paying delinquent HOA dues, if necessary. *Id*. 302-2; *see also id*. 706-17 ("[T]o retain the first-lien position, servicers must . . . ensure all real estate taxes and assessments that could become a first lien are current, especially those for . . . HOA fees"). And even when such a lien arises, the servicers can easily avoid impairment of the Enterprises' liens by paying the debt (which, particularly in the case of HOA liens, is typically relatively small). *Id*. 305-1 ("The servicer must take all reasonable actions to prevent new liens that would be superior to Fannie Mae's mortgage lien from being attached against the property.").

Moreover, if the servicer fails in these duties, it can be held financially responsible for the consequences. *Fannie Mae Single Family 2011 Servicing Guide* 102-3 (servicers agree to indemnify Fannie Mae for losses resulting from failure to satisfy its servicing duties). And, when all those measures fail, the Enterprises have insured against losses in their mortgage-backed securities portfolios through fees assessed for loans they guarantee. *See supra* n.4.

2. The Ninth Circuit's decision to extend the reach of the Foreclosure Bar also draws the statute into substantial constitutional doubt, as reflected in decisions from the Third and Fifth Circuits considering the predecessor of HERA's Foreclosure Bar.

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[25] If the servicer "has waived the escrow deposit account for a specific borrower, it still remains responsible for the timely payment of taxes" with its own funds. *Fannie Mae Single Family 2011 Servicing Guide* 302-1.

In the late 1980s, an earlier housing finance crisis led Congress to enact the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub L. No. 101-73, 103 Stat. 183. FIRREA appointed a federal agency, the Federal Deposit Insurance Corporation (FDIC), as receiver for various failed financial institutions. The statute further included the source for HERA's Foreclosure Bar, providing in materially identical language that "[n]o property of the [FDIC] shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the corporation." 12 U.S.C. § 1825(b)(2); *see also Berezovsky*, 869 F.3d at 928 ("The FIRREA provision is worded identically to HERA's Federal Foreclosure Bar except that the word 'Corporation' appears in the former where 'Agency' appears in the latter.").

In *Matagorda County v. Russell Law*, 19 F.3d 215 (5th Cir. 1994), the Fifth Circuit considered the constitutionality of that provision. Local taxing authorities had filed suit to foreclose on a property to enforce a lien for delinquent taxes. However, the property was encumbered with a lien for a business loan, which had been held by a bank that was now under FDIC receivership. The court of appeals acknowledged that as a matter of state law, the tax lien "has priority over any preexisting or subsequently imposed lien." *Id*. at 217. But it held that the FIRREA foreclosure bar prevented the foreclosure. *Id*. at 222-23.[26]

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[26] The lenders subject to FIRREA receivership did not securitize their loans as the Enterprises do, so there was no

The court then considered whether the foreclosure bar effected an unconstitutional taking. The Fifth Circuit rejected FDIC's assertion that the Takings Clause was not implicated because the bar only delayed foreclosure during the period of receivership. *See* 19 F.3d at 223, 224. Instead, the court held that "[u]nmitigated delay, coupled with diminishment of distinct investment-backed expectations, *may, at some point*, infringe on the entire 'bundle' of rights enjoyed by the [taxing authorities] to the point that a compensable taking occurs." *Id*. at 225. It then concluded that this point had not yet been reached in the case before it. *Id*. But it warned that although "two years and three months, under the facts of this case involving a piece of property worth in excess of $330,000, does not constitute a taking, it is approaching what this Court considers to be the maximum amount of time that should be allowed to resolve matters such as this without there being a 'taking' requiring compensation." *Id*. at 225 n.11.[27]

In *Simon v. Cebrick*, the Third Circuit "agree[d] with the Fifth Circuit in *Matagorda* that at some point a delay in the ability to exercise property rights may constitute a compensable taking." 53 F.3d 17, 24 (3d Cir. 1995). The court held that this point had not been

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question under that statute whether the institutions' loans were covered by the foreclosure bar.

[27] The Fifth Circuit also rejected the lower court's position that the takings problem could be avoided by allowing "the Taxing Units to foreclose on the property in question provided that the lien of the FDIC is preserved." 19 F.3d at 225 n.11. "That is not a realistic solution," the court held, because as "a practical matter, the Taxing Units cannot sell [a] property" when the amount of the lien exceeds the market value of the property. *Id*.

surpassed in the case before it because, among other reasons, the delay had been "one year and seven months." *Id.*

As interpreted by the Ninth Circuit, HERA's Foreclosure Bar has suspended the enforceability of tax, HOA, and other senior liens for more than *a decade* now, far surpassing the time the Third and Fifth Circuits considered likely to be the outer limits permitted by the Constitution. There can be little doubt, therefore, that if this case had arisen in either of those circuits, the interpretation pressed by FHFA would have been treated as raising serious constitutional questions to be avoided if at all possible. And, for the reasons explained, the Ninth Circuit had before it a reasonable – indeed, a far *more* reasonable – interpretation that would have been more faithful to the text and intent of the statute while steering clear of the constitutional shoals.

B. Sales In Violation Of The Foreclosure Bar Are Void In Their Entirety, Allowing An Unsuspecting Purchaser To Unwind The Transaction.

The panel below also held that the "Federal Foreclosure Bar preempts the Nevada Foreclosure Statute to the extent that an HOA's foreclosure of its lien cannot extinguish a property interest of [Fannie Mae or Freddie Mac] while it is under FHFA conservatorship." Pet. App. 28a-29a. As a consequence, the sale was valid but "did not convey the Properties free and clear of [the Enterprises'] deeds of trust." *Id.* 29a. Instead, the sale remained binding on petitioner, who is stuck with properties worth substantially less than it reasonably believed them to be, having no right

to seek to unwind the transaction as void under the statute. *See, e.g.*, *Shadow Wood HOA v. N.Y. Cmty. Bancorp, Inc*., 366 P.3d 1105, 1111 (Nev. 2016) (en banc) (state "courts retain the power to grant equitable relief from a defective foreclosure sale when appropriate").

As the panel explained, that holding was dictated by the Ninth Circuit's prior decision in *Berezovsky*, 869 F.3d 923. *See* Pet. App. 17a-18a.[28] But the Ninth Circuit's precedent conflicts with the plain text of the statute and the Fifth Circuit's interpretation of the identical words in FIRREA's foreclosure bar.

The statute unambiguously provides that "[n]o property of the Agency *shall be subject to . . . foreclosure[]* or sale without the consent of the Agency." 12 U.S.C. § 4617(j)(3) (emphasis added). The statute thus forbids any foreclosure or sale from occurring, rather than attempting to dictate the legal consequences of such a sale for the Enterprises' securities interests.

That is how the Fifth Circuit has long construed the provision of FIRREA from which HERA's Foreclosure Bar was copied verbatim. In *CAP Holdings, Inc. v. Lorden*, the court considered "whether a tax sale conducted in violation of" the FIRREA foreclosure bar "is void in its entirety, or void only as to the FDIC," such that the sale remained valid

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[28] Because that holding could only be overturned by the Ninth Circuit sitting en banc or this Court, petitioner did not attempt to challenge it before the panel in its case. Declining to raise an argument the panel had no power to accept does not foreclose this Court's review of the question. *See, e.g.*, *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

but failed to extinguish the FDIC's lien. 790 F.3d 599, 604 (5th Cir. 2015). The court held that such a sale "is void *in its entirety*." *Id*. It explained that it had "considered the effect of a sale of FDIC property that was conducted 'without consent of the' FDIC, and thus in violation of the [foreclosure bar] on at least three occasions." *Id*. (collecting citations). "Each time, we have held explicitly that such a sale is, simply, 'null and void.'" *Id*. (citation omitted).

The Ninth Circuit seemingly reached the contrary result by conceiving of the "property of the Agency" to be the mortgage lien, not the real estate in which the Enterprises have a property interest by virtue of the lien. On that view, the Foreclosure Bar would prohibit subjecting the *lien* to "foreclosure or sale." But a foreclosure on a house by a senior lienholder does neither. It plainly does not result in the sale of the Enterprise's lien to anyone. Nor is that lien subject to "foreclosure" when the real estate is sold. "Foreclosure" simply means sale of property to satisfy a debt. *See Black's Law Dictionary* 762 (10th ed. 2014) (defining "foreclosure" as a "legal proceeding to terminate a mortgagor's interest in property, instituted by the lender (the mortgagee) either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property"). And the sale of a house does not result in a transfer or sale of the junior liens; it results, instead, in their extinguishment by operation of law. Pet. App. 11a.

To be sure, Congress intended to prevent the extinguishment of the Enterprises' liens when the Foreclosure Bar applies. But it achieved that end by prohibiting the sale of the encumbered property, with the consequence that any sale taking place in violation

of the prohibition is void and subject to unwinding to achieve a just result. That rule also provides sellers an incentive to ensure the validity of a planned sale beforehand, knowing that any loss occasioned by a sale in violation of the Foreclosure Bar will not necessarily be left solely on the shoulders of the buyer.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 21, 2018

APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-15962

Appeal from the United States District Court
for the District of Nevada
Gloria M. Navarro, Chief Judge, Presiding

D.C. No. 2:15-cv-01338-GMN-CWH

FEDERAL HOME LOAN MORTGAGE CORPORATION; FEDERAL HOUSING FINANCE AGENCY, AS CONSERVATOR OF FREDDIE MAC; FEDERAL NATIONAL MORTGAGE ASSOCIATION,
Plaintiffs-Appellees,

v.

SFR INVESTMENTS POOL 1, LLC,
Defendant-Appellant,

AND

NEVADA NEW BUILDS, LLC; LAS VEGAS DEVELOPMENT GROUP, LLC,
Defendants.

Argued and Submitted April 11, 2018
San Francisco, California

Filed June 25, 2018

OPINION

Before: M. Margaret McKeown and
Kim McLane Wardlaw, Circuit Judges, and
Gary S. Katzmann,* Judge.

Opinion by Judge Katzmann

SUMMARY**

Housing and Economic Recovery Act

The panel affirmed the district court's summary judgment in favor of the Federal National Mortgage Association ("Fannie Mae"), the Federal Home Loan Mortgage Corporation ("Freddie Mac"), and the Federal Housing Finance Agency ("FHFA") in their action seeking declaratory relief regarding foreclosures under Nev. Rev. Stat. § 116.3116, which grants homeowners' associations superpriority liens on real property under certain circumstances.

Nevada homeowners' associations ("HOAs") sold five properties to defendant SFR Investments Pool 1, Inc., following foreclosures on liens for unpaid HOA dues. Fannie Mae and Freddie Mac had purchased mortgage loans on the properties and had securitized the loans. Fannie Mae and Freddie Mac had subsequently been placed under the conservatorship of FHFA pursuant to the Housing and Economic Recovery Act of 2008 ("HERA"). FHFA did not consent to the HOA foreclosure sales of the properties to SFR.

The Nevada Foreclosure Statute, § 116.3116, provides that foreclosure on an HOA superpriority lien

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* The Honorable Gary S. Katzmann, Judge for the United States Court of International Trade, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

quashes all other property liens or interests recorded after the recordation of the covenants, conditions, and restrictions attached to the property's title.

The panel held that under HERA, FHFA succeeded to Fannie Mae and Freddie Mac's securitized mortgage loans, which were held in trust, upon inception of conservatorship. Accordingly, FHFA, as conservator, possessed enforceable interests in the properties at the time of the HOA foreclosure sales. The Federal Foreclosure Bar, 12 U.S.C. § 4617(j)(3), therefore applied. The Federal Foreclosure Bar, a part of HERA, provides that the property of an entity in FHFA conservatorship is not subject to foreclosure without the consent of FHFA.

The panel held that under *Berezovsky v. Moniz*, 869 F.3d 923 (9th Cir. 2017), the Federal Foreclosure Bar preempts the Nevada Foreclosure Statute to the extent that an HOA's foreclosure of its superpriority lien cannot extinguish a property interest of Fannie Mae or Freddie Mac while under FHFA conservatorship. Accordingly, the HOA foreclosure sales on the properties did not extinguish Fannie Mae and Freddie Mac's interests in the properties and thus did not convey the properties free and clear of their deeds of trust to SFR.

The panel further held that FHFA did not deprive SFR of a property right without due process because (1) Nevada law did not provide SFR with a constitutionally protected property interest in purchasing the houses with free and clear title, and (2) assuming a protected property interest, SFR was not deprived of that interest without adequate procedural protections.

* * *

OPINION

KATZMANN, Judge:

The economic downturn following the subprime mortgage crisis of 2007 pushed to near default two government-sponsored enterprises that were heavily exposed to the housing market. The Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac," collectively, with Fannie Mae, "the Enterprises") suffered a severe drop in the value of their mortgage portfolios, which previously comprised nearly half of the United States mortgage market and totaled approximately $5 trillion. In response, the United States government deployed numerous measures to keep the Enterprises afloat and combat further systemic breakdown in the financial and housing markets. Among those was Congress' passage of the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654 (codified as amended at 12 U.S.C. § 4511 et seq.). HERA established an independent agency known as the Federal Housing Finance Agency ("FHFA" or "the Agency") to be the regulator of the Enterprises and the twelve Federal Home Loan Banks. Exercising a power provided by that statute, on September 6, 2008, FHFA's Director placed the Enterprises under the Agency's conservatorship.

This case concerns several provisions of HERA, and poses the following questions: can FHFA, as conservator, "succeed to" ownership of the mortgages that were securitized by the Enterprises pursuant to 12 U.S.C. § 4617(b)(2)(A), when those mortgages are

also "held in trust"? Does 12 U.S.C. § 4617(j)(3) ("Federal Foreclosure Bar"), which provides that property of an entity in FHFA conservatorship is not "subject to . . . foreclosure . . . without the consent of the Agency," preempt a Nevada statute, Nev. Rev. Stat. § 116.3116 ("Nevada Foreclosure Statute"), that grants homeowners' associations superpriority liens on real property under certain circumstances? Further, if FHFA has not consented to a non-judicial foreclosure sale of a property in which an entity in conservatorship holds an interest, and seeks quiet title in that property subsequent to the sale, has FHFA thereby deprived the property buyer of due process?

Defendant SFR Investments Pool 1, Inc. ("SFR") owns several pieces of real property in Nevada. Five of them ("the Properties") are at issue in this case. The Properties were sold to SFR by Nevada homeowners' associations ("HOAs") following foreclosures on liens for unpaid association dues. Plaintiffs FHFA and the Enterprises sued SFR in the United States District Court for the District of Nevada, seeking a declaration that "12 U.S.C. § 4617(j)(3) preempts any Nevada law that would permit a foreclosure on a superiority lien to extinguish a property interest of Fannie Mae or Freddie Mac while they are under FHFA's conservatorship," that "the HOA Sale did not extinguish the Enterprises' interest in the Properties and thus did not convey the Properties free and clear to any Defendants," and that "title to the Properties is quieted in either Fannie Mae's or Freddie Mac's favor insofar as the Defendants' interest, if any, is subject to the interest of the Enterprises or, if applicable, the interest of the Enterprises' successors." The district court granted Plaintiffs' Motion for Summary

Judgment, and denied SFR's Motion to Dismiss. SFR timely appealed. We affirm.

FACTUAL AND PROCEDURAL HISTORY

The facts relevant to the instant proceeding were recited by the district court in its opinion, and are not challenged by either party.

The Properties and the Mortgage Loans they Secure

Four of the Properties are located in Las Vegas, Nevada, and the fifth is located in Henderson, Nevada. Each of the Properties is located in a different HOA community. The Properties' original owners had mortgage loans on their respective homes. Those loans were secured by the homes. Either Fannie Mae or Freddie Mac purchased the mortgage loans in 2006, and the respective Enterprise has retained ownership since. Each loan is evidenced by a promissory note and a deed of trust, both of which came into the respective Enterprise's possession upon purchase of the mortgage loan.

The Enterprises and Securitized Mortgage Loans

"Congress created Fannie Mae (the Federal National Mortgage Association) and Freddie Mac (the Federal Home Loan Mortgage Corporation) to foster the secondary market for home mortgages." *City of Spokane v. Fed. Nat. Mortg. Ass'n*, 775 F.3d 1113, 1114 (9th Cir. 2014). The Enterprises do not themselves originate loans in the primary market, and their charters permit only secondary market functions. *See* Federal National Mortgage Association Charter Act, 68 Stat. 612 (1954) (codified as amended at 12 U.S.C. § 1716 et seq.) (reestablishing Fannie Mae as a mixed

public-private corporation); Emergency Home Finance Act of 1970, Pub. L. No. 91-351, 84 Stat. 450 (codified as amended at 12 U.S.C. § 1451 et seq.) (chartering Freddie Mac); *see generally Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 599-601 (D.C. Cir. 2017) (explaining history and purpose of the Enterprises); *Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553 (2017) (providing history of Fannie Mae's evolution from public agency to private government-sponsored entity). Essentially, the Enterprises exist in order to facilitate liquidity in the mortgage loan market, and thereby distribute the investment capital available for residential mortgage financing. *City of Spokane*, 775 F.3d at 1116; 12 U.S.C. §§ 1451, 1716; *see Fed. Hous. Fin. Agency for Fed. Nat'l Mortg. Ass'n v. Nomura Holding Am., Inc.*, 873 F.3d 85, 105 (2d Cir. 2017).

In the secondary mortgage market, existing mortgage loans are bought, sold, and securitized. *Perry Capital*, 864 F.3d at 599. The Enterprises thus continually purchase residential mortgage loans secured by property throughout the nation, and securitize those mortgage loans. *Id.*; *see Lightfoot*, 137 S. Ct. at 557.

To securitize mortgage loans, and thereby create mortgage-backed securities, the Enterprises place the purchased loans they own into pools and issue certificates entitling the certificate-holders to a contractually specified share of payments borrowers make. *Herron v. Fannie Mae*, 861 F.3d 160, 163 (D.C. Cir. 2017); *Nomura Holding*, 873 F.3d at 105. The Enterprises customarily perform this securitization by placing mortgage loans into common-law trusts, of which the relevant Enterprise is the trustee.

Passage of HERA and Relevant Provisions

From 2007 through 2008, housing prices fell rapidly as the subprime mortgage and financial crises developed. Meanwhile, interest rates on adjustable-rate mortgages rose. These factors, along with an overabundance of subprime mortgage lending and shoddy underwriting practices, resulted in a glut of homeowners who could not make their mortgage loan payments. Defaulting on mortgage loans thus became an attractive option for many homeowners. Each default and resulting foreclosure sale depressed the prices of nearby homes, promoting a vicious downward spiral in the housing market. *See Nomura Holding*, 873 F.3d at 106-08 (providing a history of the housing and financial crises).

During the 2000s, the Enterprises, as major players in the United States housing market, purchased these risky mortgage loans, and thus exposed themselves to the eventual downturn in the housing market. *Herron*, 861 F.3d at 163. Overall, in the lead up to 2008, the Enterprises' mortgage portfolios had a combined value of $5 trillion and accounted for nearly half of the United States mortgage market. *Perry Capital*, 864 F.3d at 599. The Enterprises subsequently suffered a severe drop in the value of their mortgage portfolios and were pushed to the brink of default. *Id.*; *Herron*, 861 F.3d at 163.

As noted, Congress, concerned for the Enterprises' financial condition and that their default would imperil the ailing national economy, passed HERA, which became law in July 2008. *See Nomura Holding*, 873 F.3d at 108; *Perry Capital*, 864 F.3d at 599. Several HERA subsections are immediate to the issues in this case. HERA established FHFA as the

Enterprises' regulator under § 4511(a-(c). Section 4617(a)(2) authorizes FHFA to place the Enterprises into conservatorship "for the purpose of reorganizing, rehabilitating, or winding up [their] affairs."

Section 4617(b) covers "Powers and duties of the Agency as conservator or receiver." Section 4617(b)(2) refers to "General powers." Relevant here, § 4617(b)(2)(A) provides that FHFA "shall, as conservator or receiver, and by operation of law, immediately succeed to . . . all rights, titles, powers, and privileges of the regulated entity . . . with respect to [its] assets."

Next, § 4617(b)(19) covers "General exceptions." As relevant to the parties' arguments here, § 4617(b)(19)(B)(i) specifies that "[a]ny mortgage . . . held in trust . . . by a regulated entity for the benefit of any person other than the regulated entity shall not be available to satisfy the claims of creditors generally, except that nothing in this clause shall be construed to expand or otherwise affect the authority of any regulated entity." The following provision, § 4617(b)(19)(B)(ii), explains that mortgages held in trust "shall be held by the conservator . . . for the beneficial owners of such mortgage . . . in accordance with the terms of the agreement creating such trust." Next, § 4617(b)(19)(B)(iii) states that "[t]he liability of the conservator . . . for damages shall, in the case of any contingent or unliquidated claim relating to the mortgages held in trust, be estimated in accordance with the regulations of the [FHFA] Director."

Finally, § 4617(j) covers "Other Agency exemptions." Specifically, the Federal Foreclosure Bar, § 4617(j)(3), titled "Property protection," states that "No property of the Agency shall be subject to

levy, attachment, garnishment, foreclosure, or sale without the consent of the Agency, nor shall any involuntary lien attach to the property of the Agency."

In September 2008, as noted, FHFA's Director placed Fannie Mae and Freddie Mac into conservatorship, pursuant to § 4617(a)(2), where they remain today.

The Nevada Foreclosure Statute and the HOA Foreclosure Sales

The Nevada Foreclosure Statute gives an HOA a superpriority lien on a homeowner's property for a limited amount of unpaid HOA dues. *See* NRS § 116.3116(2).[1] Under this section, a superpriority lien "is prior to all other liens and encumbrances" and "all

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[1] NRS § 116.3116(2) provides that

> A lien under this section is prior to all other liens and encumbrances on a unit except:
>
> (a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;
>
> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent, except that a lien under this section is prior to a security interest described in this paragraph to the extent set forth in subsection 3;
>
> (c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative; and
>
> (d) Liens for any fee or charge levied pursuant to subsection 1 of NRS 444.520.

[other] security interests," with certain exceptions and guidelines. *Id.* at (2-(3). Foreclosure on a superpriority lien quashes all other property liens or interests recorded after the recordation of the Covenants, Conditions, and Restrictions attached to the property's title. *Berezovsky v. Moniz*, 869 F.3d 923, 925 (9th Cir. 2017). In the case before us, the original owners of the Properties became delinquent on their homeowners' associations' dues. The HOAs thus imposed liens on their respective Properties for the outstanding balance of HOA dues, and ultimately foreclosed upon the liens on the Properties. SFR purchased each of the Properties at an HOA foreclosure sale in either 2012, 2013, or 2014.

Procedural History

FHFA and the Enterprises asserted claims against SFR seeking declaratory relief, quiet title, and a permanent injunction, and moved for summary judgment on December 18, 2015, after having filed an amended complaint on October 1, 2015. In lieu of filing an answer to FHFA's complaint, SFR moved to dismiss on October 23, 2015. On May 2, 2016, the district court denied SFR's motion to dismiss, and granted FHFA's motion for summary judgment. In granting summary judgment, the district court ruled that

> [The Federal Foreclosure Bar] preempts [the Nevada Foreclosure Statute, NRS] § 116.3116 to the extent that a[n HOA's] foreclosure of its super-priority lien cannot extinguish a property interest of [the Enterprises] while those entities are under FHFA's conservatorship. Accordingly, the HOA foreclosure sales on the Properties did not extinguish Fannie Mae's or Freddie Mac's

> interests in the Properties and thus did not convey the Properties free and clear of their deeds of trusts to SFR. Moreover, title to the Properties is quieted in either Fannie Mae's or Freddie Mac's favor insofar as SFR's interest, if any, is subject to the interest of Fannie Mae or Freddie Mac or, if applicable, the interest of Fannie Mae's or Freddie Mac's successors.[2]

Judgment was entered May 4, 2016. SFR timely appealed on May 27, 2016.

STANDARDS OF REVIEW

We review a district court's grant of summary judgment de novo and apply the same standard of review as the district court under Federal Rule of Civil Procedure 56. *Flores v. City of San Gabriel*, 824 F.3d

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[2] The district court premised much of its decision in this case on the reasoning of its prior opinion, *Skylights LLC v. Byron*, 112 F. Supp. 3d 1145 (D. Nev. 2015). The court noted that in *Skylights*, it held the plain language of § 4617(j)(3) prohibits property of FHFA from being subject to foreclosure without its consent. *See Skylights*, 112 F. Supp. 3d at 1159. In the instant matter, the district court found that FHFA, as conservator for the Enterprises, held an interest in the Properties prior to the HOA foreclosure sales. Accordingly, the court determined that the Federal Foreclosure Bar, § 4617(j)(3), "prevents the HOA's foreclosure on the Properties from extinguishing the deeds of trust in the Properties." As to SFR's motion to dismiss, which the district court characterized as "rais[ing] many objections to the application of section 4617(j)(3), which primarily relate to due process violations," the court likewise referred to *Skylights*, noting that in that opinion, it had "address[ed] many objections related to, inter alia, preemption and due process violations." The district court found "no reason to overturn its prior holding in Skylights," and denied SFR's motion to dismiss.

890, 897 (9th Cir. 2016), *cert. denied sub nom. City of San Gabriel, Cal. v. Flores*, 137 S. Ct. 2117 (2017). Under Rule 56, a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The district court's denial of a motion to dismiss is also reviewed de novo. *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005).

DISCUSSION

A. Whether FHFA can "Succeed to" Mortgages that were "Held in Trust" by an Enterprise.

HERA mandates that FHFA shall "succeed to" Enterprise assets. 12 U.S.C. § 4617(b)(2)(A)(i). SFR argues that FHFA did not "succeed to" the mortgages at issue in this case because they were instead "held in trust" by FHFA pursuant to § 4617(b)(19)(B). SFR contends that the "General Exceptions" found under § 4617(b)(19) apply directly to the "General Powers" found under § 4617(b)(2), because both are labeled "General" and are structurally linked. SFR further argues that FHFA cannot "succeed to" "Mortgages held in trust," because Congress omitted the phrase "shall succeed to" from 4617(b)(19)(B), the provision covering "Mortgages held in trust," and instead used the phrase "shall be held by." Much of SFR's remaining argument restates this statutory construction and emphasizes the dominance of the verb "held" in § 4617(b)(19)(B)(i)-(iii), while emphasizing the absence of the phraseology "succeed to." In sum, SFR argues that FHFA did not, and could not, "succeed to" the mortgages at issue here, and thus the Federal

Foreclosure Bar, § 4617(j)(3), neither applies nor preempts the Nevada Foreclosure Statute.[3]

We conclude that SFR's textual arguments lack merit. As noted *supra*, FHFA's right of succession appears under § 4617(b)(2), "General Powers," in § 4617(b)(2)(A)(i): "The Agency shall, as conservator or receiver, and by operation of law, immediately succeed to all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity[.]" Section 4617(b)(19) contains "General Exceptions," and § 4617(b)(19)(B) covers "Mortgages held in trust." Section 4617(b)(19)(B)(i) specifies that "[a]ny mortgage . . . held in trust . . . by a regulated entity for the benefit of any person other than the regulated entity shall not be available to satisfy the claims of creditors generally." Subsection (ii) explains that mortgages held in trust "shall be held by the conservator . . . for the beneficial owners of such

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[3] An unpublished opinion postdating the district court's proceedings in this case squarely addressed this issue. *See Elmer v. JPMorgan Chase & Co.*, 707 F. App'x 426, 428-29 (9th Cir. 2017) (unpublished). Amicus curiae argued that any mortgage held in trust pursuant to § 4617(b)(19)(B) is not Freddie Mac's asset, and therefore does not constitute an interest to which FHFA succeeded. *Id.* Though noting that we generally do "not consider on appeal an issue raised only by an amicus," *United States v. Gementera*, 379 F.3d 596, 607 (9th Cir. 2004), we nevertheless rejected Amicus' argument, stating: "The plain language of the section [12 U.S.C. § 4617(b)(19)(B)] cited by [amicus curiae] prohibits creditors from drawing on assets held in trust to satisfy creditors' claims; it does not bar the Agency from succeeding to Freddie Mac's interest in the assets." *Elmer*, 707 F. App'x at 429.

mortgage . . . in accordance with the terms of the agreement creating such trust." 12 U.S.C. § 4617(b)(19)(B)(ii). The following subsection (iii) directs FHFA to "estimate[]" any "contingent or unliquidated claim relating to the mortgages held in trust" according to "regulations of the [FHFA] Director." *Id.* § 4617(b)(19)(B)(iii).

The plain text of these provisions does not state or imply that FHFA may either "succeed to" mortgages or "h[o]ld [them] in trust," rather than perform *both* of these actions in regard to a securitized mortgage loan. Section 4617(b)(19)(B) nowhere disallows FHFA from "succeed[ing] to" mortgages held in trust. Subsection (i) merely contains the general ban on liquidation of securitized mortgages "held in trust" to satisfy the claims of general creditors. Meanwhile, subsection (ii) clarifies that FHFA shall continue to hold and manage those securitized mortgages for their various beneficial owners pursuant to the contractual arrangement underlying the relevant securitization pool, originally established with one of the Enterprises. This provision offers assurances to purchasers of mortgage-backed security certificates, who pay a lump sum in exchange for a certificate representing the right to a future stream of income from the mortgage loans' principal and income payments. *See Nomura Holding*, 873 F.3d at 100. Subsection (iii) additionally permits FHFA to promulgate reasonable regulations to cabin the damages available on claims relating to the securitized mortgages held in trust. Thus, it is patent that § 4617(b)(19)(B) confers *additional* protections upon the Enterprises' securitized mortgage loans,

which FHFA succeeds to pursuant to § 4617(b)(2)(A)(i). *See* 12 U.S.C. § 4617(b)(19)(B)(i)-(iii).

Since the statutory protection from creditors effected by § 4617(b)(19)(B) does not prevent FHFA from "succeed[ing] to" the Enterprises' securitized mortgage loans upon inception of conservatorship, that protection complements the bar on nonconsensual foreclosure and sale of FHFA property imposed by the Federal Foreclosure Bar, § 4617(j)(3). SFR's reading necessitates that the conservator of the Enterprises would not succeed to securitized mortgage loans that are integral to the Enterprises' Congressionally-chartered function. Indeed, though asserting that Congress' structural decisions in drafting HERA evince intent to exempt mortgages held in trust from succession, SFR fails to articulate *why* Congress would make such a decision. By contrast, justifications for FHFA's reading are readily apparent. Mortgage-backed securities are financial instruments central to the Enterprises' collective function as secondary mortgage market-maker. FHFA, as conservator, would normally be able to liquidate any asset belonging to the Enterprises in order to fulfill the claims of general creditors. However, when the Enterprises were placed into conservatorship at the height of the subprime mortgage crisis, their mortgage portfolios constituted nearly half of the United States mortgage market and were freefalling in value. *See Perry Capital*, 864 F.3d at 599; *see also Herron*, 861 F.3d at 163. Accordingly, Congress provided that the mortgage loans backing mortgage-backed securities would receive additional safeguards in order to combat further systemic breakdown in the American housing market. Thus, § 4617(b)(19)(B) prevents FHFA from

liquidating those securitized mortgage loans in order to fulfill the claims of general creditors, protects certificate holders, and grants FHFA some control over related damages.

In sum, HERA's plain text permits FHFA to "succeed to" securitized mortgage loans, which are held in trust, pursuant to § 4617(b)(2)(A)(i), and we see no reason to inject a rule to the contrary into the statute.

B. Whether the Federal Foreclosure Bar Preempts the Nevada Foreclosure Statute.

SFR contends that the Federal Foreclosure Bar, 12 U.S.C. § 4617(j)(3), does not preempt the Nevada Foreclosure Statute. First, SFR argues that the Federal Foreclosure Bar is unconstitutional because it lacks a process to request consent or an opportunity to contest FHFA's decision not to consent to a foreclosure sale. Second, SFR argues that the Federal Foreclosure Bar does not expressly displace state law, nor explicitly manifest Congress' intent to do so. *See Valle del Sol, Inc. v. Whiting*, 732 F.3d 1006, 1022 (9th Cir. 2013).

SFR's arguments lack merit. "The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." *Gonzales v. Raich*, 545 U.S. 1, 29 (2005); *see* U.S. Const. art. VI, cl. 2. We squarely addressed the preemption issue before us now in *Berezovsky*, 869 F.3d at 930, a decision postdating the district court's proceedings in this case. In *Berezovsky*, we held that "the Federal Foreclosure Bar implicitly demonstrates a clear intent to preempt Nevada's superpriority lien law. . . . As the two statutes impliedly conflict, the

Federal Foreclosure Bar supersedes the Nevada superpriority lien provision."[4] 869 F.3d at 930-31.

We see no cause to disturb our precedential decision, and continue to hold that the Federal Foreclosure Bar preempts the Nevada Foreclosure Statute for the reasons stated therein.

C. Whether FHFA Violated Due Process.

SFR argues that FHFA deprived SFR of a property right without due process, in violation of the Fifth Amendment to the United States Constitution. *See* U.S. Const. amend. V. SFR argues this case involves a due process context not discussed in *Skylights*, *supra* n.2, namely, the interplay between a federal law and property interests recognized by state law. SFR contends that, within this context, "the interplay between state and federal law implicates *deprivation*, not preemption." Specifically, SFR asserts that "Nevada law recognizes the interests that purchasers obtain at association sales, including free and clear title," and that "Nevada Law recognizes SFR's interests in the five houses." SFR argues that FHFA deprived SFR of its interests by affirmatively determining not to consent to the HOA foreclosure sales at issue here.

SFR's arguments lack merit. First, SFR's assertions that Nevada law provided it with a constitutionally protected property interest in

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[4] This conclusion was reiterated in *Elmer*, 707 F. App'x at 427 (unpublished) ("[T]he Federal Foreclosure Bar preempts the Nevada law to the extent that the Nevada law would permit a foreclosure on a superpriority lien to extinguish Freddie Mac's interest, without the Agency's consent, while Freddie Mac is under the Agency's conservatorship."), *supra* n.3.

purchasing the houses with free and clear title are incorrect. Second, assuming arguendo SFR possessed a protected property interest, it was not deprived of that interest without adequate procedural protections.

1. The Existence of a Constitutionally Protected Property Interest.

"A procedural due process claim has two distinct elements: (1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections." *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir. 1998). Protected property interests derive from "an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005) (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). However, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577. Thus, "[t]he property interests that due process protects extend beyond tangible property and include anything to which a plaintiff has a 'legitimate claim of entitlement.'" *Nozzi v. Hous. Auth. of City of Los Angeles*, 806 F.3d 1178, 1191 (9th Cir. 2015), *as amended on denial of reh'g and reh'g en banc* (Jan. 29, 2016) (quoting *Roth*, 408 U.S. at 576-77). Further, "[a] legitimate claim of entitlement is 'determined largely by the language of the statute and the extent to which the entitlement is couched in mandatory terms.'" *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623

F.3d 1011, 1030 (9th Cir. 2010) (quoting *Wedges/Ledges of Cal., Inc. v. Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994)). "A mere 'unilateral expectation' of a benefit or privilege is insufficient[.]" *Nunez v. City of Los Angeles*, 147 F.3d 867, 872 (9th Cir. 1998) (quoting *Roth*, 408 U.S. at 577).

SFR's claimed property interest in purchasing the Properties at the HOA foreclosure sales with free and clear title is unfounded. First, the federal preemption at work in this case forecloses that purported interest prior to its vestment in SFR. As stated *supra*, in *Berezovsky*, 869 F.3d at 930-31, we held that "the Federal Foreclosure Bar implicitly demonstrates a clear intent to preempt Nevada's superpriority lien law. . . . As the two statutes impliedly conflict, the Federal Foreclosure Bar supersedes the Nevada superpriority lien provision." Here, because FHFA did not consent to the HOA foreclosure sales, those sales were not in accordance with law. Thus, the Nevada Foreclosure Statute does not function to provide SFR with a constitutionally protected property interest in purchasing the Properties with free and clear title.[5]

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[5] Citing *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 316 (D.C. Cir. 2014), SFR argues that "state law determines whether 'property' exists. If state law recognizes an interest, then due process is triggered." SFR's citation to *Ralls* is inapposite. Quite apart from the fact that *Ralls* comes from the D.C. Circuit and is not binding here, it is readily distinguishable, and not analogous to the case before us. Substantively, *Ralls* presents a scenario wherein it was undisputed that appellant obtained a protected property interest under Oregon state law—specifically, ownership in certain companies and their tangible assets, including local easements permitting construction of wind

SFR's asserted accession to property "interests that purchasers obtain at association sales, including free and clear title," is not mandated by the Nevada Foreclosure Statute. *See Johnson*, 623 F.3d at 1030. The relevant provision, NRS § 116.3116(2), provides that "[a] lien under this section is prior to all other

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turbines, on an Oregon farm. 758 F.3d at 315 ("[T]here can be no doubt that Ralls's interests in the Project Companies and their assets constitute 'property' under Oregon law."). The D.C. Circuit agreed with this conclusion of the district court. *Id.* Following appellant's purchase of that property, the President of the United States cancelled the transaction on the authority of the Defense Protection Act of 1950 ("DPA"), which provides that the President may "take such action for such time as the President considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States." 50 U.S.C. § 4565(d)(1) (originally codified as amended at 50 U.S.C. app. § 2170(d)(1)), *quoted in Ralls*, 758 F.3d at 303.

The Circuit Court reversed the district court's legal conclusion that appellant's state law property interests were not constitutionally protected due to a federal contingency in the form of the DPA. Instead, the D.C. Circuit determined, "[t]here is no contingency built into the *state* law from which [appellant's] property interests derive and to which interests due process protections traditionally apply." 758 F.3d at 316-17 (emphasis in *Ralls*). The D.C. Circuit ultimately concluded that the President's action deprived the appellant of its constitutionally protected property interests without due process of law. *Id.* at 319.

The state and federal statutory interplay in the instant case is altogether different. SFR's argument is deficient because the district court here did not read a federal contingency into a state law otherwise pronouncing protected property interests. Instead, the Federal Foreclosure Bar preempts the Nevada Foreclosure Statute as regards HOA foreclosure sales on properties in which FHFA maintains an interest, and proscribes those sales by default.

liens and encumbrances on a unit [with certain exceptions]," and thus generally has superpriority. This superpriority lien belongs to "[t]he association." NRS § 116.3116(1). The statute does not mandate, and SFR has presented no language mandating, vestment of rights in purchasers at HOA foreclosure sales. *Id.* SFR therefore lacks "a legitimate claim of entitlement," *Roth*, 408 U.S. at 577, deriving from "the language of the statute," since, here, the asserted entitlement is not "couched in mandatory terms." *Johnson*, 623 F.3d at 1030 (quoting *Wedges/Ledges of Cal.*, 24 F.3d at 62). Rather, SFR's expectation of obtaining free and clear title at an HOA foreclosure is more akin to a "unilateral expectation" of a benefit or privilege. *Nunez*, 147 F.3d at 872 (quoting *Roth*, 408 U.S. at 577).[6]

Further, SFR's characterization of FHFA's non-consent to the HOA foreclosure sales as affirmative declinations is incorrect. The Federal Foreclosure Bar

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[6] This approach is consistent with *Berezovsky*, 869 F.3d at 927 n.2. In that case, the buyer of a property at an HOA foreclosure sale argued that the Federal Foreclosure Bar violates due process because the statute "lack[s] procedures for notice to interested parties and procedures for any hearing." *Id.* (alteration in *Berezovsky*). At oral argument, the buyer's counsel acknowledged his due process contention sought to vindicate the HOA's property rights, but not his own, and that he lacked standing to assert that claim. *Id.* (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)); *see also Skylights*, 112 F. Supp. 3d at 1153-54 (assuming without analysis that an HOA possessed a protected property interest in its superpriority lien under the Nevada Foreclosure Statute for procedural due process purposes, but assuming no property interest on behalf of the plaintiff property buyer at foreclosure). We note that here, SFR seeks to assert its own property rights, and no party has suggested SFR lacks standing to assert its due process argument.

provides that "[n]o property of the Agency shall be subject to . . . foreclosure . . . without the consent of [FHFA]." 12 U.S.C. § 4617(j)(3). The plain text of this provision does not necessitate a decision by FHFA not to consent to a given foreclosure sale; rather, the bar on foreclosure sales lacking FHFA's consent applies by default. *See Berezovsky*, 869 F.3d at 929 ("The Federal Foreclosure Bar does not require the Agency to actively resist foreclosure. . . . Rather, the statutory language cloaks Agency property with Congressional protection unless or until the Agency affirmatively relinquishes it.") (citation omitted). Indeed, the record before this Court does not demonstrate that FHFA made any determinations not to consent to the HOA sales of the Properties.

Nor did the absence of the Enterprises' names in the mortgage loans' local recording documents at the time of the HOA sales undercut the Enterprises' interests and provide SFR free and clear title to the Properties. In *Berezovsky*, we explained that, under Nevada law, the note owner's name need not appear in the mortgage's recording. "Nevada law requires recording of a lien for it to be enforceable, but does not mandate that the recorded instrument identify the note owner by name." *Berezovsky*, 869 F.3d at 932 (citing Nev. Rev. Stat. § 106.210). "Nevada law thus recognizes that, in an agency relationship, a note owner remains a secured creditor with a property interest in the collateral even if the recorded deed of trust names only the owner's agent." *Id.* (citing *In re Montierth*, 354 P.3d 648, 651 (Nev. 2015)). In *Berezovsky*, though the recorded deed of trust omitted note owner Freddie Mac's name, Freddie Mac introduced evidence in the district court showing it

acquired the loan secured by the relevant property years earlier, and that the recorded deed of trust beneficiary was Freddie Mac's loan servicer. Freddie Mac's property interest was thus valid and enforceable under Nevada law. *Id.* at 932-33. Under HERA, FHFA succeeded to Freddie Mac's interest in the property at issue, and the Federal Foreclosure Bar shielded that interest.

In the case before us, the liens were recorded. The Enterprises introduced evidence in the district court showing one of them acquired each of the loans securing the Properties prior to each of the HOA foreclosure sales. The district court based its finding that an Enterprise had an interest in each Property on the fact that, in each case, a servicer acquired a beneficial interest in the respective Property's deed of trust, and serviced the respective mortgage loan on behalf of one of the Enterprises. Each acquisition of a Property's deed of trust by a servicer occurred on a date prior to the respective HOA foreclosure sale. The district court thus found that FHFA, which succeeded to the Enterprises' assets per HERA, held an interest in the Properties prior to the sales. Accordingly, the named beneficiary under the recorded deed of trust in each case is someone other than the note owner, one of the Enterprises. However, per *Berezovsky*, 869 F.3d at 931-33, and under Nevada law, the Enterprises' purchases conveyed valid interests in the Properties. Further, HERA does not require the Enterprises to have recorded their ownership of the liens in local recording documents for FHFA to have succeeded to those valid interests upon inception of conservatorship.

2. Whether FHFA Denied SFR Adequate Procedural Protections.

Even assuming arguendo that SFR had some constitutionally protected property interest, SFR received all the procedural protections it was due. The second element of a procedural due process claim is "a denial of adequate procedural protections." *Brewster*, 149 F.3d at 982. "[O]nce a court determines that a protected property interest has been taken, 'the question remains what process is due.'" *Roybal v. Toppenish Sch. Dist.*, 871 F.3d 927, 933 (9th Cir. 2017) (alteration in *Roybal*) (quoting *Brewster*, 149 F.3d at 983). SFR argues that it was deprived of due process because the Federal Foreclosure Bar lacks integral procedural protections, such as the ability to obtain consent to the HOA sales from FHFA. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *City of W. Covina v. Perkins*, 525 U.S. 234, 242 (1999).

SFR's argument fails. Due process is a flexible concept, and the procedural protections it demands are molded by the relevant factual context. *Yagman v. Garcetti*, 852 F.3d 859, 863 (9th Cir. 2017); *see Shinault v. Hawks*, 782 F.3d 1053, 1057 (9th Cir. 2015) ("Once a protected interest is found, we employ the three-part balancing test of *Mathews v. Eldridge*, 424 U.S. 319[, 335] (1976) . . . . (1) the private interest affected; (2) the risk of erroneous deprivation through the procedures used, and the value of additional safeguards; and (3) the government's interest, including the burdens of additional procedural requirements.") (citation omitted). The Federal Foreclosure Bar dictates that "[n]o property of the Agency shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent

of the Agency." 12 U.S.C. § 4617(j)(3). As relevant to the facts of this case, the provision patently modifies the conduct of a party seeking to foreclose upon or sell FHFA property. Therefore, a theoretical deprivation of due process under § 4617(j)(3) involving an HOA foreclosure sale, would implicate the potential seller, or the foreclosing HOA, and not the buyer. *See, e.g.*, *Skylights*, 112 F. Supp. 3d at 1153-55 (analyzing, under similar facts, an HOA's procedural due process argument and concluding that the HOA's due process rights were satisfied by sound legislative procedure in enacting § 4617(j)(3)). Accordingly, SFR articulates no risk of erroneous deprivation of a buyer's interest under the statute's procedures, and any additional procedures so providing would burden the government's interest, as codified in the Federal Foreclosure Bar, in protecting the Enterprises' assets from foreclosure. We are not persuaded that the absence of an explicit procedural avenue through which a possible buyer may obtain, from FHFA, consent to a foreclosure sale by an HOA constitutes an impermissible lack of procedural safeguards.

SFR also contends that that the Enterprises' interests in the Properties were hidden from the public until the commencement of this litigation, and were not "reasonably calculated . . . to apprise interested parties of the pendency of the action." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see Bourne Valley Court Tr. v. Wells Fargo Bank, NA*, 832 F.3d 1154, 1158 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2296 (2017). This argument too is unpersuasive. As explained *supra*, under Nevada law, the note owner's name need not appear in the local recording documents, and, as the district court found, the

Enterprises possessed valid interests in the Properties at the time of the HOA foreclosure sales. Again, HERA does not require that potential buyers received notice of FHFA's or the Enterprises' interests in properties whose sales are prevented by the Federal Foreclosure Bar. Further, contrary to SFR's characterizations, FHFA did not affirmatively decline to consent to the HOA foreclosure sales; rather, the protections of the Federal Foreclosure Bar applied by default, rendering those sales contrary to law. Moreover, SFR does not argue, and the record does not disclose, that it sought FHFA's consent to the relevant HOA foreclosure sales, nor that it was incapable of learning of the Enterprises' interests in the Properties through due diligence. *See Gallo v. U.S. Dist. Court For Dist. of Arizona*, 349 F.3d 1169, 1181 (9th Cir. 2003) ("[I]t has never been suggested that each citizen must in some way be given specific notice of the impact of a new statute on his property before that law may affect his property rights.") (alteration in *Gallo*) (quoting *Texaco, Inc. v. Short*, 454 U.S. 516, 536 (1982)).

D. Whether FHFA Violated "Reasoned Decisionmaking."

SFR argues that the process FHFA used in deciding whether to consent to foreclosure on the Properties was not "logical and rational," because no such process exists. Under the doctrine cited by SFR, "[f]ederal administrative agencies are required to engage in 'reasoned decisionmaking.'" *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (quoting *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998)). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and

rational." *Id.* (quoting *Allentown Mack*, 522 U.S. at 374). Thus agency action is lawful only if it relies "on a consideration of the relevant factors." *Id.* (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)).

SFR's arguments again lack merit. SFR's citation to *Michigan*, 135 S. Ct. 2699, is inapposite. That case considered "EPA's decision to regulate power plants under [42 U.S.C.] § 7412," a provision which authorizes the EPA to regulate power plants "if it finds such regulation is appropriate and necessary." 135 S. Ct. at 2706. In the instant case, by contrast, the text of the Federal Foreclosure Bar reads that "[n]o property of [FHFA] shall be subject to . . . foreclosure . . . without the consent of [FHFA]." 12 U.S.C. § 4617(j)(3). While presuming that FHFA may consent to foreclosure sales such as those that the HOAs here conducted, this provision does not require an affirmative decision by FHFA *not* to consent. SFR essentially repackages its argument that FHFA deprived SFR of due process by again characterizing FHFA's lack of consent to the HOA foreclosure sales as a series of affirmative decisions not to consent to each sale. Here, however, as explained *supra*, FHFA did not perform any, and the record discloses no, agency action subject to an analysis of whether "the process by which [FHFA] reache[d] that result [was] logical and rational." *Michigan*, 135 S. Ct. at 2706 (quoting *Allentown Mack*, 522 U.S. at 374).

CONCLUSION

FHFA, as the Enterprises' conservator, possessed enforceable interests in the Properties at the time of the HOA foreclosure sales. The Federal Foreclosure

Bar preempts the Nevada Foreclosure Statute to the extent that an HOA's foreclosure of its superpriority lien cannot extinguish a property interest of an Enterprise while it is under FHFA's conservatorship. Accordingly, the HOA foreclosure sales on the Properties did not extinguish the Enterprises' interests in the Properties and thus did not convey the Properties free and clear of their deeds of trust to SFR. Further, because the Nevada Foreclosure Statute did not imbue SFR with a constitutionally protected property interest, and SFR was not denied adequate procedural protections, SFR did not suffer a deprivation of due process by virtue of this statutory framework.

The district court properly denied Defendant SFR's Motion to Dismiss and granted the Motion by Plaintiffs FHFA and the Enterprises for Summary Judgment.[7]

AFFIRMED.

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[7] Plaintiffs, in their third cause of action in the first amended complaint, sought "a permanent injunction that enjoins any claim by named Defendants or absent members of the Proposed Class that an HOA Foreclosure Sale extinguished an Enterprise Lien, or asserting any slander of title claim against Plaintiffs in the absence of satisfaction of the Enterprise Lien." In issuing its order, the district court "granted [plaintiffs] summary judgment on all of their claims," but did not mention a permanent injunction.

SFR argues that the district court's order contravened Fed. R. Civ. Pro. 65(d), which provides that "every order granting an injunction . . . must: (A) state the reasons why it issued; (B) state the terms specifically; and (C) describe in reasonable detail . . . the act or acts restrained or required." Counsel for FHFA at oral argument agreed that no injunction is in place. In any event, our holding moots SFR's contention.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Case No.: 2:15-cv-01338-GMN-CWH

FEDERAL HOUSING FINANCE AGENCY, IN ITS CAPACITY AS CONSERVATOR OF THE FEDERAL NATIONAL MORTGAGE ASSOCIATION AND FEDERAL HOME LOAN MORTGAGE CORPORATION; FEDERAL NATIONAL MORTGAGE ASSOCIATION; AND FEDERAL HOME LOAN MORTGAGE CORPORATION,
PLAINTIFFS,

v.

SFR INVESTMENTS POOL 1, LLC,
A NEVADA DOMESTIC LIMITED LIABILITY COMPANY;
NEVADA NEW BUILDS, LLC, A NEVADA DOMESTIC LIMITED LIABILITY COMPANY; AND
LAS VEGAS DEVELOPMENT GROUP, LLC, A NEVADA DOMESTIC LIMITED LIABILITY COMPANY,
DEFENDANTS.

ORDER

Pending before the Court is the Motion to Certify Class (ECF No. 23), Motion for Summary Judgment (ECF No. 70), and Motion to Seal (ECF No. 98) filed by Plaintiffs Federal Housing Agency ("FHFA"), Federal National Mortgage Association ("Fannie Mae"), and Federal Home Loan Mortgage Corporation ("Freddie Mac") (collectively, "Plaintiffs"). Additionally, pending before the Court is the Motion to Dismiss (ECF No. 46) and Motion to Sever (ECF No. 48) filed by Defendant SFR Investments Pool 1, LLC ("SFR"). Moreover, pending before the Court is the Countermotion for 56(d) Relief (ECF No. 95) filed by Defendant Las Vegas

Development Group, LLC ("Las Vegas Development"). All of the instant motions have been fully briefed.

I. BACKGROUND

The present action involves the interplay between Nevada Revised Statutes § 116.3116 and 12 U.S.C. § 4617 as it relates to the parties' interests in real property located at the following locations: (1) 1633 Xanadu Drive, Henderson, Nevada (the "Xanadu Drive Property"); (2) 7671 Mocorito Avenue, Las Vegas, Nevada (the "Mocorito Avenue Property"); (3) 5321 Clover Blossom Court, North Las Vegas, Nevada (the "Clover Blossom Court Property"); (4) 2612 Bahama Point Avenue, North Las Vegas, Nevada (the "Bahama Point Avenue Property"); (5) 1577 Pasture Lane, Las Vegas, Nevada (the "Pasture Lane Property") (collectively, the "Properties").[1]

A. FHFA's Conservatorship Over Fannie Mae and Freddie Mac

In July of 2008, Congress passed the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654, *codified at* 12 U.S.C. § 4511 *et seq.*, which established FHFA for the purpose of regulating Fannie Mae, Freddie Mac, and the twelve Federal Home Loan Banks. In September of 2008, FHFA placed Fannie Mae and Freddie Mac into conservatorships "for the purpose of reorganizing, rehabilitating, or winding up [their] affairs." 12 U.S.C. § 4617(a)(2). As conservator, FHFA immediately

[1] Because this Order severs Plaintiffs' claims against Defendants Nevada New Builds and Las Vegas Development Group, the Court does not recite facts that pertain to these severed Defendants.

succeeded to "all rights, titles, powers, and privileges" of Fannie Mae and Freddie Mac. 12 U.S.C. § 4617(b)(2)(A)(i).

In HERA, Congress granted FHFA numerous privileges and exemptions to carry out its statutory functions when acting as conservator of Fannie Mae and Freddie Mac. Among these is a statutory "exemption" captioned "Property protection" providing that when acting as conservator, "[n]o property of [FHFA] shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of [FHFA], nor shall any involuntary lien attach to the property of [FHFA]." 12 U.S.C. § 4617(j)(3).

B. The Xanadu Drive Property

On February 27, 2006, the Xanadu Drive Property was secured by a deed of trust. (Xanadu Deed of Trust, Ex. 20 to Plaintiffs' Request for Judicial Notice, ECF No. 72-2).[2] The Xanadu Deed of Trust names Washington Mutual Bank, FA ("WAMU") as the beneficiary and California Reconveyance Company as the trustee. (*Id.*). Freddie Mac acquired ownership of a mortgage loan secured by the Xanadu Drive Property on April 11, 2006 and has owned it ever since. (*See* Meyer Decl. ¶ 16(a), ECF No. 70-1; Exs. A-B to Meyer Decl., ECF No. 70-1).

On September 25, 2008, WAMU transferred its beneficial interest to JP Morgan Chase ("Chase") by

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[2] The Court takes judicial notice of Exhibits 2-6, 20-35 (ECF Nos. 72-1–72-4) of Plaintiffs' Request for Judicial Notice (ECF No. 72). *See Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Each of these documents is publicly recorded in the Clark County Recorder's office.

operation of law as authorized by Section 11(d)(2)(G)(i)(II) of the Federal Deposit Insurance Act, 12 U.S.C. § 1821(d)(2)(G)(i)(II), which was memorialized by a corporate assignment of deed of trust on May 1, 2013. (Xanadu Corp. Assignment of Deed of Trust, Ex. 21 to Plaintiffs' Request for Judicial Notice, ECF No. 72-2). SFR purchased the Xanadu Drive Property as the highest bidder at an HOA foreclosure sale on July 11, 2012. (Xanadu Trustee's Deed Upon Sale, Ex. 22 to Plaintiffs' Request for Judicial Notice, ECF No. 72-2).

C. The Mocorito Avenue Property

On April 11, 2006, the Mocorito Avenue Property was secured by a deed of trust. (Mocorito Deed of Trust, Ex. 23 to Plaintiffs' Request for Judicial Notice, ECF Nos. 72-2–72-3). The Mocorito Deed of Trust names Mortgage Electronic Registration Systems, Inc. ("MERS") as the beneficiary and Landam as the trustee. (*Id.*). Freddie Mac acquired ownership of a mortgage loan secured by the Mocorito Avenue Property on May 11, 2006 and has owned it ever since. (*See* Meyer Decl. ¶ 16(d); Exs. C-D to Meyer Decl., ECF No. 100-1).

On December 23, 2011, MERS assigned the Mocorito Deed of Trust to Ocwen Loan Servicing, LLC ("Ocwen"). (Mocorito Assignment of Deed of Trust, Ex. 25 to Plaintiffs' Request for Judicial Notice, ECF No. 72-3). Furthermore, on May 31, 2013, Ocwen assigned its beneficial interest to Nationstar Mortgage, LLC ("Nationstar"). (Mocorito Corporate Assignment of Deed of Trust, Ex. 26 to Plaintiffs' Request for Judicial Notice, ECF No. 72-3). SFR purchased the Mocorito Avenue Property as the highest bidder at an HOA

foreclosure sale on July 9, 2014. (Mocorito Trustee's Deed Upon Sale, Ex. 27 to Plaintiffs' Request for Judicial Notice, ECF No. 72-3).

D. The Clover Blossom Court Property

On December 15, 2005, the Clover Blossom Court Property was secured by a deed of trust. (Clover Blossom Deed of Trust, Ex. 28 to Plaintiffs' Request for Judicial Notice, ECF No. 72-3). The Clover Blossom Deed of Trust names MERS as the beneficiary and First American Title Insurance Company as the trustee. (*Id.*). Fannie Mae acquired ownership of a mortgage loan secured by the Clover Blossom Court Property on February 1, 2006 and has owned it ever since. (*See* Curcio Decl. ¶ 4, ECF No. 70-3; Ex. A to Curcio Decl., ECF No. 70-3).

On December 8, 2011, MERS assigned the Clover Blossom Deed of Trust to Bank of America, N.A. ("BANA"). (Clover Blossom Assignment of Deed of Trust, Ex. 29 to Plaintiffs' Request for Judicial Notice, ECF No. 72-3). SFR purchased the Clover Blossom Court Property as the highest bidder at an HOA foreclosure sale on July 22, 2013. (Clover Blossom Trustee's Deed Upon Sale, Ex. 30 to Plaintiffs' Request for Judicial Notice, ECF No. 72-3).

E. The Bahama Point Avenue Property

On May 30, 2006, the Bahama Point Avenue Property was secured by a deed of trust. (Bahama Point Deed of Trust, Ex. 31 to Plaintiffs' Request for Judicial Notice, ECF Nos. 72-3–72-4). The Bahama Point Deed of Trust names MERS as the beneficiary and National Alliance Title ("National Alliance") as the trustee. (*Id.*). Fannie Mae acquired ownership of a mortgage loan secured by the Bahama Point Avenue

Property on July 1, 2006 and has owned it ever since. (*See* Curcio Decl. ¶ 5; Ex. B to Curcio Decl., ECF No. 70-3).

On February 3, 2012, MERS assigned the Bahama Point Deed of Trust to BANA. (Bahama Point Assignment of Deed of Trust, Ex. 33 to Plaintiffs' Request for Judicial Notice, ECF No. 72-4). Furthermore, on July 10, 2013, BANA assigned the Bahama Point Deed of Trust to EverBank. (Bahama Point Assignment of Deed of Trust, Ex. 34 to Plaintiffs' Request for Judicial Notice, ECF No. 72-4). SFR purchased the Bahama Point Avenue Property as the highest bidder at an HOA foreclosure sale on July 16, 2013. (Bahama Point Trustee's Deed Upon Sale, Ex. 35 to Plaintiffs' Request for Judicial Notice, ECF No. 72-4).

F. The Pasture Lane Property

On September 28, 2006, the Pasture Lane Property was secured by a deed of trust. (Pasture Deed of Trust, Ex. 2 to Plaintiffs' Request for Judicial Notice, ECF No. 72-1). The Pasture Deed of Trust names MERS as the beneficiary and National Alliance as the trustee. (*Id.*). Fannie Mae acquired ownership of a mortgage loan secured by the Bahama Point Avenue Property on December 1, 2006 and has owned it ever since. (*See* Curcio Decl. ¶ 6; Ex. C to Curcio Decl., ECF No. 70-3).

On September 20, 2011, MERS assigned the Pasture Deed of Trust to BANA. (Pasture Corporation Assignment of Deed of Trust, Ex. 3 to Plaintiffs' Request for Judicial Notice, ECF No. 72-1). Furthermore, on June 6, 2013, BANA assigned the Pasture Deed of Trust to Fannie Mae. (Pasture Corporation Assignment of Deed of Trust, Ex. 4 to

Plaintiffs' Request for Judicial Notice, ECF No. 72-1). SFR purchased the Pasture Lane Property as the highest bidder at an HOA foreclosure sale on September 11, 2013. (Pasture Trustee's Deed Upon Sale, Ex. 6 to Plaintiffs' Request for Judicial Notice, ECF No. 72-1).

II. MOTION TO CERTIFY CLASS[3]

A. Legal Standard

As a threshold matter, a party seeking class certification must prove that the class is ascertainable, meaning that membership in the class can be determined by reference to objective criteria. *Kristensen v. Credit Payment Servs.*, 12 F. Supp. 3d 1292, 1302 (D. Nev. 2014) (citing *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1071 n.3 (9th Cir. 2014)). If this threshold is met, a court then turns to Rule 23.

Rule 23 of the Federal Rules of Civil Procedure outlines the conditions for establishing a class action. Specifically, the suit must satisfy each of the four criteria set out in subdivision (a), and fit into one of the three categories described in subdivision (b). *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 712 (9th Cir. 2010) (citing *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010)). The

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[3] Plaintiffs filed a Motion to Seal (ECF No. 98), asserting that a portion of Exhibit A to Plaintiffs' Reply to Motion to Certify Class contains confidential and sensitive financial information. (Mot. Seal 2:15-17). The Court finds that good cause exists to seal this document to protect this information, and grants Plaintiffs' Motion to Seal. However, because sealing Exhibit A (ECF No. 73-1) will result in Exhibit A being sealed in its entirety, Plaintiffs' shall file a corrected Exhibit A with the sealed portions redacted.

decision to grant or deny class certification is within the trial court's "wide discretion," being in the "best position to consider the most fair and efficient procedure for conducting any given litigation." *Bateman*, 623 F.3d at 712. However, a party seeking class certification "must affirmatively demonstrate his compliance with the Rule." *WalMart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Thus, certification is proper only where the trial court has engaged in a rigorous analysis and found Rule 23 to be satisfied. *Id.* at 350-51.

Such rigorous analysis "[f]requently . . . entail[s] some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Id.* at 351. Certifying a class "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* Such overlap is not "unusual," but rather is "a familiar feature of litigation." *Id.* at 351-52.

B. Discussion

"In order for a proposed class to satisfy the ascertainability requirement, membership must be determinable from objective, rather than subjective, criteria." *Xavier v. Philip Morris USA, Inc.*, 787 F. Supp. 2d at 1089 (citing *Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 30 (2d Cir. 2006)). The proposed class definition should "describe[ ] a set of common characteristics sufficient to allow a prospective plaintiff to identify himself or herself as having a right to recover based on the description." *Vandervort v. Balboa Capital Corp.*, 287 F.R.D. 554, 558 (C.D. Cal. 2012). Determination of class membership should not entail detailed individual inquiries. 3 William B.

Rubenstein, Newberg on Class Actions § 3:3 (5th ed. 2013). Similarly, class definitions based on the merits of individual members' claims are not sufficiently definite. *Id.* § 3:6; *Vandervort*, 287 F.R.D. at 557 ("A class must be ascertainable without inquiring into the merits of the case."). The inquiry into class membership must not require holding countless hearings resembling "mini-trials." Newberg on Class Actions § 3:6.

Here, Plaintiffs define the proposed class as a defendant class of "current record owners—other than Fannie Mae, Freddie Mac, or the Conservator—of Units as to which: (1) HOA Foreclosure Sales have been or will be completed on or after September 18, 2009, (2) an Enterprise Lien had attached and had not been satisfied at the time of the applicable HOA Foreclosure Sale, and (3) the Court may assume and exercise in rem jurisdiction." (FAC ¶ 14, ECF No. 22). Defendant SFR asserts that "this case's merits . . . hinge on the extent to which Plaintiffs owned an 'Enterprise Lien' . . . 'at the time of the HOA foreclosure sale.' As a result, the class definition's reliance on the phrase 'Enterprise Lien' means that the class definition impermissibly implicates the merits of this case." (SFR's Resp. 15:13-16, ECF No. 58). The Court agrees.

One of the primary disputes in this case, along with other cases implicating section 4617(j)(3), pertains to whether FHFA held an interest in the property at issue at the time of an HOA foreclosure sale. (*See* SFR's Resp. to Mot. Summ. J., ECF No. 87). *See also Skylights LLC v. Byron*, 112 F. Supp. 3d 1145, 1157-58 (D. Nev. 2015); *Berezovsky v. Moniz*, 2:15-cv-01186-GMN-GWF, 2015 WL 8780198 (D. Nev. Dec. 15,

2015). This issue is dependent upon a highly individualized factual inquiry. Therefore, the Court finds that such an inquiry into class membership based upon Plaintiffs' proposed defined class would result in countless hearings resembling "mini-trials." Accordingly, because the Court finds that Plaintiffs' proposed class is not reasonably ascertainable, the Court denies Plaintiffs' Motion to Certify Class.

III. MOTION TO SEVER

A. Legal Standard

Rule 20(a)(2) of the Federal Rules of Civil Procedure provides that, in order for more than one defendant to be joined together in an action, the defendants must meet two specific requirements: (1) the right to relief asserted against each defendant must arise out of or relate to the same transaction or occurrence or series of transactions or occurrences; and (2) a question of law or fact common to all defendants must arise in the action. "If the test for permissive joinder is not satisfied, a court, in its discretion, may sever the misjoined parties, so long as no substantial right will be prejudiced by the severance." *Coughlin v. Rogers*, 130 F.3d 1348, 1350 (9th Cir. 1997) (citing Fed. R. Civ. P. 21). If the district court chooses to sever the case, it may do so by dismissing "all but the first named [defendant] without prejudice to the institution of new, separate lawsuits [against] the dropped [defendants]." *Id.*

B. Discussion

Here, the Court finds that, while each of the Defendants purchased properties at HOA foreclosure sales, these entirely separate, though similar, events

do not constitute a series of transactions or occurrences. Accordingly, because the factual scenario related to each Defendant is different, severance of the misjoined Defendants is proper.

Since joinder of the Defendants is improper, the Court severs the case under Rule 21 of the Federal Rules of Civil Procedure. Rule 21 allows the Court to add or drop parties at any time on just terms. Here, the Court severs each Defendant from this case save the first named Defendant, SFR Investments Pool 1, LLC, and dismisses them without prejudice, to which Plaintiffs can reassert their separate claims in two separate, distinct actions.

IV. MOTION TO DISMISS

A. Legal Standard

Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on which it rests, and although a court must take all factual allegations as true, legal conclusions couched as a factual allegation are insufficient. *Twombly*, 550 U.S. at 555. Accordingly, Rule 12(b)(6) requires "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id*.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). "A claim has facial plausibility when the plaintiff pleads factual content

that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. This standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*.

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). "However, material which is properly submitted as part of the complaint may be considered." *Id*. Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). On a motion to dismiss, a court may also take judicial notice of "matters of public record." *Mack v. S. Bay Beer Distrib*., 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if a court considers materials outside of the pleadings, the motion to dismiss is converted into a motion for summary judgment. Fed. R. Civ. P. 12(d).

If the court grants a motion to dismiss for failure to state a claim, leave to amend should be granted unless it is clear that the deficiencies of the complaint cannot be cured by amendment. *DeSoto v. Yellow Freight Sys., Inc*., 957 F.2d 655, 658 (9th Cir. 1992). Pursuant to Rule 15(a), the court should "freely" give leave to amend "when justice so requires," and in the absence of a reason such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by

virtue of allowance of the amendment, futility of the amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

B. Discussion

In *Skylights LLC v. Byron*, 112 F. Supp. 3d 1145 (D. Nev. 2015), the Court held that section 4617(j)(3) prohibits property of FHFA from being subject to a foreclosure without its consent, even if such foreclosure sale is held by an HOA pursuant to Nevada Revised Statutes § 116.3116. 112 F. Supp. 3d at 1158. The Court reached this holding, addressing many objections related to, *inter alia*, preemption and due process violations. *Id.* at 1151-59. In its Motion to Dismiss, Defendant SFR raises many objections to the application of section 4617(j)(3), which primarily relate to due process violations. (*See* Mot. Dismiss 5:5-17:3, ECF No. 46). However, the Court finds no reason to overturn its prior holding in *Skylights*, and therefore, denies Defendant SFR's Motion to Dismiss.

V. MOTION FOR SUMMARY JUDGMENT

A. Legal Standard

The Federal Rules of Civil Procedure provide for summary adjudication when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those that may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to

return a verdict for the nonmoving party. *See id.* "Summary judgment is inappropriate if reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict in the nonmoving party's favor." *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103-04 (9th Cir. 1999)). A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

In determining summary judgment, a court applies a burden-shifting analysis. "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323-24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's

evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970).

If the moving party satisfies its initial burden, the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. *See Celotex Corp.*, 477 U.S. at 324.

At summary judgment, a court's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249. The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249-50.

B. Discussion[4]

In the instant Motion for Summary Judgment, Plaintiffs requests that the Court declare that "12 U.S.C. § 4617(j)(3) preempts any Nevada law that would permit a foreclosure on a superpriority lien to extinguish a property interest of Fannie Mae or Freddie Mac while they are under FHFA's conservatorship," "the HOA Sale did not extinguish the Enterprises' interest in the Properties and thus did not convey the Properties free and clear to any Defendants," and "title to the Properties is quieted in either Fannie Mae's or Freddie Mac's favor insofar as the Defendants' interest, if any, is subject to the interest of the Enterprises or, if applicable, the interest of the Enterprises' successors." (*Id.* 45:6-14).

The Court addressed the applicability of 12 U.S.C. § 4617(j)(3) in *Skylights*. 112 F. Supp. 3d at 1159. After addressing many different arguments regarding the applicability of section 4617(j)(3), the Court held that the plain language of section 4617(j)(3) prohibits property of FHFA from being subject to a foreclosure without its consent. *Id.*

Here, the Court finds that FHFA held an interest in the Properties prior to the HOA foreclosure sales. First, because Chase was servicing the Xanadu Loan on behalf of Freddie Mac and acquired the beneficial interest in the Xanadu Deed of Trust on September 25, 2008, Freddie Mac has held an interest in the Xanadu Drive Property since at least September 25, 2008,

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[4] Because Defendant Las Vegas Development has been severed from this case, the Motion for 56(d) Relief (ECF No. 95) is denied as moot.

which is prior to the HOA foreclosure sale on July 11, 2012. (*See* Exs. A-B to Meyer Decl., ECF No. 70-1; Xanadu Trustee's Deed Upon Sale, Ex. 22 to Plaintiffs' Request for Judicial Notice, ECF No. 72-3). *See also* Restatement (Third) of Prop.: Mortgages § 5.4 cmt. C (explaining that, when a servicer of a loan held by an institutional purchaser of the loan is assigned the beneficial interest of the mortgage, "[i]t is clear in this situation that the owner of both the note and mortgage is the investor and not the servicer.").

Second, because Nationstar was servicing the Mocorito Loan on behalf of Freddie Mac and acquired the beneficial interest in the Mocorito Deed of Trust on May 31, 2013, Freddie Mac has held an interest in the Mocorito Avenue Property since at least May 31, 2013, which is prior to the HOA foreclosure sale on July 9, 2014. (*See* Exs. C-D to Meyer Decl., ECF No. 100-1; Mocorito Trustee's Deed Upon Sale, Ex. 27 to Plaintiffs' Request for Judicial Notice, ECF No. 72-3).

Third, because BANA was servicing the Clover Blossom Loan on behalf of Fannie Mae and acquired the beneficial interest in the Clover Blossom Deed of Trust on December 8, 2011, Fannie Mae has held an interest in the Clover Blossom Court Property since at least December 8, 2013, which is prior to the HOA foreclosure sale on July 22, 2013. (*See* Ex. A to Curcio Decl., ECF No. 70-3; Clover Blossom Trustee's Deed Upon Sale, Ex. 30 to Plaintiffs' Request for Judicial Notice, ECF No. 72-3).

Fourth, because EverBank was servicing the Bahama Point Loan on behalf of Fannie Mae and acquired the beneficial interest in the Bahama Point Deed of Trust on July 10, 2013, Fannie Mae has held an interest in the Bahama Point Avenue Property

since at least July 10, 2013, which is prior to the HOA foreclosure sale on July 16, 2013. (*See* Ex. B to Curcio Decl., ECF No. 70-3; Bahama Point Trustee's Deed Upon Sale, Ex. 35 to Plaintiffs' Request for Judicial Notice, ECF No. 72-4).

Fifth, because Fannie Mae was assigned the Pasture Deed of Trust on June 6, 2013, Fannie Mae has held an interest in the Pasture Lane Property since at least June 6, 2013, which is prior to the HOA foreclosure sale on September 11, 2013. (*See* Ex. C to Curcio Decl., ECF No. 70-3; Pasture Corporation Assignment of Deed of Trust, Ex. 4 to Plaintiffs' Request for Judicial Notice, ECF No. 72-1; Pasture Trustee's Deed Upon Sale, Ex. 6 to Plaintiffs' Request for Judicial Notice, ECF No. 72-1).

Accordingly, because FHFA held an interest in the deeds of trust of the Properties as conservator for Freddie Mac and Fannie Mae prior to the particular HOA foreclosures, section 4617(j)(3) prevents the HOA's foreclosure on the Properties from extinguishing the deeds of trust of the Properties.

VI. CONCLUSION

IT IS HEREBY ORDERED that Plaintiffs' Motion to Certify Class (ECF No. 23) is **DENIED**.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Seal (ECF No. 98) is **GRANTED**. Accordingly, the Clerk of the Court is instructed to seal Exhibit A (ECF No. 73-1) to Plaintiffs' Response to Motion to Certify Class (ECF No. 73). Moreover, Plaintiffs shall file a corrected, unsealed Exhibit A on the docket with the confidential information redacted by **May 26, 2016**.

IT IS FURTHER ORDERED that Defendant SFR's Motion to Sever (ECF No. 48) is **GRANTED**, and the claims asserted against Defendants Nevada New Builds, LLC and Las Vegas Development Group, LLC are **SEVERED** from this case. Plaintiffs shall have until **May 26, 2016**, to file separate cases against each of the severed Defendants. Once these two new cases are filed, the Clerk of the Court will assign them to the undersigned district judge and Magistrate Judge Carl W. Hoffman.

IT IS FURTHER ORDERED that Defendant SFR's Motion to Dismiss (ECF No. 46) is **DENIED**.

IT IS FURTHER ORDERED that Defendant Las Vegas Development's Motion for 56(d) Relief (ECF No. 95) is **DENIED as moot**.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment (ECF No. 70) is **GRANTED**. The Court finds that 12 U.S.C. § 4617(j)(3) preempts Nevada Revised Statutes § 116.3116 to the extent that a homeowner association's foreclosure of its superpriority lien cannot extinguish a property interest of Fannie Mae or Freddie Mac while those entities are under FHFA's conservatorship. Accordingly, the HOA foreclosure sales on the Properties did not extinguish Fannie Mae's or Freddie Mac's interests in the Properties and thus did not convey the Properties free and clear of their deeds of trusts to SFR. Moreover, title to the Properties is quieted in either Fannie Mae's or Freddie Mac's favor insofar as SFR's interest, if any, is subject to the interest of Fannie Mae or Freddie Mac or, if applicable, the interest of Fannie Mae's or Freddie Mac's successors.

IT IS FURTHER ORDERED that Plaintiffs' are granted summary judgment on all of their claims.

The Clerk of the Court shall enter judgment accordingly and close this case.

DATED this 30 day of April, 2016.

s/
Gloria M. Navarro, Chief Judge
United States District Judge