No.

IN THE

Supreme Court of the United States

DEBRA M. BROWN.

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION

PETITION FOR A WRIT OF CERTIORARI TO THE APPEALS COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

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Pro se

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QUESTION(S) PRESENTED

In 2018 petitioner discovered that a judgment issued by the Massachusetts Land Court ("Land Court") in 2009 ordered the sale of her property. The petition in the Land Court was filed by Federal National Mortgage Association's ("FNMA") servicer and foreclosure attorneys. By statute in 1990, the Massachusetts legislature terminated the authority of the Land Court to issue such judgments. Yet the Land Court continued to issue such judgments. Like all but a handful of homeowners with qualifying military service, petitioner was denied notice and all right to participate in the Land Court proceeding. When she discovered this void judgment she immediately filed a post-foreclosure motion to vacate in the Housing Court in that this taking and the consequent Housing Court eviction proceeding violated her due process and equal protection rights guaranteed her by the U.S. and Massachusetts Constitutions. The Land Court and the Housing Court judgments violated the petitioner's constitutional rights and were void as a matter of law. Petitioner and FNMA agree petitioner was not in default at the time the notice of default letter issued. Petitioner and FNMA agree that FNMA had no financial interest in the property and paid nothing for the taking of the property.

I. Whether the U.S. Government and/or state government can take private citizens' property without due process of law constituting a violation of the Fifth and Fourteenth Amendments of the United States Constitution.

PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

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The opinion of the Massachusetts Supreme Judicial Court Application for Further Appellate Review Denied, October 23, 2020, Massachusetts Court of Appeals decision (CA 1A); Northeast Housing Court decision (CA 5A), and Massachusetts Land Court decision (CA 10A).

JURISDICTION

This Court has jurisdiction over this matter, invoked under 28 U.S.C. § 1257(a). This petition is timely filed within 150 days of the October 22, 2020 final state court judgment (C.A. 19A) pursuant to Supreme Court Rule 13.1

RELEVANT PROVISIONS INVOLVED

U.S. Const. Amend. V:

> No person shall be… be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV, sec. 1:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

This case presents the exceptionally important question of when a state court becomes an "actor" in the taking of a private citizen's property triggering the requirements for due process. The importance is heightened when the "taker" is the federal government as it was here. FNMA, conservatee of the Financial Housing Finance Agency ("FHFA) took a private citizen's property without any pre-deprivation due process and entered two Massachusetts courts to obtain judgments without allowing the homeowner any due process. Petioner and FNMA agree that Petitioner was not in default when the default notice issued.

FNMA successfully argued in this case that (1) the Land Court judgment did not matter; (2) this matter has been fully litigated; and (3) no due process was required. This is consistent with the nationwide litigation effort FHFA and FNMA successfully conducts that (1) FNMA is not the government and is not required to provide due process before a taking of private property; (2) HERA pre-empts all state consumer protection laws related to foreclosures; and (3) HERA pre-empts all post-foreclosure defense actions. Essentially FHFA understands their agency and FNMA to be untethered by the Constitution and state laws or courts that interfere with their taking.

. In the First Circuit there is inter-circuit confusion on this issue and there are circuit conflicts throughout the U.S. on the status of FNMA as the government and if there are any limitations on their actions. A Massachusetts U.S. District Court Judge ruled that FHFA is not required to comply with a Massachusetts statute that prohibits unnecessary foreclosures. A Rhode Island U.S. District Court Judge

ruled that FHFA and FNMA violate the U.S. Constitution by taking citizens' property in non-judicial foreclosure without due process.

The Massachusetts Courts have created a judiciary scheme around the non-judicial foreclosure statute that makes the state an "actor" in the taking of private property without due process. The state became an "actor" when the Land Court issued a judgment to sell the property without allowing due process to petitioner in that proceeding. (CA 10A) The state was also an actor in the Housing Court, where petitioner is being dispossessed of her property without due process (CA-5A) and an actor when the Appeals Court did not consider the trial court's record of due process in the appeal.(CA-1A) In over nine years of litigation, petitioner was allowed no due process in violation of the Fifth and Fourteenth Amendment as due process is defined by this Court.

The Court of Appeals decision constitutes an error of law because (1) the Land Court judgment was void ab initio; (2) Land Court judgment represents a state action ordering the sale of a private citizen's property without due process; (3) the foreclosure was void ab initio as it was a government taking of property without due process; and (4) the Housing Court process is a state action dispossessing a private citizen from her property and due process was required. Where it is the federal government, acting through contractors to take the property and put into the government's name, that action without any pre-deprivation due process is unconstitutional.

The time for this Court to resolve the debate about the status of FNMA under the conservatorship of FHFA as government agencies (as such required to provide for pre-deprivation due process) is now. FHFA

and FNMA provide no oversight of their servicers/contractors actions.[1] The servicers do not allow any pre-deprivation due process and there is no way for anyone with a mortgage to have any direct exchange with FNMA or FHFA. FHFA provides a hotline for fraud, waste and abuse but reports the submissions to the hotline to FNMA for response. No response is allowed to the victims. FHFA and FNMA vigorously argue nationwide that they are "not the government" and not required to provide pre-deprivation due process. [2]

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[1] On July 27, 2020 the FHFA-OIG issued a report "Oversight by FNMA of Compliance with Forbearance Requirements Under the CARES act and Implementing Guidance by Mortgage Servicers. The report stated the following: "**We learned from the Enterprises that neither views its responsibilities to include testing whether its servicers comply with legal and regulatory requirements. According to the Enterprises, their long-standing business relationships with mortgage servicers, the servicers' familiarity with the Enterprises' servicing requirements, and their continual contact with servicers give them confidence that servicers are well-informed of their legal and contractual obligations under the CARES Act and implementing guidance. The Enterprises rely on representations and warranties made by each servicer that it complies with applicable law and regulations. A breach of these representations and warranties can lead an Enterprise to invoke contractual remedies. In addition, each Enterprise reported to us that it obtains an annual certification from each servicer that it complies with applicable law and regulations. FHFA advised us that it considered this oversight acceptable.** See also: FHFA-OIG Report March 30, 2020: FHFA Faces a Formidable Challenge: Remediating the Chronic and Pervasive Deficiencies in its Supervision Program Prior to Ending the Conservatorships of Fannie Mae and Freddie Mac

[2] This Court cited FHFA in Seilla Law LLC v. CFPB 591 U.S. __(2020): The only remaining example is the Federal Housing Finance Agency (FHFA), created in 2008 to assume responsibility for Fannie Mae and Freddie Mac. That agency is essentially a companion of the CFPB, established in response to the same

FHFA continues to administer an agency that they understand to be above government oversight, including all state legislation to halt unnecessary foreclosure. States have interests in preventing community blight and preventing widespread homelessness of families and FHFA's actions violate FNMA's charter to be only a "secondary-market participant" and not own property directly. In Massachusetts, the state law is construed to not apply to FHFA and FNMA.

Petitioner in this case is an individual whose home was taken by FNMA. (CA12A-18A) In 2009 FNMA ordered their contractors to enter the Land Court to obtain a judgment ordering the sale of the property. (CA-10A) Following that judgment, FNMA's contractors created transfer papers (CA-12A-18A) and recorded them in the registry of deeds. Then FNMA entered the Housing Court to obtain a judgment for possession by motion for summary judgment. (CA-5A) The Housing Court allowed discovery that included admissions by FNMA that (1) they ordered the foreclosure; (2) they were the holder of the note and mortgage; (3) under their guidelines, petitioner was not in default of her mortgage; (4) FNMA paid nothing for the note and mortgage; (5) FNMA paid nothing for the assignment of bid of the property; and (6) FNMA did not know what happened to petitioner's note and mortgage. The Appeals Court did not consider the record of due process which was non-existent. (CA-1A)

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financial crisis. See Housing and Economic Recovery Act of 2008, 122 Stat. 2654. It regulates primarily Government-sponsored enterprises, not purely private actors. And its single-Director structure is a source of ongoing controversy. Indeed, it was recently held unconstitutional by the Fifth Circuit, sitting en banc. See Collins v. Mnuchin, 938 F. 3d 553, 587–588 (2019).

This case cleanly presents the question whether FNMA can take private citizens' property without pre-deprivation due process utilizing state actors (judicial proceedings and non-judicial foreclosure statutes to deny the petitioner due process prior to taking her property). The petition for a writ of certiorari should therefore be granted.

A. Background

1. Nature Of Due Process

U.S. Const. Amend. V: No person shall be… be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation and U.S. Const. Amend. XIV, sec. 1: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This Court has determined that the loss of an individual's home constitutes a final, lasting deprivation of property entitling him/her to the protection of the due process clause. Los Angeles v. David, 538 U.S. 715, 717(2003) (deprivation of even money is the deprivation of property for purpose of evaluating due process protection). Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538;541 (1985) ("The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures")(emphasis supplied). The Due Process Clause mandates that a sanction such losing

one's home "should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." Roadway Express, Inc. v. Piper, 447 U.S. 752, 766-767(1980).

This Court has determined that individuals are entitled to procedural due process if the property/liberty interest at stake is deemed to be of such magnitude or importance that its loss can fairly be characterized as important; and it depends upon the extent to which the individual will be "condemned to suffer grievous loss." Morrissey v. Brewer, 408 U.S. 471, 481(1972) quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). Goldberg v. Kelly, 397 U.S. 254, 262-263 (1970).

This Court has outlined that once it is determined that the Due Process Clause applies to the proceedings below, "the question remains what process is due." Loudermill, 470 U.S. at 541 quoting Morrissey v. Brewer, 408 U.S. at 481. This Court's decision in Mathews v. Eldridge, 424 U.S. 319, 334-335(1976) dictates that the process due in any given instance is determined by **weighing "the private interest that will be affected by the official action" against the government's asserted interest, "including the function involved" and the burdens the government would face in providing greater safeguards.** Id. at 335. The Mathews calculus contemplates a judicious balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute procedural safeguards." Id. See Hamdi v. Rumsfeld, 542 U.S. 507, 528-529(2004).

Factors roughly in order of priority that have been considered to be elements of a fair hearing: (1) an

unbiased tribunal; (2) notice of the proposed action and the grounds asserted for it; (3) an opportunity to present reasons why the proposed action should not have been taken; (4), (5) and (6) the right to call witnesses, to know the evidence against one, and to have decision based only on the evidence presented; (7) counsel; (8) and (9) the making of a record and a statement of reasons; (10) public attendance; and (11) judicial review. Friendly, "Some Kind of Hearing", 123 U.Pa.L.Rev. 1267, 1279-95 (1975).

2. HERA and the Creation of FHFA

Congress enacted the Housing and Economic Recovery Act ("HERA") in 2008 as financial reform legislation in response to the subprime mortgage crisis and the collapse of the U.S. financial markets. HERA was intended to renew public faith in government-sponsored enterprises (GSEs) that provided home loans—namely Fannie Mae and Freddie Mac. It allowed states to refinance subprime loans with mortgage revenue bonds and created the Federal Housing Finance Agency (FHFA). As a new agency, the FHFA used its newfound authority to put Fannie Mae and Freddie Mac under conservatorship in 2008.[3]

> FNMA was chartered by Congress to further governmental objectives related to the secondary mortgage market and national housing policies. The federal government maintains a substantial ownership interest in FNMA and FNMA is substantially funded by

[3] https://www.investopedia.com/terms/h/housing-and-economic-recovery-act-hera.asp

> the federal government. The Board of Directors of FNMA are appointed by FHFA and FNMA has been under the control of FHFA and/or the United States Treasury for thirteen years. The Rhode Island District Court Judge held "based on these facts, FNMA is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the federal government by the United States Constitution. *Sisti v. Fed. Hous. Fin. Agency*, 324 F. Supp. 3d 273, 277 (D.R.I. 2018) .R.I. 2018). See DOT v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1232-1233 (U.S. 2015); Lebron v. National Railroad Passenger Corp., 513 U.S. 374 (1995).

FHFA as conservator was charged with *reorganizing, rehabilitating or winding up [FNMA] affairs* 12 U.S.C §4617(a)(2). In fact, FHFA expanded FNMA affairs, embraced a nationwide litigation campaign to further insulate FNMA actions from judicial scrutiny, engaging courts to determine that (1) FHFA is not a government actor; (2) HERA gave FHFA and FNMA immunity from all state consumer protection laws: and (3) "Congress intended FHFA to "exercise [its]rights, powers, and privileges" as conservator without being "subject to the direction or supervision of any other agency of the United States or any state. 12 U.S.C. §4617(a)(7) these "rights, powers and privileges expressly include the "transfer or sale of any GSE asset without approval, assignment or consent. FHFA vigorously opposed the Sisti decision (Id.) and is currently maintaining an appeal in the First Circuit Court of Appeals - agreeing with petitioner that this matter is of utmost importance.

Under the FHFA conservatorship FNMA has exponentially increased their interests in the U.S. mortgage market.[4] To date FNMA continues business as usual using servicers/contractors to maintain customer interface and the general public remains unaware of the presence of FNMA in their mortgages. While the public remains unaware, the moratoriums have allowed servicers to automatically suspend mortgage payments for certain borrowers, even without request. The "loss mitigation" allows FNMA to choose which properties receive loan modifications and which receive non-judicial foreclosures. The unique

[4] By 2007, Fannie and Freddie issued or guaranteed $3.4 trillion in single-family mortgages. This was 40% of the entire mortgage market. Of that, just $300 billion were subprime loans. Experts believed it was too small a percentage of its overall portfolio to threaten the agency's viability. These loans were higher risk, but they also returned a higher profit. In the highly-competitive mortgage market, Fannie and Freddie needed these returns to keep stock prices high. During the summer of 2007, mortgage-holders began defaulting. Banks stopped lending, unless Fannie and Freddie guaranteed the loans. In other words, banks shifted the risks to the two GSE's. As a result, Fannie and Freddie sustained huge losses. By the second half of 2007, Fannie and Freddie announced a net loss of $8.7 billion.11 As a result, their stock prices plummeted and investors grew concerned. In February 2008, Congress authorized Fannie Mae and Freddie Mac to guarantee more subprime mortgages. This was done to reassure the housing market Together, Fannie and Freddie saved the U.S. housing market. By 2009, Fannie Mae, Freddie Mac, and FHLB provided 90% of the financing for new mortgages. This was more than double their share of the mortgage market prior to the 2008 crisis. Private mortgage financing had simply dried up. https://www.thebalance.com/fannie-mae-vs-freddie-mac-3305695 by Kimberly Amadeo sourced to Fannie Mae and FHFA reports.

status of the FHFA and FNMA has led to lawlessness, particularly in states that are "non-judicial." [5]

FHFA is managed by a single director and this Court recognized that this Single Director structure as an anomaly in Seila Law LLC v. CFPB 591 U.S. (2020) declaring that the single Director configuration "is incompatible with our constitutional structure. Aside from the sole exception of the Presidency, that structure scrupulously avoids concentrating power in the hands of any single individual." "The Constitution does not vest the Federal Government with an undifferentiated 'governmental power.'" Department of Transportation v. Association of American Railroads, 575 U. S. 43, 67 (2015) (THOMAS, J., concurring in

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[5] "The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." Bowsher, 478 U. S., at 730. Their solution to governmental power and its perils was simple: divide it. To prevent the "gradual concentration" of power in the same hands, they enabled "[a]mbition . . . to counteract ambition" at every turn. The Federalist No. 51, p. 349 (J. Cooke ed. 1961) (J. Madison). At the highest level, they "split the atom of sovereignty" itself into one Federal Government and the States. Gamble v. United States, 587 U. S. ___, ___ (2019) (slip op., at 9) (internal quotation marks omitted). They then divided the "powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." Chadha, 462 U. S., at 951. They did not stop there. Most prominently, the Framers bifurcated the federal legislative power into two Chambers: the House of Representatives and the Senate, each composed of multiple Members and Senators. Art. I, §§2, 3. The Framers viewed the legislative power as a special threat to individual liberty, so they divided that power to ensure that "differences of opinion" and the "jarrings of parties" would "promote deliberation and circumspection" and "check excesses in the majority." See The Federalist No. 70, at 475 (A. Hamilton); see also id., No. 51, at 350. Id. 591 US_(2020)

judgment) Id 591 US (2020) Thomas concurrence and dissent.

In Rhode Island, the Chief Judge John J. McConnell was the first to decide that FHFA and FNMA are government actors and must provide pre-deprivation due process in non-judicial foreclosure states. Judge McConnell held in *Sisti v. Fed. Hous. Fin. Agency*, 324 F. Supp. 3d 273, 277 (D.R.I. 2018) .R.I. 2018):

> The Court holds that the Plaintiffs can prove that the GSEs and FHFA·as conservator are government actors, and thus, can prove that the Defendants denied Plaintiffs due process by conducting non-judicial foreclosures. This Court is aware that this holding is contrary to every other court to reach the issue. Numerous district courts, as well as the Sixth and D.C. Circuits, have concluded that the Defendants are not government actors for purposes of constitutional claims-a fact the Defendants emphasized throughout their briefing and at oral argument (as well they should have). See, e.g.:, Defs.' Reply at 29-33 (listing decisions of other courts). Nevertheless, none of those cases is binding on this Court; they are only available to the Court for any persuasive value they may have. This Court, however, is duty-bound to conduct an independent inquiry of the matter before it, bound by the law that controls it. See D'Arezzo v. Providence Ctr., Inc., 142 F. Supp. 3d 224, 228-29 (D.R.I. 2015). In so doing, the Court is not persuaded by the reasoning of prior cases discussed more below and instead concludes that the Defendants can be found to be government

actors. *Sisti v. Fed. Hous. Fin. Agency*, 324 F. Supp. 3d 273, 277 (D.R.I. 2018) .R.I. 2018).

FHFA's appeal argues that (1) FHFA and FNMA are not "government" actors; (2) are not required to provide pre-deprivation due process and (3) that the District Court's conclusion that FHFA and FNMA are government actors "rests on flawed logic.[6]" Brief of Appellant page 11 filed December 7, 2020.[7]

The very rationale for placing the entities into conservatorship – to stop the fraud – has been channeled by the FHFA single director into a nationwide litigation campaign that the protections afforded individuals by the U.S. Constitution do not apply to FHFA and FNMA and the lawlessness of their contractors/servicers **are immune** from prosecution by any individual, state, or judiciary.

In June 2014, the former Massachusetts Attorney General filed a complaint in Massachusetts Superior Court charging that FNMA and FHFA engaged in unfair or deceptive practices in Massachusetts by failing to comply with existing statutes, [including An Act Preventing Unlawful and Unnecessary

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[6] FHFA argues that the key proposition underlying the district court's erroneous conclusion – drawn from Goldman, The Indefinite Conservatorship Of Fannie Mae And Freddie Mac Is State Action. 17 J. Bus &Sec. L. 11,26 (2016)

[7] FHFA's summary of the argument states "Ms. Boss's argument that those entities denied her due process by conducting a non-judicial foreclosure fails as a matter of law, because neither entity is a government actor for such purposes. Brief at page 10. On September 29, 2020 the parties filed a Stipulation and Joint Motion for Entry of Final Judgment to bring this action to a final, appealable judgment. JA506-511. Since the parties settled, FHFA essentially has no opposition to their appeal and no likelihood that this Court could review this matter.

Foreclosures Ch. 244 §35B-35C)] rules, regulations or laws meant to protect the public health, safety and welfare as set forth in 940 C.M.R. §3.16. FNMA and FHA removed the action to the federal court and the federal court granted FNMA's motion to dismiss. Commonwealth v. FHFA 54 F. Supp. 3rd 94 (2014)

> "HERA prohibits courts from taking any action to restrain the function of the FHFA as conservator. The District Court Judge interpreted 12 U.S.C. §4617(b)(2)(D)(ii) HERA's anti-injunction clause as expressly removing conservatorship decisions from court's oversight. Granting FHFA's Motion to Dismiss, he wrote "**Congress intended FHFA to "exercise [its]rights, powers, and privileges" as conservator without being "subject to the direction or supervision of any other agency of the United States or any state.** 12 U.S.C. §4617(a)(7) **these "rights, powers and privileges expressly include the "transfer or sale of any GSE asset without approval, assignment or consent.** [emphasis added] Id at See also FHFA v. City of Chicago 962 F.Supp 2nd 1044, 1060-1061. Commonwealth v. FHFA 54 F. Supp. 3rd 94 (2014). See also Fannie Mae and Freddie Mac's Subversion of State Consumer Protection Law under the Guise of HERA: Post-Foreclosure Litigation in Massachusetts 20 U.Pa.J.L.& Social Change 273 (2017).

This decision had a chilling effect on all cases in Massachusetts involving FNMA, including the petitioner's. No Massachusetts Judge in her case(s) has allowed for due process while FNMA is the plaintiff.

B. Facts and Procedural History

1. Petitioner owned her home since 1991 and believed that she had been given a one-year forbearance for her mortgage payments due to an extraordinary event. She received verbal confirmation from her servicer that she thought was the "lender."

2. In December 2009, unknown to petitioner, FNMA's servicer obtained a judgment from the Land Court, naming petitioner ordering a sale of the property. (CA-10A-11A) This proceeding is pursuant to the Soldiers and Sailors Relief Act ("SCRA") petitioner has no right to notice of the proceeding and is not allowed to participate in the proceeding in any way.[8]

3. In May 2010 FNMA ordered the servicer and foreclosure attorneys to conduct a non-judicial sale of her home.(CA-12A-18A) FNMA did not allow any pre-deprivation hearing to hear evidence of non-default. Petitioner filed an action in the Massachusetts Superior Court and received a preliminary injunction after a hearing to stop the recording of the deed because FNMA's servicer failed to comply with the Government's Home Affordable Modification Program ("HAMP") when they foreclosed prior to allowing

[8] In 1990 the Massachusetts Legislature determined that the Land Court could not issue "judgments of foreclosure" and could only issue a determination of military status of the homeowner. In 2013 it was revealed in an SJC decision that the Land Court had continued using a form of judgment that included a judgment allowing the foreclosure sale for 23 years after the legislature outlawed the practice and the SJC determined that judgement is void as (1) the Land Court is a court of limited jurisdiction and (2) that judgment was beyond the authority of the Land Court to issue. HSBC v. Matt 464 Mass 193 (2013)

written consideration of her application for the HAMP program.[9]

3. FNMA and Servicer removed the case to Federal Court and the Federal Court dismissed the complaint without any hearing. Petitioner appealed this decision on the technical issue of a defective notice of removal and this Court denied the writ of certiorari on that issue, not on the merits.

4. FNMA entered the Northeast Housing Court on September 10, 2012 seeking possession of the property. (CA-5A) Housing Court is a court of limited jurisdiction that allows minimal notice to a defendant but allows a defendant to file an answer. In this matter an answer was filed and discovery was allowed. The discovery generated admissions that (1) FNMA was the holder of the note and mortgage since 2005; (2) FNMA ordered the servicer to conduct the foreclosure, (3)FNMA paid nothing for the note and mortgage; (4) FNMA paid nothing at the time of foreclosure; and (5) under FNMA's standards petitioner was not in default at the time the Notice of Default letter was sent to her. A Motion to Dismiss was filed. FNMA's filed a Motion for Summary Judgment that was granted on October 7, 2015 without any evidentiary hearing. (CA-5A)

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[9] HAMP was created under the Troubled Asset Relief Program (TARP) in response to the subprime mortgage crisis of 2008. During this period, many American homeowners found themselves unable to sell or refinance their homes after the market crashed because of tighter credit markets. HAMP, established in 2009 was a loan modification program introduced by the federal government to help homeowners avoid foreclosure. HAMP required servicers to provide a written decision after review of the application prior to any foreclosure. Although an application was submitted by Petitioner, no determination had been provided as of the time of the foreclosure.

5. In 2018 petitioner discovered the void Land Court judgment and immediately moved the Housing Court to declare the judgment void ab initio. The Housing Court denied her motion. Petitioner appealed the decision on grounds that (1) the void judgment from the Land Court should render everything void; (2) that there was no subject matter jurisdiction for the Land Court or the Housing Court; and (3) petitioner was denied Constitutional due process in all the prior proceedings. The Appeals Court issued a non-published decision (CA-1A) affirming the Housing Court opining: "none of the several courts that adjudicated the borrower's rights have relied on the Land Court Judgment" and "Accordingly, as the Housing Court judgment was not void, the judge properly denied the borrower's motion to vacate." The Land Court and the Housing Court judgments violated the petitioner's constitutional rights and were void as a matter of law because FNMA had no standing to enter the Land Court or Housing Court.

REASONS FOR GRANTING THE PETITION

This case presents a question of extraordinary importance: whether state actors can take property without due process and whether HERA exempts FHFA and FNMA from compliance with the U.S. Constitution's Article V and XIV prohibition of the taking of private property by the government and/or state without due process of law. The FHFA and FNMA, through their appeal to the U.S. Court of Appeals in the Sisti case, (U.S.C.A. 20-02025 On appeal from the U.S.D.C. for the District of Rhode Island, Case No. 1:17-cv-00042) recognizes that the question of whether they need to comply with the Constitution and

provide pre-deprivation due process is of the utmost importance. The substantial arguments on both sides of the question have been fully aired in a multitude of lower-court opinions; the Appeals Court erred as a matter of law by its refusal to acknowledge an otherwise void judgment and allow FNMA to take possession of property by summary judgment without due process.

The FHFA issued a moratorium on foreclosures and evictions since March 2020 resulting in millions of U.S. households in limbo with their mortgages, forbearances, modification status and evictions. When the moratorium lifts it will be more important than ever that FHFA and FNMA allow homeowners an opportunity for pre-deprivation due process so that issues that occurred with mortgage servicers may be considered independently of FNMA's general support of all actions committed by contractors/servicers. This Court's resolution of the question presented is urgently required. The petition for a writ of certiorari should therefore be granted.

A. The Question Presented Is Exceptionally Important And Warrants Review In This Case

The importance of the question presented cannot be overstated. This case presents a fundamental constitutional question at the heart of the government's right to take private citizens' property. FHFA, an agency with expansive powers whose structure constitutes a "dramatic and meaningful departure from the independent agency structures that this Court has previously upheld." Seila Law LLC v. Consumer Financial Protection Bureau 591 US (2020). The obvious importance of the question is confirmed by

Chief Justice McConnell's decision in Sisti that states "Numerous district courts, as well as the Sixth and D.C. Circuits, have concluded that the Defendants are not government actors for purposes of constitutional claims-a fact the Defendants emphasized throughout their briefing and at oral argument.." *Sisti v. Fed. Hous. Fin. Agency*, 324 F. Supp. 3d 273, 277 (D.R.I. 2018) .R.I. 2018.

The question presented is of utmost importance for addressing a tsunami of foreclosures and evictions that will result in homelessness of millions of families in the wake of the pandemic. This case presents an opportunity for the Court to resolve the issue and reinstate Constitutional protections of pre-deprivation due process for all Americans with mortgages subsidized by the government-sponsored agencies.

1. The FHFA is an agency like no other. It wields broad authority over the U.S. housing market. Similar to the Consumer Financial Protection Bureau's structure, the FHFA is headed by a single director, and the President cannot remove that Director except for "inefficiency, neglect of duty, or malfeasance in office. FHFA's Director enjoys more unilateral authority than any other official in any of the three branches of the U.S. Government," aside from the President himself. PHH Corp. v. Consumer Financial Protection Bureau, 881 F.3rd 75, 167 (D.C. Cir. 2018)(en banc) Kavanaugh, J., dissenting). The Director alone decides "what rules to issue, how to enforce the law, whether an individual or entity violated the law, and what sanctions and penalties to impose on violators of the law." Id. At 165. Yet the President cannot remove the Director except for cause. That combination –

power that is massive in scope, concentrated in a single person, and unaccountable to the President" raised grave constitutional concerns for this Court. Silia Law at 165-166.

In Massachusetts, a non-judicial foreclosure state, the District Court interpreted 12 U.S.C. §4617(b)(2)(D)(ii) HERA's anti-injunction clause as expressly removing conservatorship decisions from court's oversight. The Court held that "Congress intended FHFA to "exercise [its]rights, powers, and privileges" as conservator without being "subject to the direction or supervision of any other agency of the United States or any state. 12 U.S.C. §4617(a)(7) these "rights, powers and privileges expressly include the "transfer or sale of any GSE asset without approval, assignment or consent. [emphasis added] Id at See also FHFA v. City of Chicago 962 F.Supp 2nd 1044, 1060-1061. Commonwealth v. FHFA 54 F. Supp. 3rd 94 (2014).

Chief Judge McConnell of Rhode Island found that FHFA and FNMA are government actors subject to the U.S. Constitution.

> "This Court is duty-bound to conduct an independent inquiry of the matter before it, bound by the law that controls it. See D'Arezzo v. Providence Ctr., Inc., 142 F. Supp. 3d 224, 228-29 (D.R.I. 2015). In so doing, the Court is not persuaded by the reasoning of prior cases discussed more below and instead concludes that the Defendants can be found to be government actors." *Sisti v. Fed. Hous. Fin. Agency*, 324 F. Supp. 3d 273, 277 (D.R.I. 2018) .R.I. 2018

The FHFA placed FNMA into conservatorship in 2008 rather than receivership. "Conservatorship", in contrast [from receivership], serves a different function. FHFA has described the purpose of conservatorship is "to establish control and oversight of a company to put it in a sound and solvent condition." Goldman, supra, at 25; accord 12 U.S.C. § 1821(d)(2)(D) (conservator may take action to put entity in "a sound and solvent condition," as well as carry on entity's business and conserve assets); 12 U.S.C. § 4617(b)(2)(D) (same). Conservators, unlike receivers, have a fiduciary duty running to the corporation itself...l Goldman, at 26. Applying the logic of Meyer to this case reveals that FHFA has waived sovereign immunity, and thus, can be considered a government actor. In contrast to the Massachusetts decision that immunizes FNMA from liability under state consumer protections laws and housing court summary process actions.

The D.C. Circuit explained in Perry Capital v. Menuchen:

> Assuming the FHFA has sovereign immunity when it acts on behalf of the Companies as conservator, the Congress has waived the agency's immunity by consenting to suit. The Congress has granted Freddie Mac "power ... to sue and be sued ... in any State, Federal, or other court," 12 U.S.C. § 1452(c)(7), and has granted Fannie Mae the same "power ... to sue and to be sued ... in any court of competent jurisdiction, State or Federal," id. § 1723a(a). The FHFA "by operation of law []immediately succeed[ed] to ... all ... powers" of the Companies upon its appointment as conservator-including the Companies' power to

> sue and be sued-under the so-called Succession Clause of the Recovery Act. Id. § 4617(b)(2)(A)(i). Such a statutory grant of power to "sue and be sued" constitutes an "unequivocally expressed" waiver of sovereign immunity.

Perry Capital LLC v. Menuchen, 864 F.3cl 591, 622 (D.C. Cir. 2017) (alterations in original) (citations omitted).

Because only federal entities can waive sovereign immunity, it logically follows that FHFA·as·conservator is a government actor. If FHFA is a government actor, as Chief Judge McConnell writes: "The Court holds that the Plaintiffs can prove that the GSEs and FHFA-as-conservator are government actors, and thus, can prove that the Defendants denied Plaintiffs due process by conducting non-judicial foreclosures. " *Sisti v. Fed. Hous. Fin. Agency*, 324 F. Supp. 3d 273, 277 (D.R.I. 2018) .R.I. 2018).

This case presents the same question raised in Sisti Id."that the foreclosure is void because the government failed to provide petitioner due process by conducting a non-judicial foreclosure." Unlike the complaint that Judge McConnell ruled upon, this case record included FNMA admissions that it directed the servicer and foreclosure attorneys (1) to obtain the Land Court judgment; (2) conduct the foreclosure; (3) to obtain the execution for possession, even though a FNMA spokesperson gave testimony that the petitioner was not in default at the time of the notice of default.

2. The question of whether FNMA can take property without compensation and no due process is of vital importance at this time in our country. Since 2008 the FNMA footprint on the U.S. secondary mortgage market has doubled and now is involved with ninety percent of mortgages. That means that FNMA's numbers of servicers, contractors and foreclosure attorneys haves also expanded without oversight. In the wake of the 2008 financial crisis FNMA, through their servicers engaged in widespread conversion of private property to FNMA's Real Estate Owned ("REO") assets. In some states whole neighborhoods were converted from families to the FNMA REO assets.

The framers of our constitution sought to ensure that "no man or group of men will be able to impose its unchecked will." United States v. Brown, 381 U.S. 437, 443 (1965). The concentration of so much power in the hands of the Director of the FHFA increases the likelihood of a person's property deprivation without due process.

A decision that HERA's anti-injunction clause expressly removes conservatorship decisions from court's oversight violates the separation of powers of the U.S. Constitution. "**The Constitution constrains governmental action by whatever instruments or in whatever modes that action may be taken. And under whatever congressional label."** quoting *Ex parte Virginia* , 100 U.S. 339, 346–47, 25 L.Ed. 676 (1880)

HERA's anti-injunction clause cannot invalidate the U.S. Constitution and the Fifth Amendment protections for an individual's right to property. Chief Justice John McConnell wrote:

> "To allow Congress to determine whether the Constitution applied to a government-created entity would allow the government "to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Id.* at 397, 115 S.Ct. 961. The Court explained, "[o]n that thesis, *Plessy v. Ferguson* , 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), can be resurrected by the simple device of having the State of Louisiana operate segregated trains through a state-owned Amtrak." *Lebron* , 513 U.S. at 397, 115 S.Ct. 961 ; *see also.* at 392–93, 115 S.Ct. 961

3. This case is an ideal vehicle for the Court to address the question presented. The question was presented below and briefed by the parties and passed on by the court of appeals without consideration of due process. As it comes to this Court, this case presents that question, and it presents it cleanly and squarely: if petitioner was entitled to due process the foreclosure was void. The void foreclosure renders all the decisions void as a matter of law. The petitioner obtained a stay in the housing court pending all appeals that would prevent the case becoming moot before this Court could issue a decision on the merits.

The longer this question remains unresolved, the impact on states facing increased numbers of homeless families will be impacted because the FHFA and FNMA bought into most U.S. mortgages and considers themselves immune from all state laws and U.S. Constitution.

B. The Decision Below Is Erroneous – State Is An Actor

1. This Court has outlined the elements of substantive due process to be afforded an individual prior to the government taking an individual's property and the Massachusetts courts have not followed that precedent. The starting point in defining an individual's rights is identifying the individual's property or liberty interest at risk in these proceedings. The Fifth Amendment prohibits the state from taking property without due process and the fourteenth amendment restates that prohibition. Plaintiff was entitled to procedural due process if the property/liberty interest at stake is deemed to be of such magnitude or importance that its loss can fairly be characterized as important; and it depends upon the extent to which the individual will be "condemned to suffer grievous loss." Morrissey v. Brewer, 408 U.S. 471, 481(1972) quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). Goldberg v. Kelly, 397 U.S. 254, 262-263 (1970).

When the government has not been required to show standing in the Courts, it has not fully complied with the non-judicial foreclosure statutes and obtains summary judgment resulting in the taking of private property, the state became an actor and part of the taking. Even if Land Court did its job of requiring SCRA petitioners to prove standing, this would not satisfy due process (notice; opportunity to be heard; neutral arbiter). Though a SCRA case explicitly concerns "narrow issue" of military status (*HSBC Bank v. Matt*, 464 Mass. 193 (2013), the Land Court's assumption that most if not all petitioners have

standing results almost invariably in an Order of Notice finding the petitioner to be the mortgagee. This assumption about standing effectively constitutes a determination concerning property — i.e., the ownership of legal title to mortgaged premises — even though the mortgagor is prevented from controverting petitioner's assertion that it owns that legal title.

When used by the federal government, the Land Court and Housing Court proceedings do not satisfy the due process clause of the Fifth and Fourteenth Amendments before depriving an owner of her or her property. This Court invalidated replevin statutes that permitted sellers to repossess goods without notice and hearing. Fuentes v. Shevin 407 U.S. 67, 86 (1972). "The Fourteenth Amendment draws no bright lines around three-day, ten-day or fifty-day deprivations of property. Any significant taking of property by the state is within the purview of the Due Process Clause. Id at 86. In Flagg Bros, Inc. v. Brooks 436 US 149 (1978) this Court described a limitation on a state's action "a state's mere acquiescence in a private action does not convert such action into that of the state." This is not a private action - the Government takes a property under the guise of a private party in the Land Court to get a judgment and then enters the Housing Court in its own identity to secure possession. The act of ordering a sale and handing over possession without due process is not the reluctant acceptance of something without protest.[10] See also North Georgia

[10] In 2020 at a Governor's Council hearing to approve the new chief justice, a blind homeless man testified that a housing court judge ordered him to sign papers that gave away all his property rights. The Judge new he was blind and could not read the documents. He became homeless as a result.

Finishing v. DiChem, Inc. 419 US 601 (1975), Mitchell v. WJ Grant Co., 416 U.S. 600 (1974) and Smiadach v. Family Finance Corp. 395 US 337 (1969)

The petitioner has a significant property interest at stake. The foreclosure and eviction permanently deprives her of ownership, possession, and use of the property, which she uses as her primary residence; clouds the title to the property; impairs her ability to sell, rent, or otherwise alienate the property; taints her credit rating; reduces the chance of her obtaining a future loan or mortgage; subjects her to eviction; and jeopardizes her security in a dwelling place. No compensation was given for the excess equity in the property.

The government had no financial interest at stake before obtaining ownership and possession of the property as admitted in the FNMA's testimony. There are no exigent circumstances that would justify the lack of a pre-deprivation hearing, nor would a meaningful hearing before a neutral party impose significant fiscal or administrative burdens.[11]

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1. [11] A 30(b)(6) deposition was taken of Terrence Evans, a 16-year employee of FNMA on February 11, 2014. In that deposition Mr. Evans made the following statements:

   Q. Who at FNMA holds the information as to what mortgage-backed security pool a particular loan goes into? A. **The lenders create their pools and place loans into them.** Q. Say that again? A. **The lender creates, you know, their pools and puts loans into the pools. So FNMA does not make, you know, does not always make those allocations.** APP 159

   How could this type of transfer of property interest comply with the Statute of Frauds? It could not. Q. So if Debra Brown's mortgage was placed in a mortgage-backed

security pool, then you would agree that the transaction would be under a lender swap transaction? **A. I mean, you know, we hear the term swapping loans for MBS. So the practice of Countrywide, they're a very large lender and so they would – their business practice was generally to securitize loans or swap loans for MBS. Q. MBS security? A. MBS securities, yes. Q. And so the security would go back to Countrywide? A. Correct. Q. Countrywide would then sell the securities? A. Correct.** Q. So FNMA then, in fact, own the note and mortgage and not the trust, not the Mortgage-Backed Security pool? A. I believe that is the case. Q. And, again, just tell me one more time why you think that's the case? **A. I don't believe that it's operationally, I think it would be very cumbersome for us to assign things into all these various trusts. We create so many of them each month, each year. So I believe it's just into FNMA. A. My recollection of the [servicing guide] is that it doesn't really talk about assigning anything into individual trusts.** Q. Your clear that whatever the process is, that first step of the sale or first step of the transfer of the note and mortgage is into FNMA itself? A. Yes. Q. Where you struggle with is whether FNMA then transfers the note and mortgage into the pool? A. Right. **Q. I guess I would ask if it's not in the trust, then what does the trust hold? A. I mean, maybe that's a little bit outside of my knowledge in terms of the legal nuances of, you know…Q. So if the trust holds nothing, then it holds nothing? A. Yes.** Q. Do you know the amount of consideration FNMA paid at foreclosure? A. I want to say it was in the ballpark of 297,000. Q. So what would be the actual amount FNMA paid. A. It was the consideration given. **Q So what does that mean? What's the difference between paid and consideration given? So no money exchanged hands? A. That's right. I mean, we basically – you know, we took ownership of the property. Q. And in doing so, you did not receive any consideration? A. Well, the property. Q. You didn't pay any consideration? A. Right.** (APP 208, page 233) **Q. With respect to Exhibits 6-A, 7, 8-A and 8-B you don't have any knowledge as to whether the servicer complied with any of these one way or the other with respect to Debra Brown's mortgage? A. I do not know that, right. Q. And you have not seen any documents as to whether they**

The SJC recognizes the role of the Housing Court includes a higher burden where property rights are in the balance:

> We therefore hold that, whenever it becomes apparent to a court in a summary process action that a plaintiff may not be the owner or lessor of the property at issue, the court is obligated to inquire into the plaintiff's standing and, if it determines that the plaintiff lacks standing, it must dismiss the action for lack of subject matter jurisdiction, regardless of whether any party raises an issue of standing. See HSBC, 464 Mass. at 199-200; Mass. R. Civ. P. 12 (h) (3). Although dismissals for lack of subject matter jurisdiction are ordinarily without prejudice because they typically do not involve an adjudication on the merits, in cases where a lack of standing is also fatal to the merits of the plaintiff's claim, as here, dismissal must be with prejudice. See Abate v. Fremont Inv. & Loan, 470 Mass. 821, 828, 836

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complied or not? A. Correct. Q. Or is any of this that FNMA needs to do? A. These are servicer responsibilities. Q. Does FNMA have any responsibilities with respect to foreclosure? A. We delegate the decision making to the servicer. (APP 185, page 144) Q. So tell me how this works A. The Servicer will determine the bid price [according to] how it is laid out in our guide. Q. Once that decision is made and once the bid is made and once it's the high bid, what happens? A. The property is reverted into Fannie Mae's REO inventory. Q. But no money exchanges hands A. Correct. Q. Because Fannie Mae buys the property for itself A. Essentially. (APP 813, page 234-236)

> (2015) (dismissal with prejudice appropriate in try title action where determination of standing "effectively negate[d] the merits of [plaintiff's] claim"). Where the complaint is dismissed with prejudice for lack of subject matter jurisdiction, the plaintiff cannot file a new summary process complaint against the tenant unless he or she subsequently becomes the owner or lessor of the property. However, nothing would bar the true owner or lessor of the property from filing a new complaint.

Rental Property Mgt. Svs. et al. v. Hatcher, 479 Mass. 542, 547 (2018). (This decision is not enforced.)

The loss of plaintiff's home constitutes a final, lasting deprivation of property entitling her to the protection of the due process clause. Los Angeles v. David, 538 U.S. 715, 717(2003) (deprivation of even money is the deprivation of property for purpose of evaluating due process protection). Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538;541 (1985) ("The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures")(emphasis supplied). The Due Process Clause mandates that a sanction such losing one's home "should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." Roadway Express, Inc. v. Piper, 447 U.S. 752, 766-767(1980).

In addition to the loss of property adverse judgments are lasting marks on plaintiff's integrity, honor and character. For where a person's good name, reputation, honor or integrity is at stake because of

what the government is doing to him, notice and an opportunity to be heard are essential. Wisconsin v. Constantineau, 400 U.S. 433 (1971). As a title-theory state, even though a property has a mortgage, they have not lost all rights to their property.

The right to cross-examine and confront adverse witnesses and their evidence implies the right to marshal and adduce one's own evidence in support of a position on a contested fact issue such as (1) whether the foreclosure was void because there was no pre-deprivation hearing Sniadach v. Family Fin. Corp., 395 U.S. 337, 89 S.Ct.1820 (1969); (2) whether the Land Court judgment was void by testimony of the author of the assignment; (3) the precise amount of the debt due respondents under the note, if plaintiff's liability was established. 441 U.S. 418, 423(1979). See Hamdi v. Rumsfeld, 542 U.S. at 534.

In a recent case in Massachusetts, Judge Sorokin wrote: In Massachusetts, courts have consistently held that non-judicial foreclosures are constitutional. See, e.g., U.S. Bank Nat. Ass'n v. Ibanez, 941 N.E.2d 40, 49 (Mass. 2011) ("Massachusetts does not require a mortgage holder to obtain judicial authorization to foreclose on a mortgaged property."); Rice v. Wells Fargo Bank, N.A., 2 F. Supp. 3d 25, 33 (D. Mass. 2014) ("Massachusetts is a non-judicial foreclosure state and a mortgage holder need not obtain judicial authorization to foreclose on mortgaged property."). *Garcia v. Nationstar Mortg.*, Civil No. 20-10246-IT, 2-3 (D. Mass. Feb. 10, 2020)

The disconnect in this decision is the following: (1) a land court judgment ordering a sale (making the state an actor in the taking); and (2) a housing court grants possession to the government without due process makes the housing court a state actor. When

the government is the taker by non-judicial foreclosure without a pre-deprivation hearing for the mortgagee. FNMA's taking of this property is unconstitutional and void and foreclosure should be void ab initio.

2. FNMA Had No Standing To Enter Land Court And Housing Court

As this Court recently declared in Carney v. Adams 592 U.S. (2020) decided December 10, 2020:

> This case begins and ends with standing. The Constitution grants Article III courts the power to decide "Cases" or "Controversies." Art. III, §2. We have long understood that constitutional phrase to require that a case embody a genuine, live dispute between adverse parties, thereby preventing the federal courts from issuing advisory opinions. See Flast v. Cohen, 392 U. S. 83, 96–97 (1968); Coleman v. Miller, 307 U. S. 433, 460 (1939) (opinion of Frankfurter, J.) ("[I]t was not for courts to pass upon . . . abstract, intellectual problems but only if a concrete, living contest between adversaries called for the arbitrament of law"). The doctrine of standing implements this requirement by insisting that a litigant "prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." Hollingsworth v. Perry, 570 U. S. 693, 704 (2013); Lujan v. Defenders of Wildlife, 504 U. S. 555, 560–561 (1992).Two aspects of standing doctrine are relevant here. First, standing requires an "'injury in fact'" that must be "concrete and

particularized," as well as "'actual or imminent.'" Id., at 560. It cannot be "' "conjectural or hypothetical.'" " Ibid. Second, a grievance that amounts to nothing more than an abstract and generalized harm to a citizen's interest in the proper application of the law does not count as an "injury in fact." And it consequently does not show standing. Hollingsworth, supra, at 706; see also Lance v. Coff-man, 549 U. S. 437, 439–441 (2007) (per curium) (describing this Court's "lengthy pedigree" in refusing to serve as a forum for generalized grievances). In other words, a plaintiff cannot establish standing by asserting an abstract "general interest common to all members of the public," id., at 440, "no matter how sincere" or "deeply committed" a plaintiff is to vindicating that general interest on behalf of the public, Hollingsworth, supra, at 706–707. Justice Powell explained the reasons for this limitation. He found it "inescapable" that to find standing based upon that kind of interest "would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government." United States v. Richardson, 418 U. S. 166, 188 (1974) (concurring opinion). He added that "[w]e should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch." Ibid.; see also Schlesinger v. Reservists Comm. to Stop the War, 418 U. S. 208, 222 (1974); Warth v. Seldin, 422 U. S. 490, 500 (1975). Cf. Federal Election Comm'n v. Akins, 524 U. S. 11, 21–25 (1998)

(finding standing where a group of voters suffered concrete, though wide-spread, harm when they were prevented from accessing publicly disclosable voting-related material).

FNMA did not have standing to bring an action in the Land Court or Housing Court because it had no injury or financial interest.

This case presents the question of whether the government can take private property without due process. That question has been answered no by this Court throughout the nation's history. Where the FHFA an agency created by Congress with HERA and FNMA holds themselves above the Constitution, the states' and individual rights and Massachusetts and other federal courts are in agreement – it is imperative that this Court resolve this question as it relates to FHFA and FNMA. This case is an ideal opportunity for the Court's review. The Court should therefore grant the petition for certiorari and, on the merits, hold that FHFA and FNMA are government actors and as such must provide for pre-deprivation due process and that the state actors must allow for due process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appeals Court of Massachusetts.

FEDERAL NATIONAL MORTGAGE ASSOCIATION

v.

Debra M. BROWN.

19-P-286

Entered: February 11, 2020.

By the Court (Kinder, Henry & Ditkoff, JJ.[1])

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, **Debra M. Brown** (borrower), appeals from the orders denying her motions in the Housing Court to vacate a judgment pursuant to Mass. R. Civ. P. 60 (b) (4), 365 Mass. 828 (1974), and to stay execution. Concluding that the borrower has failed to

show that the Housing Court judgment was void or to demonstrate error in the form of the execution, we affirm.

1. Motion to vacate judgment. A party may move for relief from a judgment on the ground that "the judgment is void." Mass. R. Civ. P. 60 (b) (4).[2] "[W]e review de novo the denial of a rule 60 (b) (4) motion." Dumas v. Tenacity Constr. Inc., 95 Mass. App. Ct. 111, 114 (2019).[3]

The borrower argues that a Land Court judgment issued in 2009 pursuant to the Massachusetts Soldiers' and Sailors' Civil Relief Act in favor of BAC Home Loans Servicing, L.P. (not the plaintiff here) and against the borrower is void under HSBC Bank USA, N.A. v. Matt, 464 Mass. 193 (2013). Even if we assume the dubious proposition that this judgment was void, the borrower provides no argument that the Housing Court judgment in favor of plaintiff Federal National Mortgage Association was void, except for her oft-repeated conclusory claim that "all that followed the void judgment is a nullity." To the contrary, "a servicemember proceeding is neither a part of nor necessary to the foreclosure process; it simply ensures that a foreclosure will not be rendered invalid for failure to provide the protections of the [Federal Servicemembers Civil Relief Act] to anyone so entitled, an assurance that also could be obtained at a postforeclosure action to quiet title under G. L. c. 240, § 6." Matt, supra at 197.[4]

Furthermore, none of the several courts that adjudicated the borrower's rights have relied on the Land Court judgment. The Housing Court decision in 2015, our decision in 2017, and the decision of the United States Court of Appeals for the First Circuit do not mention the Land Court at all. The decision of the United

States District Court for the District of Massachusetts mentions the Land Court solely to reject the borrower's argument that Bank of America filed a false affidavit in that action; it did not rely on the Land Court judgment in reaching its decision. Accordingly, as the Housing Court judgment was not void, the judge properly denied the borrower's motion to vacate.[5]

Execution. The borrower's challenge to the execution's inclusion of other occupants (specifically, her daughter) does not appear to be properly before us. The borrower did not appeal the July 27, 2018, order extending the execution to other occupants. See Mass. R. A. P. 3 (c), as appearing in 430 Mass. 1602 (1999) ("The notice of appeal shall specify the party or parties taking the appeal and shall, in civil cases, designate the judgment, decree, adjudication, order, or part thereof appealed from").[6] The borrower's motion to stay did not raise this issue.

In any event, Housing Court Administrative Regulation no. 1-17(1) (2017) permits an execution against other occupants who, as here, "are members of the defendant's immediate family (spouse, children, or other familial relation)." The borrower's conclusory statement that the regulation is unconstitutional without any argument, identification of the relevant constitutional provision, or even identification of which constitution the regulation purportedly violates does not rise to the level of appellate argument. See Butler v. Turco, 93 Mass. App. Ct. 80, 89 (2018).[7]

Orders entered August 17, 2018, affirmed.

Footnotes

1The panelists are listed in order of seniority.

2Rule 60 applies here. See Rule 11(b) of the Uniform Summary Process Rules (1980).

3Contrary to the claim of the plaintiff, the denial of a rule 60 motion is not interlocutory and may be appealed immediately. See Boston Redev. Auth. v. Charles River Park "C" Co., 402 Mass. 1004, 1005 (1988). The grant of a rule 60 motion, by contrast, generally is interlocutory. See McDonnell v. McDonnell, 39 Mass. App. Ct. 932, 933 (1995).

4The borrower concedes that she was not a servicemember.

5We reject the borrower's claim that the recording of the Land Court judgment in the registry of deeds constituted a binding admission that any future summary process proceedings would be void if that judgment was void. "[T]here is nothing magical in the act of recording an instrument with the registry that vests an otherwise meaningless document with legal effect." Bevilacqua v. Rodriguez, 460 Mass. 762, 771 (2011).

6We cite to the Massachusetts Rules of Appellate Procedure in effect during the relevant time period. The rules were wholly revised, effective March 1, 2019. See Reporter's Notes to Rule 1, Mass. Ann. Laws Court Rules, Rules of Appellate Procedure, at 446 (LexisNexis 2019). The substantive requirements of rule 3 (c), at issue in this case, are unchanged. See Mass. R. A. P. 3 (c) (1), as amended, 481 Mass. 1604 (2019).

7The borrower's request for attorney's fees is, of course, denied.

Judgment of Summary Process For Plaintiff		Docket Number 12H77SP003422	Commonwealth of Massachusetts Housing Court Department
	RE: Federal National Mortgage Association vs. Debra M Brown Aka Debra M. Bauhaus et al		
	Plaintiff(s) who are parties to this Judgment: Federal National Mortgage Association		Northeast Housing Court Fenton Judicial Center 2 Appleton Street Lawrence, MA 01840 (978)689-7833
	Defendant(s) who are parties to this Judgment: Debra M Brown Aka Debra M. Bauhaus Robert T Brown		Premises Address: 99 Homestead Circle South Hamilton, MA 01982

After coming before the court, the issues having been duly tried or heard, and a finding or verdict having been duly rendered, IT IS ORDERED AND ADJUDGED by the court (Kerman, J.) that the Plaintiff(s) named above recover of the Defendant(s) named above Judgment in summary process for possession of the premises listed above and money damages as follows:

Date of Breach, Demand or Complaint	09/10/2012
Date Judgment Entered	10/07/2015
Pre Judgment Interest as provided by law from 09/10/2012 to	$.00
Damages	$0.00
Double or Treble Damages Awarded by Court	$
Filing Fee & Surcharge	$0.00
Other Costs Awarded by Court	$0.00
Other Costs	$0.00
Court Ordered Attorney Fees	$
Judgment Total Payable to Plaintiff(s)	$0.00

Further orders of the court:
Execution is stayed 60 days

Entered and notice sent on October 7, 2015.

_____
Susan M Trippi
Clerk - Magistrate

COMMONWEALTH OF MASSACHUSETTS
NORTHEAST HOUSING COURT

FEDERAL NATIONAL MORTGAGE ASSN

Plaintiff No. 12-SP-3422

- v.-

DEBRA M. BROWN

Defendant

RULINGS AND ORDER

In this post-foreclosure summary process case, the plaintiff Federal National Mortgage Association moves for summary judgment [Doc.#55, 62, 63, 64, 67, 68] on its claim for possession of the subject premises and on the merits of the defendant's affirmative defenses [Doc.#5]. The defendant cross moves to dismiss or for summary judgment [Doc.#57, 61, 65, 66]. After hearing, and after considering the summary judgment record, I deny the motion by the defendant and I allow the plaintiff's motion.

The defendant in this case filed ort May 27, 2010, an affirmative suit no. ES-CV-2010-01136-B in the Essex County Superior Court, to determine unlawful and stop enforcement of the foreclosure sale that was conducted on May 10, 2010. That case was removed on the basis of diversity jurisdiction by the Bank of America Corporation and the Federal National- Mortgage-

Association on June 25, 2010, as no. 10-CV-11085-GAO to the Federal District Court, which on March 31, 2011, and April 4, 2011, dismissed the suit, on the merits, under FRCvP Rule 12(b)(6). On appeal no. 11-1363 the First Circuit Court of Appeals affirmed the judgment of dismissal on May 7, 2012, and on petition no. 12-178 the United States Supreme Court denied certiorari on October 9, 2012 [Doc.#64].

The prior adjudication has res adjudicata effect and now bars the defendant's claims in this case that the foreclosure sale that was conducted (more than five years ago) on May 10, 2010, was unlawful. See my rulings in U. S. National Association v. McDermott. N.E.Hsg.Ct. No. 12-SP-2006 (March 12, 2013), aff'd 87 Mass.App. 1103, 24 N.E.3d 1061 (2015) (R.l:28 decision); FNMA v. Nkwah, N.E.Hsg.Ct. No. 12-SP-1488 (June 20, 2013); HSBC v. Pailes, N.E.Hsg.Ct. No. 11-SP-0361 (September 16, 2013); JP Morgan v. Mancia, N.E.Hsg.Ct. No. 13-SP-2655 (December 11, 2013).

In the Interest of completeness, I state my view that there is no merit to the defendant's claim that MERS lacked standing to foreclose. See my rulings in FNMA v. McArdle, N.E.Hsg.Ct No. 14- SP-1199 (March 25, 2015). See, Bank of New York v. Wain, 85 Mass.App. 498, 502-504, 11 N.E.3d 633, 637-639 (2014); Shea v. FNMA, 87 Mass.App. 901, 31 N.E.3d 1122 (2015) (rescript).

I also state my view that there is no merit to the claim that there was no default. The record shows that on August 18, 2008, when the Notice of Intention to Foreclose was sent the defendant was at least one, probably two months' payments behind, and that her last payment was credited to her account on August 18, 2008, such that when the foreclosure sale occurred (almost twenty-one months later) on May 10, 2010, there was a

considerable sum ($16,475.29 as of April 16, 2010) owed [Doc.#57 Exh.B, C, D; Doc.#62 Exh.A; Doc.#63 Exh.E].

There is merit to the claim that the pre-foreclosure Notice of Intention to Foreclose by Countrywide Home Loans dated August 18, 2008, upon which the plaintiff relies [Doc.#55 Exh.D; Doc.#57 Exh.E; Doc.#63 Exh.D] failed to comply with the requirements of the statute, Gen.L. c.244 §35A, and with the terms of the mortgage, §22 [Doc.#55 Exh.B]. See, Pinti v. Emigrant Mortgage Co., Inc., 472 Mass. 226, 33 N.E.3d 1213 (2015) . See my rulings and order in FNMA v. Vasauez. N.E.Hsg.Ct No. 12-SP-2167 (October 6, 2015).

However, under the ruling in U.S. Bank v. Schumacher, 467 Mass. 421, 5 N.E.3d 882 (2014), the failure to comply with the statute does not affect the validity of the foreclosure, and under the law of res adjudicata, the claim of failure to comply with the mortgage cannot now be raised.

ORDER

The motion by the plaintiff for summary judgment [Doc.#55, 62, 63, 64, 67, 68] is allowed and the cross motion by the defendant [Doc.#57, 61, 65, 66] is denied. Enter judgment for the plaintiff for dismissal on the merits of the defendant's affirmative defenses and for possession of the subject premises. The issuance of execution is stayed 60 days.

_____

David D. Kerman
Associate Justice

October 6, 2015

COMMONWEALTH OF MASSACHUSETTS LAND COURT DEPARTMENT OF THE TRIAL COURT Suffolk _____ss.	Land Court Use Only	LET JUDGMENT ISSUE: Chief Justice

COMPLAINT TO FORECLOSE MORTGAGE

PLAINTIFF:
Name
BAC Home Loans Servicing, L.P.

City or Town of Residence
Piano, TX

DEFENDANT:
Name
Debra M. Brown

City or Town of Residence Interest
South Hamilton, MA Owner

1. Your Plaintiff is the assignee and holder of a mortgage with the statutory power of sale given by Robert T. Brown, Jr. and Debra M. Bauhaus, a/k/a Debra M. Brown to Mortgage Electronic Registration Systems, Inc. dated May 16, 2005 recorded at the Essex County (Southern District) Registry of Deeds at Book 24316. Page 21 covering* 99 Homestead Circle. South Hamilton. (street and number) (and city and town) (Unit No, and Condo. Name if a Condominium)

and more particularly described in said mortgage.
LAND COURT USE ONLY

JUDGMENT

Under the provisions of the Servicemembers Civil Relief Act, as amended, this cause came on to be heard and thereupon, upon consideration thereof, it appearing to the court that the record owner is not entitled to the benefits of said Act, it is

ORDERED and ADJUDGED that the plaintiff be authorized and empowered to make an entry and to sell the property covered by the mortgage as set forth in this complaint in accordance with the powers contained in said mortgage.

By the Court.
Attest:
(SEAL)

DEBORAH J. PATTERSON
RECORDER

NOTE: Wherever the singular is used herein, it shall be deemed to mean and include plural where applicable.
* A metes and bounds description of the property is not necessary

MASSACHUSETTS FORECLOSURE DEED BY CORPORATION

Bank of America, NA s/b/m BAC Home Loans Servicing, L.P.

a national association having its usual place of business at PO Box 9000, 475 Crosspoint Parkway, Getzville, NY 14068

the current holder by assignment of a mortgage

from Robert T. Brown Jr. and Debra M. Bauhaus a/k/a Debra M. Brown

to Mortgage Electronic Registration Systems, Inc.

dated May 16, 2005 and recorded with the Essex County (Southern District) Registry of Deeds at Book 24316, Page 21, by the power conferred by said mortgage and every other power for TWO HUNDRED NINETY-SEVEN THOUSAND SEVEN HUNDRED SEVENTY-ONE AND 46/100 ($297,771.46) DOLLARS paid, grants to Fannie Mae a/k/a Federal National Mortgage Association, organized and existing under the laws of the United States of America P.O. Box 650043, Dallas, TX 75265-0043, the premises conveyed by said mortgage.

The grantee is exempt from paying the Massachusetts state excise stamp tax by virtue of 12 United States Code §1452(e), §1723a, or §1825.

WITNESS the execution and the seal of said limited partnership this 19 day of September 2011.

Bank of America, NA s/b/m BAC
Home Loans Servicing, L.P.
By Jill Wosnak, Vice President

State of California

Ventura County, ss. 19 Sept. 2011

On this 19 day of September, 2011, before me, the undersigned notary public, personally appeared Jill Wosnak, proved to me through satisfactory evidence of identification, which were A Driver License (form of identification), to be the person whose name is signed on the preceding or attached document, and acknowledged to me that (~~he~~) (she) signed it voluntarily for its stated purpose.

Capacity: (as Vice President
of Bank of America, NA s/b/m BAC Home Loans Servicing, L.P.)

_____.(Affix Seal)
Notary Signature
My commission expires: Dec 10 2014

CHAPTER 183 SEC. 6 AS AMENDED BY CHAPTER 497 OF 1969

Every deed presented for record shall contain or have endorsed upon it the full name, residence and post office address of the grantee and a recital of the amount of the full consideration thereof in dollars or the nature of the other consideration therefor, if not delivered for a specific monetary sum. The full consideration shall mean the total price for the conveyance without deduction for

any liens or encumbrances assumed by the grantee or remaining thereon. All such endorsements and recitals shall be recorded as part of the deed. Failure to comply with this section shall not affect the validity of any deed. No register of deeds shall accept a deed for recording unless it is in compliance with the requirements of this section.

ASSIGNMENT OF BID

California
Ventura, ss.

For good and valuable consideration, I, Wosnak, Vice President, Bank of America, NA s/b/m BAC Home Loans Servicing, L.P., hereby assign Bank of America, NA s/b/m BAC Home Loans Servicing, L.P.'s bid and all of its right, title and interest in and to and under a Memorandum of Sale of Real Properly by Auctioneer, dated May 10, 2010 in connection with premises situated at 99 Homestead Circle, South Hamilton (Hamilton), MA 01982 which is the subject of a mortgage given by Robert T. Brown Jr. and Debra M. Bauhaus a/k/a Debra M. Brown to Mortgage Electronic Registration Systems, Inc. dated May 16, 2005 and recorded with Essex County (Southern District) Registry of Deeds in Book 24316, Page 21 to:

Fannie Mae a/k/a Federal National Mortgage Association,
organized and existing under the laws of the United States of America
P.O. Box 650043, Dallas, TX 75265-0043

This Assignment is made without recourse, and subject to all terms and conditions contained in the said Memorandum of Sale, and Additional Terms, and Notices of Mortgagee's Sale of Real Estate.

Bank of America, NA s/b/m BAC Home Loans Servicing, L.P.

By Jill Wosnak, Vice President

State of California

Ventura, ss. 19 Sept. 2011

On this 19 day of September, 2011, before me, the undersigned notary public, personally appeared Jill Wosnak, proved to me through satisfactory evidence of identification, which were A Driver License (form of identification), to be the person whose name is signed on the preceding or attached document, and acknowledged to me that (~~he~~) (she) signed it voluntarily for its stated purpose.

Capacity: (as Vice President
of Bank of America, NA s/b/m BAC Home Loans Servicing, L.P.)

_____, (Affix Seal)
Notary Signature
My commission expires: Dec 10 2014

AFFIDAVIT

I, Neil W. Heiger, Esquire, of Harmon Law Offices PC as attorneys for Bank of America, NA s/b/m BAC Home Loans Servicing, L.P. make oath and say that the principal and interest obligation mentioned in the mortgage above referred to were not paid or tendered or performed when due or prior to the sale, and that BAC Home Loans Servicing, L.P. caused to be published on April 15, 2010, April 22, 2010 and April 29, 2010 in the Hamilton-Wenham Chronicle, a newspaper having a general circulation in South Hamilton, a notice of which the following is a true copy. (See attached Exhibit A)

I also complied with Chapter 244, Section 14 of the Massachusetts General Laws, as amended, by mailing the required notices certified mail, return receipt requested.

Pursuant to said notice at the time and place therein appointed BAC Home Loans Servicing, L.P. sold the mortgaged premises at public auction by Eve M. Katz, a licensed auctioneer, to BAC Home Loans Servicing, L.P. for TWO HUNDRED NINETY-SEVEN THOUSAND SEVEN HUNDRED SEVENTY-ONE AND 46/100 ($297,771.46) DOLLARS bid by BAC Home Loans Servicing, L.P., being the highest bid made therefore at said auction. Said bid was then assigned by Bank of America, NA s/b/m BAC Home Loans Servicing, L.P. to Fannie Mae a/k/a Federal National Mortgage Association, as evidenced by assignment of bid to be recorded herewith as Exhibit 'B'.

By: _____
Neil W. Heiger, Esquire

Commonwealth of Massachusetts

Middlesex, ss May 29, 2012

On this 29 day of May 2012, before me, the undersigned notary public, personally appeared Neil W. Heiger, Esq. proved to me through satisfactory evidence of identification, which were personal knowledge, to be the person whose name is signed on the preceding or attached document, who swore or affirmed to me that the contents of the document are truthful and accurate to the best of his/her knowledge and belief.

Capacity: (as _____
of _____

_____ (Affix Seal)
Notary Signature

My commission expires: _____

Supreme Judicial Court for the Commonwealth of Massachusetts

RE: Docket No. FAR-27329

FEDERAL NATIONAL MORTGAGE ASSOCIATION
vs.
DEBRA M BROWN & another

Housing Court. Northeast No. 12H77SP003422
A.C. No. 2019-P-0286

NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW

Please take note that on October 22, 2020, the application for further appellate review was denied.

Francis V. Kenneally, Clerk

Dated: October 22, 2020

To: Victor Shapiro, Esquire
Marina Plummer, Esquire
Matthew Carbone, Esquire
Thomas J. Walsh, Esquire
Thomas J. Santolucito, Esquire
Debra M. Brown, Esquire
Robert T. Brown
Grace C. Ross