No. 18-670

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,

Respondent.

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

BRIEF OF LAS VEGAS DEVELOPMENT GROUP, LLC; LVDG, LLC; LAS VEGAS DEVELOPMENT, LLC; THUNDER PROPERTIES, INC.; AIRMOTIVE INVESTMENTS, LLC; SATICOY BAY, LLC; AND LN MANAGEMENT, LLC AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are collectively the purchasers and/or owners of in excess of approximately eight hundred (800) parcels of real property located in the State of Nevada that were the subject of homeowners association lien foreclosure sales conducted under the authority of NRS §116.3116 *et seq*. between approximately October 1, 2010 and October 1, 2015. These properties have an aggregate potential market value of tens of millions or hundreds of millions of dollars. Amici are representative of scores of other similar individuals and small business entities who also purchased such properties during the relevant time period.

Unbeknownst to Amici and other purchasers at the time that they purchased nearly every single property at these lawful foreclosure sales, many of the properties are claimed to secure loans that are purportedly owned by Federal National Mortgage Association (*"Fannie"*) or Federal Home Loan Mortgage Corporation (*"Freddie"*) (*collectively, the "GSEs"*). In nearly every case, the claimed interests of the GSEs were unknown to Amici because the GSEs failed to publicly record any document evidencing their claimed ownership interests in the

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[1] *Amici* provided petitioner and respondent with timely notice of their intent to file this brief. All parties have consented to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

applicable county recorder's office or elsewhere. As a result, the GSEs and Federal Housing Finance Agency (*"FHFA"*) were the only parties with knowledge of these claimed interests by the GSEs.

Amici are involved in many hundreds of lawsuits regarding the force and effect of the lien foreclosure sales upon the security interests that were recorded against their various properties, including many in which FHFA, the GSEs and/or their ostensible servicing agents have asserted the so-called "Federal Foreclosure Bar" of §4617(j)(3) of the Housing and Economic Recovery Act of 2008 (*"HERA"*) as a defense. See 12 U.S.C. §4617(j)(3). Alternatively, said entities have sought affirmative relief based upon the Federal Foreclosure Bar. Generally speaking, based upon the Federal Foreclosure Bar, FHFA, the GSEs and their purported servicers assert that their claimed security interests were wholly unaffected by the lien foreclosure sales. If true, this effectively renders the properties for which Amici paid valuable consideration valueless to Amici because the debt secured by these security interests nearly always significantly exceeds the value of the real property. As such, Amici have a significant interest in the issue at hand.

SUMMARY OF ARGUMENT

For the past several years, Amici and other purchasers of real properties at homeowners association lien foreclosure sales in Nevada have been embroiled in litigation with purportedly secured deed of trust holders regarding the force and effect of NRS §116.3116, which provides a homeowners association with a super-priority lien on an individual homeowner's property for up to nine months of unpaid homeowners association dues. In a nutshell, the purchasers of these properties have always asserted that homeowners association lien foreclosure sales served to extinguish all junior liens, including a first position deed of trust, pursuant to black letter lien law. Deed of trust holders incorrectly asserted that their security interests survived the HOA lien foreclosure sales.

The conflicting positions of the purchasers and the purportedly secured mortgage holders were the subject of significant dispute for a lengthy period of time. However, on September 18, 2014, the Nevada Supreme Court, in the matter of *SFR Investments Pool I, LLC v. U.S. Bank, N.A.*, 130 Nev. ___, 334 P.3d 408, 2014 WL 4656471 (Adv. Op. No. 75, Sept. 18, 2014), definitively determined that the foreclosure of a homeowners association's super-priority lien does indeed extinguish a first deed of trust. "The SFR decision made winners out of the investors who purchased foreclosure properties in HOA sales and losers of the lenders who gambled on the opposite result, elected not to satisfy the HOA liens to prevent foreclosure, and thus saw their interests wiped out by sales that often yielded a small fraction of the loan balance." *Freedom Mortg. Corp. v. Las Vegas Dev. Grp., LLC*, 2015 U.S. Dist. LEXIS 66249, 1-2 (D. Nev. May 19, 2015) (Dorsey, J.).

Notwithstanding the Nevada Supreme Court's decision in the matter of *SFR Investments*, soon thereafter, FHFA, the GSEs and their purported servicers began arguing that despite the Nevada Supreme Court's decision, deeds of trust that were at any point in time owned by one of the GSEs could not be extinguished pursuant to the Federal Foreclosure

Bar for so long as the GSEs are under the conservatorship of FHFA. As discussed in the petition of SFR Investments Pool 1, LLC (*"SFR"*), FHFA and the GSEs do not distinguish between those deeds of trust that the GSEs actually own and those deeds of trust that the GSEs simply hold in trust for third party entities who are *not* under the conservatorship of FHFA. There is no reason that the Federal Foreclosure Bar should protect these third parties where they or their agents negligently failed to protect their own interests. Neither should the negligent loss of security interests on the part of these third parties have any effect whatsoever on either Fannie or Freddie.

Aside from the foregoing, the documents governing the relationships between Fannie, Freddie and these third parties and their servicers dictated that the third parties protect their interests. Fannie and Freddie both approved of and consented to the super-priority lien pursuant to their own guidelines. Under such circumstances, the subordinate liens should not be immune from extinguishment.

ARGUMENT

I. Fannie and Freddie's Post-HERA Publications Reflect and Support Their Consent to and Support for the Super-Priority Lien

Fannie and Freddie's Servicing Guide and Announcements post-HERA make it very clear that, although they had various contractual safeguards in place to avoid extinguishment, both they and FHFA consented to the super-priority lien and thereby consented to the extinguishment of security interests where the foreclosure of a super-priority lien occurred. Specifically, on June 10, 2011, nearly 3 years *after* the enactment of HERA on July 30, 2008, and over 3 years *before* the Nevada Supreme Court issued its decision in *SFR Investments* on September 14, 2014, Fannie's then-current servicing guide provided as follows:

> **Section 202, Special Assessments (01/31/03)**
> Special assessments may be imposed by special tax, municipal utility, or community facilities districts in some states, by the HOA of a PUD or condo project; or by the co-op corporation of a co-op project. The servicer must maintain accurate records on the status of any special assessments that could become a lien against the property. Generally, the borrower will pay special assessments directly, but if he or she fails to do so, the servicer must advance its own funds to pay them if that is necessary to protect the priority of Fannie Mae's lien. In a few instances, deposits to pay special assessments will be collected as part of the mortgage loan payment.
>
> When the HOA of a PUD or condo project notifies the servicer that a borrower is 60 days' delinquent in the payment of assessments or charges levied by the association, the servicer should advance the funds to pay the

> charges if necessary to protect the priority of Fannie Mae's mortgage lien. If the project is located in a state that has adopted the Uniform Condominium Act (UCA), the Uniform Common Interest Ownership Act (UCIOA), or a similar statute that provides for up to six months of delinquent regular condo assessments to have lien priority over the mortgage lien, Fannie Mae will reimburse the servicer for up to six months of such advances.[2]

On April 11, 2012, Fannie issued Servicing Guide Announcement (SVC-2012-05), which reminded servicers of their duty to satisfy HOA assessment liens and the fact that such liens could indeed obtain priority over their mortgage liens. This Announcement stated in pertinent part as follows:

> Currently, Fannie Mae requires servicers to advance funds when the servicer is notified by an HOA for a PUD or condo project that the borrower is 60 days delinquent in the payment of assessments or charges levied by the association if necessary to protect the priority of Fannie Mae's mortgage lien.
> ...
> For properties located in states providing priority for assessment liens

[2] https://www.fanniemae.com/content/guide/svc061011.pdf (last visited December 20, 2018).

> over a previously-recorded mortgage document, servicers must take steps to protect the priority of the mortgage lien.[3]

On January 14, 2014, Fannie issued Selling Guide Announcement SEL-2014-02, which plainly stated that Fannie supported the six-month super-priority lien in favor of a homeowners association. The Announcement stated in pertinent part as follows:

> Fannie Mae supports maintaining the maximum six-month limited priority lien for common expense assessments (typically knows as homeowner association or HOA fees) that currently applies in most jurisdictions. The six-month period is clear and provides discrete and measurable risk exposure for mortgage lending on units located in condo and PUD projects. The six-month period sufficiently balances the rights and needs of lenders (including mortgage servicers and secondary market investors), HOAs and borrowers.
>
> This policy change will be included in a future version of the Selling Guide. Until that time, the updated version of

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[3] https://www.fanniemae.com/content/announcement/svc1205.pdf (last visited December 20, 2018).

> the applicable Selling Guide topic is as follows:
>
> **B4-2.1-06, Priority of Common Expenses**
> Fannie Mae allows a limited amount of regular common expense assessments (typically known as homeowner or HOA fees) to have priority over Fannie Mae's mortgage lien for mortgage loans secured by units in a condo project or planned unit development (PUD). This applies if the condo or Pud Project is located in a jurisdiction that has enacted
> • the Uniform Condominium Act
> • the Uniform Common Interest Ownership Act, or
> • a similar statue that provides for unpaid assessment to have priority over first mortgage loans.[4]

Notably, Fannie specifically recognized that the super-priority lien constituted a "discrete and measurable risk exposure" to which it was agreeable.

Similarly, shortly thereafter and pursuant to a bulletin dated February 14, 2014, Freddie specifically warned its servicers as follows:

> To maintain the priority of a Freddie Mac Mortgage, we require Servicers to

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[4] https://www.fanniemae.com/content/announcement/sell402.pdf (last visited December 20, 2018).

> pay any condominium, HOA and PUD regular assessments that are assessed prior to the foreclosure sale date that are, or may become, a lien prior to a Freddie Mac Mortgage or that, if not paid, would result in the subordination of Freddie Mac's interest in the Mortgaged Premises.[5]

Pursuant to this bulletin, Freddie acknowledged not only that a homeowners association lien may become "prior to a Freddie Mac Mortgage" but also that the non-payment of such a lien by a servicer "would result in the subordination of Freddie Mac's interest."

It is obvious that FHFA, Fannie and Freddie have always supported (and pursuant to the explicit terms of their own governing contractual documents, consented to) the existence of the super-priority lien and that they have, in fact, required that their servicers take necessary steps to protect their security interests and to "preserve the priority" of their liens by paying to homeowners associations their super-priority assessment amounts. Notably, this all occurred *after* HERA was enacted. Only after the various servicers incompetently failed to comply with the terms of their contracts with Fannie and Freddie did FHFA assert that it had not consented to foreclosure.

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[5] http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/b111402.pdf (last visited December 20, 2018).

II. THE LOSS ASSOCIATED WITH THE EXTINGUISHMENT OF A SECURITIZED MORTGAGE SHOULD BE BORNE BY THE SERVICER THAT CAUSED IT

As discussed above, it is clear that Fannie and Freddie have always approved of the super-priority lien established by NRS Chapter 116. Indeed, Fannie has expressly stated that such a super-priority lien "sufficiently balances the rights and needs of lenders (including mortgage servicers and secondary market investors), HOAs and borrowers." Additionally, most deeds of trust included planned unit development riders that specifically required that borrowers pay HOA assessments and provided the lenders with various rights to pay them and thereafter recoup such payments if the borrower failed to do so. To that end, Fannie and Freddie both explicitly directed and required that servicers pay these liens in order to protect the priority of mortgages. As demonstrated by the vast amount of litigation that has been spawned over the past several years, the servicers woefully failed to perform the conditions placed upon them by Fannie and Freddie.

The vast majority of financial institutions who were servicing loans during the time period leading up to the financial crisis of 2007-2008 failed and refused to satisfy homeowners association liens whether on behalf of Fannie and Freddie or on their own accounts. To the extent that Fannie or Freddie were the owners of these loans and the corresponding deeds of trust, they possess very specific remedies against the servicers for their breach of the servicing guidelines. Fannie and Freddie should be required to seek remedies for the harms allegedly suffered by them from the parties with whom they contracted and which actually caused the harm claimed. This is particularly true given Fannie and Freddie's involvement in the financial crisis. Indeed, a school of thought suggests that Fannie and Freddie actually in large part caused the financial crisis by relaxing underwriting standards, by designing the no down payment products issued by various lenders, by promoting small mortgage brokers, and by maintaining a close relationship with subprime lenders such as Countrywide Home Loans. Joseph Fried, Who Really Drove the Economy into the Ditch? (New York, NY: Algora Publishing, 2012, 16-42, 67-119).

At any rate, it is abundantly clear that after HERA was enacted, both Fannie and Freddie had explicit safeguards in place requiring that their servicers satisfy homeowners association liens in order to protect the priority of their liens. In many, many instances, the servicers failed to do so. When the homeowners associations ultimately foreclosed upon these liens, the deeds of trust recorded against the applicable properties were subordinate and therefore extinguished. While Congress may have saved Fannie and Freddie from their servicers' negligence by virtue of the Federal Foreclosure Bar where Fannie or Freddie actually owned the loans and deeds of trust, such should not be the case where the loans were previously securitized and sold to third parties other than Fannie or Freddie.

The Federal Foreclosure Bar provides 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." 12 U.S.C. §4617(j)(3). As discussed at length in SFR's petition, where loans were securitized and sold by Fannie and Freddie to third parties, such loans no longer constituted property of Fannie or Freddie and, as a result, cannot be deemed to be property of FHFA for purposes of the Federal Foreclosure Bar. Any losses associated with these loans and security interests should be borne by the third parties that actually purchased and owned the loans and who assumed the benefits, risk and responsibility associated with their ownership. Because these third parties and their agents mismanaged their assets and allowed them to be extinguished, they should be solely responsible for the losses. Where the management of the assets was placed in the hands of professional loan servicers, these servicers should ultimately be responsible for their negligent handling of the loans. Fannie and Freddie should not be affected by such losses in any manner whatsoever.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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