IN THE SUPREME COURT OF NEVADA

Case No. 71822

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JPMORGAN CHASE BANK, N.A.,

Appellant,

vs.

SFR INVESTMENTS POOL 1, LLC,

Respondent.

Appeal from the Eighth Judicial District Court, Clark County

The Honorable Jim Crockett, District Judge

District Court Case No. A-13-692202-C

BRIEF OF AMICUS CURIAE FEDERAL HOUSING FINANCE AGENCY IN SUPPORT OF JPMORGAN CHASE BANK, N.A., AND IN SUPPORT OF REVERSAL OF THE JUDGMENT OF THE DISTRICT COURT

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae the Federal Housing Finance Agency ("FHFA") submits this brief in support of Appellant JPMorgan Chase Bank, N.A. ("Chase").[1] The ruling below misconstrues the law of standing in a way that directly, significantly, and adversely affects FHFA and the two entities currently under its conservatorship, Fannie Mae and Freddie Mac (the "Enterprises").

The Enterprises are federally chartered entities Congress created to enhance the nation's home-finance market. They own millions of mortgages, including hundreds of thousands in Nevada. In 2008, Congress enacted the Housing and Economic Recovery Act ("HERA"), which established FHFA as the Enterprises' regulator. *See* 12 U.S.C. § 4511.

HERA further vests FHFA with the power to place the Enterprises into conservatorship under statutorily defined circumstances, mandating that as Conservator, FHFA would succeed to all "rights, titles, powers, and privileges" of the entity in conservatorship with respect to its assets. 12 U.S.C. § 4617(b)(2)(A). On September 6, 2008, FHFA's Director placed the Enterprises into FHFA's conservatorship, where they remain today. When FHFA acts in its capacity as

[1] Under the Nevada Rules of Appellate Procedure, FHFA is permitted, as an agency of the United States, to file this amicus curiae brief without consent of the parties or leave of court, and without a corporate disclosure statement. Nev. R. App. P. 26.1, 29(a).

Conservator, its actions are found to be non-governmental for many substantive purposes.

While this brief addresses FHFA's statutory powers as Conservator, FHFA submits the brief exclusively in its capacity as an agency of the United States. FHFA has an interest in this case in its capacity as an agency of the United States because the trial court decision, if not reversed, will impose significant burdens on the Enterprises in taking advantage of the absolute federal statutory property protection Congress provided to FHFA conservatorships. These protections are crucial to the Enterprises' ability to fulfill their congressionally mandated mission, which is under the purview of FHFA as regulator.

INTRODUCTION

This case involves a Nevada homeowners' association's non-judicial foreclosure sale of real property for unpaid dues owed by the former borrower. Under NRS § 116.3116(2) (the "State Foreclosure Statute"), such HOA sales, if properly conducted, can extinguish all other preexisting lien interests in the underlying property, including deeds of trust. *SFR Investments Pool 1 v. U.S. Bank*, 334 P.3d 408, 419 (Nev. 2014). But the federal statute that created FHFA provides that while an Enterprise is in conservatorship, its "property," including its lien interests, is not "subject to . . . foreclosure." 12 U.S.C. § 4617(j)(3) (the "Federal Foreclosure Bar").

The district court never reached the question whether the Federal Foreclosure Bar preempts the State Foreclosure Statute or whether its protections apply to the deed of trust at issue in this case. Instead, it held that Chase lacks standing to argue that the Federal Foreclosure Bar protected the deed of trust. *See* Order ¶ O. Accordingly, this appeal presents one straightforward issue of law related to the Federal Foreclosure Bar that directly affects FHFA and the conservatorships: may Chase, as Fannie Mae's servicer and record beneficiary of the deed of trust at issue, raise the Federal Foreclosure Bar as a defense to a claim of quiet title by the HOA sale purchaser?

Blackletter law governing standing allows Chase, as Fannie Mae's contractually authorized servicer, to assert the Federal Foreclosure Bar both on Fannie Mae's behalf and to protect Chase's own interest in the deed of trust as servicer—an interest derived from and dependent on Fannie Mae's interest as loan owner. The governing legal principles are not only well established but entirely sensible: Sound policy supports servicers' ability to assert the Federal Foreclosure Bar in litigation. The district court's conclusion that Chase lacks standing is, therefore, wrong as a matter of law.

ARGUMENT

The district court held that Chase lacked standing to invoke the Federal Foreclosure Bar, implying that Fannie Mae or FHFA, or both, must be parties in

order for the federal statute to govern resolution of this case. Order ¶ O. That is incorrect. As a matter of law, any party may assert a governing federal statute to provide the rule of decision in a case properly before a court. As a matter of policy, recognizing servicers' ability to assert the Federal Foreclosure Bar will enhance FHFA's and Fannie Mae's ability to fulfill their important federal missions.

I. Well-Established Principles of Standing Confirm that Enterprise Servicers May Assert the Federal Foreclosure Bar

Contrary to the district court's holding, private litigants are not precluded from raising the Federal Foreclosure Bar to protect their own interests or the interests of those that they are contractually obligated to protect. In its capacity as Fannie Mae's servicer, Chase has its own interest in the property—albeit one derivative of Fannie Mae's interest—both through its contractual servicing relationship with Fannie Mae and as the record beneficiary of the deed of trust. These two interests, separately or together, confer standing on Chase to raise the Federal Foreclosure Bar in this litigation.

While the district court cites no legal authority for its holding, in its briefing below, SFR argued that *Armstrong v. Exceptional Child Center, Inc.*, suggests Chase cannot raise the Federal Foreclosure Bar as a defense to SFR's quiet-title claim. SFR's Opp. to MSJ at 12-13 (citing 135 S. Ct. 1378 (2015)). Undoubtedly,

Armstrong stands for the limited proposition that the Supremacy Clause "does not create a cause of action." *Armstrong*, 135 S. Ct. at 1383.

But no one here argues that it does. Rather, the Federal Foreclosure Bar provides the substantive rule governing claims that everyone agrees are properly before the court. In *Armstrong*, the U.S. Supreme Court held that when deciding a case properly before it, the court *must* apply federal law as the "rule of decision" when "state and federal law clash." *Id.* *Armstrong* expressly acknowledges that "once a case or controversy properly comes before a court, judges are bound by federal law." *Id*. at 1384. In other words, while the Supremacy Clause cannot be a party's ticket into court, it nevertheless requires courts to recognize the preemptive effect of federal law in cases otherwise properly before them.

Indeed, *Armstrong* itself confirms the point by citing *Mutual Pharmaceutical Co. v. Bartlett*, 133 S. Ct. 2466 (2013), with approval. *See Armstrong*, 135 S. Ct. at 1384. In *Bartlett*, a private defendant successfully argued that federal drug-labeling law preempted state tort law, thereby defeating a state-law failure-to-warn claim. If the *Armstrong* Court had adopted the district court's reasoning that private parties cannot assert defenses grounded in preemption—a position that would effectively negate the Supremacy Clause—it would have had to distinguish, limit, or overturn *Bartlett*, not cite it approvingly.

Similarly, this Court recently held that a Nevada statute was preempted because it "frustrate[d] the purpose of" a federal law (the Financial Institutions Reform, Recovery and Enforcement Act of 1989), notwithstanding the fact that the party asserting preemption was a bank, not a federal agency. *Munoz v. Branch Banking & Trust Co.*, 348 P.3d 689 (Nev. 2015). Likewise, Nevada federal courts examining this issue have held that private parties may raise federal preemption arguments. Indeed, one court recently relied on *Armstrong* to hold that a private party had standing to challenge the constitutionality of N.R.S. 116.3116 under the Supremacy Clause. *See Thunder Props., Inc. v. Wood*, No. 3:14-cv-00068-RCJ-WGC, 2015 WL 1926768, at *4 (D. Nev. Apr. 28, 2015) ("an evaluation of whether N.R.S. 116.3116 as applied to federally insured mortgages conflicts with [the Supremacy Clause] is a question of law that may be raised by any party, and not just a government agency" (citing *Armstrong*, 135 S. Ct. at 1883)).

The district court's order also implies that the Federal Foreclosure Bar is somehow exclusive to FHFA or the Enterprises, and therefore cannot be asserted by Fannie Mae's contractually authorized servicer. However, nothing in HERA or the regulations promulgated therein limit the enforcement of the Federal Foreclosure Bar to FHFA or the Enterprises.

Chase's contractual servicing relationship with Fannie Mae and its status as record beneficiary of Fannie Mae's deed of trust provide Chase with authority not

only to litigate on Fannie Mae's behalf, but also with its own interest to defend, thus permitting Chase to invoke the Federal Foreclosure Bar here. *See, e.g.*, Fannie Mae's Single-Family Servicing Guide ("Guide") at A2-1-04, Chapters E-1 & E-1.3-01.[2] The contract provides Chase a pecuniary interest that provides a personal interest. Because this interest would be extinguished along with the deed of trust if SFR were to prevail, the Federal Foreclosure Bar affects Chase's interests as well. *See, e.g.*, *CWCapital Asset Mgmt., LLC v. Chicago Props.*, 610 F.3d 497, 501 (7th Cir. 2010) ("There is no doubt about Article III standing in this case; though the plaintiff may not be an assignee, it has a personal stake in the outcome of the lawsuit because it receives a percentage of the proceeds of a defaulted loan that it services."); *Greer v. O'Dell*, 305 F.3d 1297, 1299 (11th Cir. 2002) ("[A] loan servicer is a 'real party in interest' with standing to conduct, through licensed counsel, the legal affairs of the investor relating to the debt that it

[2] The Guide is publicly available on Fannie Mae's website. An interactive version is available at https://www.fanniemae.com/content/guide/servicing/index.html, and archived prior versions of the Guide are available at that URL by clicking "Show All" in the left hand column of that site. While some sections of the Guide have been amended over the course of Fannie Mae's ownership of the Loan, none of these amendments materially changed the relevant sections. A static, PDF copy of the most recent version of the Guide is available at https://www.fanniemae.com/content/guide/svc021517.pdf. The Court may take judicial notice of the Guide. *See, e.g.*, *Charest v. Fannie Mae*, 9 F. Supp. 3d 114, 118 & n.1 (D. Mass. 2014); *Cirino v. Bank of Am., N.A.*, No. CV 13-8829, 2014 WL 9894432, at *7 (C.D. Cal. Oct. 1, 2014).

services."). Chase, either representing Fannie Mae or defending its own interest, has standing to assert the Federal Foreclosure Bar.[3]

II. Sound Policy Supports Servicers' Ability to Invoke the Federal Foreclosure Bar

As Conservator, FHFA succeeded to all of the Enterprises' rights, titles, and powers over their assets—with the statutory authority to manage, preserve, and conserve those assets as FHFA, in its discretionary business judgment, sees fit. *See* 12 U.S.C. § 4617(b)(2)(A)-(B), (D), (G). FHFA was given broad powers to preserve and protect the property interests of the Enterprises. *See* 12 U.S.C. § 4617(b)(2)(D)(ii).

In furtherance of those interests, FHFA has issued a public statement specifically supporting the practice of the Enterprises' servicers raising the Federal Foreclosure Bar in litigation: "FHFA supports the reliance on Title 12 United States Code Section 4617(j)(3) in litigation by authorized servicers of [Fannie Mae] to preclude the purported involuntary extinguishment of [Fannie Mae]'s interest by an HOA foreclosure sale."[4] Doing so assists FHFA in its role as

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[3] FHFA adopts and incorporates the discussion of the robust law supporting servicer standing in Chase's opening brief. *See* Appellant Br. at 20-23.

[4] FHFA, Statement on Servicer Reliance on the Housing and Economic Recovery Act of 2008 in Foreclosures Involving Homeownership Associations, http://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/Authorized-Enterprise-Servicers-Reliance.pdf.

Conservator in efficiently managing, protecting, and administering its property interests and advancing the policy goals of HERA.

It is also consistent with well-established law and common practice in the mortgage market. Like other large mortgage owners, Fannie Mae and Freddie Mac regularly delegate practical aspects of mortgage management—such as communicating with borrowers and initiating loss-mitigation and default-resolution activity—to contractually authorized servicers such as Chase. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1038-39 (9th Cir. 2011) (describing how loan owners contract with servicers and the servicers' role). The Restatement approach to mortgages—adopted into Nevada law by this Court—also embraces the role of servicers in the modern mortgage market. *See* Restatement (Third) of Prop.: Mortgages § 5.4 cmt. c ("Restatement") (discussing the common practice where investors in the secondary mortgage market designate their servicer to be assignee of the mortgage); *In re Montierth*, 354 P.3d 648, 650-51 (Nev. 2015) (citing Restatement § 5.4).

This is especially important for the Enterprises, which are extraordinary in their size—pursuant to their federal statutory mandate, the Enterprises own millions of loans nationwide. FHFA and the Enterprises can more efficiently fulfill their federal statutory mission of supporting the national secondary mortgage market by contracting with servicers to manage loans. Accordingly, defending

Fannie Mae's legal interests, especially in cases involving individual mortgage loans among the 17 million Fannie Mae owns, is an integral part of the servicers' duties.

Indeed, this role is described at length in the servicing guides that include central terms of the relationship between the Enterprises and their servicers. For example, the Guide provides that:

> In order to ensure that a servicer is able to perform the services and duties incident to the servicing of the mortgage loan, Fannie Mae temporarily gives the servicer possession of the mortgage note whenever the servicer, acting in its own name, represents the interests of Fannie Mae in foreclosure actions, bankruptcy cases, probate proceedings, or other legal proceedings.

Guide at A2-1-04. Similarly, an entire chapter of the Guide, E-1 discusses how servicers should manage default-related and other litigation on behalf of Fannie Mae. Included in the litigation that servicers are authorized—indeed, contractually obligated—to handle to protect Fannie Mae's interests is "non-routine litigation" such as "[a]ny issue involving Fannie Mae's conservatorship." Guide at E-1.3-01. The servicing guides delegate to servicers the authority—indeed, a contractual obligation—to protect the Enterprises' interests in litigation just like this case.

In Nevada alone, several hundred mortgage loans owned by the Enterprises are the subject of litigation in federal and state courts, including many cases where, as here, a purchaser at an HOA sale asserts that the HOA sale extinguished an Enterprise's deed of trust. Precluding servicers from asserting the Federal

Foreclosure Bar to protect the Enterprises' property interests would introduce massive inefficiency. It would require that the Enterprises and FHFA be a party to each case, diverting substantial resources away from fulfilling their statutory roles of increasing the availability of mortgages to managing litigation.

Furthermore, the preemptive effect of the Federal Foreclosure Bar is a straightforward matter of law. In 19 decisions, 6 federal judges have held that the Federal Foreclosure Bar preempts state law to preclude an HOA foreclosure sale from extinguishing a property interest owned by Fannie Mae or Freddie Mac.[5] Its

[5] *See Skylights v. Byron*, 112 F. Supp. 3d 1145 (D. Nev. 2015); *Elmer v. Freddie Mac*, No. 2:14-cv-01999-GMN-NJK, 2015 WL 4393051 (D. Nev. July 14, 2015); *Premier One Holdings, Inc. v. Fannie Mae*, No. 2:14-cv-02128-GMN-NJK, 2015 WL 4276169 (D. Nev. July 14, 2015); *Williston Inv. Grp., LLC v. JP Morgan Chase Bank, NA*, No. 2:14-cv-02038-GMN-PAL, 2015 WL 4276144 (D. Nev. July 14, 2015); *My Glob. Vill., LLC v. Fannie Mae*, No. 2:15-cv-00211-RCJ-NJK, 2015 WL 4523501 (D. Nev. July 27, 2015); *1597 Ashfield Valley Trust v. Fannie Mae*, No. 2:14-cv-02123-JCM, 2015 WL 4581220 (D. Nev. July 28, 2015); *Fannie Mae v. SFR Invs. Pool 1, LLC*, No. 2:14-CV-2046-JAD-PAL, 2015 WL 5723647 (D. Nev. Sept. 29, 2015); *Saticoy Bay, LLC Series 1702 Empire Mine v. Fannie Mae*, No. 2:14-CV-01975-KJD-NJK, 2015 WL 5709484 (D. Nev. Sept. 29, 2015); *Berezovsky v. Moniz*, No. 2:15-cv-01186-GMN-GWF, 2015 WL 8780198 (D. Nev. Dec. 15, 2015); *Opportunity Homes, LLC v. Freddie Mac*, 169 F. Supp. 3d 1073 (D. Nev. 2016); *FHFA v. SFR Investments Pool 1, LLC*, No. 2:15-cv-1338-GMN-CWH, 2016 WL 2350121 (D. Nev. May 2, 2016); *G & P Inv. Enters., LLC v. Wells Fargo Bank*, N.A., No. 2:15-cv-0907-JCM-NJK, 2016 WL 4370055 (D. Nev. Aug. 4, 2016); *Saticoy Bay LLC, Series 2714 Snapdragon v. Flagstar Bank, FSB*, No. 2-13-CV-1589-JCM-VCF, 2016 WL 1064463 (D. Nev. Mar. 17, 2016); *Koronik v. Nationstar Mortg. LLC*, No. 2:13-CV-2060-GMN-GWF, 2016 WL 7493961 (D. Nev. Dec. 30, 2016); *Nevada Sand Castles, LLC v. Green Tree Servicing LLC*, No. 2:15-cv-0588-GMN-VCF, 2017 WL 701361 (D. Nev. Feb. 22, 2017); *Alessi & Koenig, LLC v. Dolan, Jr.*, No. 2:15-cv-00805-JCM-CWH, 2017

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application in any given case depends primarily on a single fact to which servicers have ready access—whether the servicer is acting on behalf of an Enterprise that owns the loan at issue. There is no legal requirement that an Enterprise to be a party to every case in which the Federal Foreclosure Bar's protection is asserted.

Nor would it be sensible to require FHFA to participate directly in every case in which the Federal Foreclosure Bar is raised. To the contrary, allowing servicers to assert the Federal Foreclosure Bar—when, in FHFA's judgment, that is appropriate—advances important policy goals. It conserves federal government resources, as it would be duplicative and wasteful for FHFA to intervene in hundreds of cases to assert substantially the same statutory argument. FHFA has only a few hundred employees. Those employees do not only manage the conservatorships; they are tasked with overseeing the regulation of Fannie Mae, Freddie Mac, and the Federal Home Loan Banks. Servicers, conversely, have dedicated employees and attorneys experienced in efficiently managing litigation involving individual mortgage loans like the one at issue here. Given FHFA's

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WL 773872 (D. Nev. Feb. 27, 2017); *FHFA v. Nevada New Builds, LLC*, No. 2:16-cv-1188-GMN-CWH, 2017 WL 888480 (D. Nev. Mar. 6, 2017); *LN Mgmt. LLC v. Pfeiffer*, No. 2:13-cv-1934-JCM-PAL, 2017 WL 955184 (D. Nev. Mar. 9, 2017); Order, *Vita Bella Homeowners Ass'n v. Fannie Mae*, No. 2:15-cv-0515-JCM-VCF (D. Nev. Mar. 9, 2017) (ECF No. 54); *JP Morgan Chase Bank, N.A. v. Las Vegas Dev't Grp., LLC*, No. 2:15-cv-1701-JCM-VCF, 2017 WL 937722 (D. Nev. Mar. 9, 2017).

limited resources and the substantial number of loans it owns and manages, the reliance on contractually authorized servicers is essential to the efficient achievement of Congress's goals.

CONCLUSION

For these reasons, FHFA supports Chase's request for reversal of the trial court's decision.

DATED: April 26, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to NEFCR 9(b)(d)(e), I certify that on April 26, 2017, a true and correct copy of the BRIEF OF AMICUS CURIAE FEDERAL HOUSING FINANCE AGENCY IN SUPPORT OF JPMORGAN CHASE BANK, N.A., AND IN SUPPORT OF REVERSAL OF THE JUDGMENT OF THE DISTRICT COURT, was transmitted electronically through the Court's e-filing system to the attorney(s) associated with this case. If electronic notice is not indicated through the court's e-filing system, then a true and correct paper copy of the foregoing document was delivered via U.S. Mail.

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ATTORNEY'S CERTIFICATE PURSUANT TO
NEVADA RULE OF APPELLATE PROCEDURE 28.2

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Time New Roman in 14 point font; or

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2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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[ ] Does not exceed _____ pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: April 26, 2017

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