IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WONDER TWINS HOLDINGS, LLC, Plaintiff, v. DANIEL KANTER, *et al.* Defendants.	)	Case No.: 1:19-cv-00026 (KBJ)
FAY SERVICING, LLC; U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR BLUEWATER INVESTMENT TRUST 2018-A, Counter-Plaintiffs, v. WONDER TWINS HOLDINGS, LLC, Counter-Defendant.	)	
FAY SERVICING, LLC; U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR BLUEWATER INVESTMENT TRUST 2018-A, Third-Party Plaintiffs, v. UNIT OWNERS' ASSOCIATION OF THE LANGSTON HUGHES CONDOMINIUM OWNERS' ASSOCIATION, Third-Party Defendant.	)	

***AMICUS CURIAE* BRIEF OF THE COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF PLAINTIFF WONDER TWINS HOLDINGS, LLC AND THIRD-PARTY DEFENDANT UNIT OWNERS' ASSOCIATION OF THE LANGSTON HUGHES CONDOMINIUM OWNERS' ASSOCIATION ON COUNTER-PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

I, the undersigned counsel of record for the Community Associations Institute, certify that to the best of my knowledge and belief, Community Associations Institute is a national, nonprofit research and education organization. It does not have "any parent corporation" and is not a "publicly held corporation that owns 10% or more of its stock." Thus, there is no such corporation to which Rule 26.1 would apply.

These representations are made in order that judges of this Court may determine the need for recusal.

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STATEMENT OF INTEREST

By leave of court, the Community Associations Institute ("CAI") respectfully submits this *amicus curiae* brief in support of Plaintiff Wonder Twins Holdings, LLC and Third-Party Defendant Langston Hughes Condominium Owners' Association with respect to Counter-Plaintiffs New Penn Financial, LLC and U.S. Bank National Association (collectively, the "Banks") Motion for Summary Judgment.[1] CAI urges the court to deny the Banks' Motion for Summary Judgment.

The Federal Housing Finance Agency ("FHFA") was created under the Housing and Economic Recovery Act of 2008 ("HERA"), codified as 12 U.S.C. § 4511 *et seq.*, to act as conservator for the Federal Home Loan Mortgage Corporation ("Freddie Mac") and Fannie Mae and to manage their bailout. The significant question presented here is whether HERA § 4617(j) preempts Washington, D.C. Code § 42-1903.13(a)(2) ("D.C. Code") to block a condominium association's ability to recover unpaid assessments under its limited lien priority as provided for in the D.C. Code.

Beyond the parties here, this case is of substantial importance to homeowners across the country because it affects a community association's ability to recover unpaid assessments through a state statutory limited lien priority.

A. Homeowners.

An estimated 73.5 million Americans—one-fourth of the country's residents—live in one of 350,000 community associations.[2] Condominium and homeowner associations and

[1] Since the time of filing the Motion for Summary Judgment (ECF No. 48), Fay Servicing, LLC has been substituted for New Penn Financial, LLC. *See* ECF No. 60; Feb. 7, 2020 Minute Order. For ease of reference, we will refer to New Penn Financial throughout this brief.

[2] Foundation for Community Association Research ("FCAR"), *2018-2019 National and State Statistical Review for Community Association Data* at 1, CMTY. ASS'N INST.

cooperatives maintain infrastructure and deliver other vital services traditionally performed by local government. These services protect property values, benefiting homeowners, tenants, lenders, FHFA, and Freddie Mac. Without effective and timely tools to collect unpaid assessments, the financial burden would shift to other homeowners and would eventually cause the overall quality of the association and the property values of all parties to decline.

B. Amicus Curiae Community Associations Institute.

As *amicus curiae*, CAI provides the perspective of homeowners and community associations nationwide that is unavailable from the individual parties in this matter.

CAI is a national, nonprofit research and education organization formed in 1973 by the Urban Land Institute, the National Association of Home Builders, and the United States Conference of Mayors to provide effective and objective guidance for the creation and operation of condominium and homeowner associations and cooperatives.

With 40,000 members in 60 chapters, CAI includes homeowners, associations, volunteer board members, managers, attorneys, accountants, bankers, insurers, and other professionals and service providers. CAI submits this brief in keeping with its longstanding interest in promoting understanding regarding the operation and governance of community associations.

SUMMARY OF ARGUMENT

Part I of CAI's brief argues that HERA does not apply because there is no federal interest at stake as a result of Freddie Mac contractually transferring the risk of loss to the loan servicer. In this case, the servicer defaulted on its obligation to preserve the priority of Freddie Mac's

(2018), https://foundation.caionline.org/wp-content/uploads/2019/07/2018-19StatsReview.pdf. All industry data herein is contained in this study, unless specified otherwise.

mortgage loan under Freddie Mac's Single-Family Seller/Servicer Guide ("Guide").[3] The Guide requires the servicer to pay delinquent assessments with priority over Freddie Mac's mortgage and seek reimbursement from Freddie Mac. Failure to comply with this requirement is a default requiring the servicer to indemnify Freddie Mac against any resulting loss. Thus, the loss in this case falls on the servicer under Freddie Mac's own Guide and should not defeat the purpose of the D.C. Code to ensure the flow of assessments that enable an association to provide essential services. Because Freddie Mac need not bear the loss, there is no federal interest in this case and HERA does not apply.

Part II argues alternatively that HERA and the D.C. Code operate in harmony and do not conflict because Freddie Mac has a long history of explicit consent by policy and practice. Freddie Mac's consent is evidenced by its role in drafting the Uniform Condominium Act ("UCA") in the late 1970s, which conceived of the limited lien priority for condominium assessment liens. Freddie Mac then implemented this policy by acknowledging that states would adopt the UCA and requiring loan servicers to take specific actions to protect the priority of Freddie Mac's mortgage liens or suffer the loss. HERA preemption is not necessary to protect Freddie Mac from loss; instead, it is a bailout of the defaulting seller/servicer that failed to comply with its obligations

[3] The Banks acknowledge that the "relationship between New Penn, as the servicer of the Loan, and Freddie Mac, as owner of the Loan, is governed by the Guide" and that the Guide is "a document central to Freddie Mac's relationship with servicers nationwide." Motion for Summary Judgment ("MSJ") 6, ECF No. 48. The Guide has been amended many times. Portions of the Guide applicable to the foreclosure sale in 2017 are attached as Exhibit A-6 to the MSJ (ECF No. 48-3, at pages 22-92). The current version of the Guide is available at https://guide.freddiemac.com/app/guide/segment/Seller%2FServicer%20Relationship?gclid=EAIaIQobChMI9JbW8vuP6QIVCr7ACh0t5wLmEAAYASAAEgKh6fD_BwE&gclsrc=aw.ds. Notably, the relevant provisions demonstrating Freddie Mac's consent to the limited lien priority first appeared in lender bulletins (modifying the earlier versions of the Guide) at least as early as October 6, 2000 (*see* Bulletin 2000-7, attached hereto as **Exhibit 1**) and October 14, 2005 (*see* Bulletin 2005-5, attached hereto as **Exhibit 2**) and remain substantively unchanged in the revised Guide which became effective on May 4, 2020.

under the Guide. Since the two laws operate in harmony without conflict, preemption is not applicable.

Part III describes why this case is of substantial national importance to homeowners. Community associations must have the financial resources necessary to provide essential services to the communities they serve. A decision favoring the Banks in this case would impair the ability of community associations to provide the services that protect property values to the benefit of all parties relying on those services, including homeowners, lenders with loans secured by property, and even local governments. In supporting the limited lien priority, Freddie Mac agreed that associations must have an effective means to recover unpaid assessments. Thus, this court should reject the Banks' attempt to shift the financial burden of unpaid assessments to homeowners already paying their share.

ARGUMENT

I. HERA DOES NOT APPLY BECAUSE FREDDIE MAC TRANSFERRED ALL RISK OF LOSS TO THE LOAN SERVICER SO THAT THERE IS NO FEDERAL INTEREST AT RISK

The Banks, supported by FHFA as amicus[4], argue that HERA § 4617(j) precludes foreclosure of the condominium association's assessment lien because it would deprive Freddie Mac of a federal interest.[5] However, Freddie Mac's Guide explicitly addresses this issue by a contractual transfer of the risk of loss to Counter-Plaintiff New Penn Financial, as servicer. The Guide "consists of Freddie Mac's requirements relating to the purchase, sale and Servicing of

[4] FHFA filed its *amicus* brief ("FHFA Br.") on January 13, 2020, stating that as Conservator of Freddie Mac, it is responsible for the property interests of Freddie Mac and has a direct stake in the outcome of this case. *See* FHFA Br. 1-2, ECF No. 58. Were there truly a federal interest at stake, FHFA should have intervened and been a party in this litigation. It is disingenuous for FHFA to act now as a friend of the court.

[5] *See* MSJ, ECF No. 48; *see also* FHFA Br. 5-6.

Mortgages."[6] Section 1101.2(a)(i) provides that:

> A [Servicer] must service all Mortgages that the [Servicer] . . . has agreed to service for Freddie Mac in accordance with the standards set forth in the [Servicer's] Purchase Documents. All of a [Servicer's] obligations to service Mortgages for Freddie Mac constitute, and must be performed pursuant to the Servicing Contract, and the servicing obligations assumed pursuant to any contract to sell Mortgages to Freddie Mac merged into, and must be performed pursuant to, such Servicing Contract.

The Guide also requires a Servicer to "[c]omply with the Purchase Documents and any instruction, request or requirement issued by Freddie Mac" and "[r]eimburse Freddie Mac for any expenses (including court costs and reasonable attorney fees) incurred by Freddie Mac, at its sole discretion, in remedying or correcting any failure of the Servicer to service a Mortgage or REO in accordance with the requirements of the Purchase Documents."[7] It also specifies certain servicer warranties for which "Freddie Mac will not exercise its remedies, including the issuance of a repurchase request, in connection with the [Servicer's] breaches."[8] However, Section 1301.11(c) specifically excludes the servicer's representation and warranty for the life of the lien that: "The Mortgage must be enforceable as a First Lien . . . and have clear title through foreclosure." Thus, by contract, Freddie Mac transferred the risk of loss—the risk that its mortgage lien could lose its priority to the condominium association's limited priority lien—to the servicer and retained its remedies should the servicer default in that obligation, including its right to indemnity.

In fact, the Guide specifically deals with condominium assessments, acknowledging the possibility of subordination of Freddie Mac's interest:

> The Servicer must obtain bills and make payment for all expenses requiring payment under the Security Instrument. Such expenses may include, but are not limited to, real estate or personal property taxes, special assessments, water bills,

[6] Guide, § 1101.1.

[7] Guide, § 1301.9.

[8] Guide, § 1301.11.

> ground rents and other charges *including condominium, homeowners association (HOA) and Planned Unit Development (PUD) regular assessments, that are, or may become, a First Lien priority on the property or that if not paid would result in the subordination of Freddie Mac's interest in the property.* If the Borrower's Escrow Funds are insufficient to pay these items as they become due during foreclosure, . . . the Servicer must advance funds to pay these expenses, when and to the extent necessary, to protect Freddie Mac's interest in the property.[9]

Furthermore, Section 9701.8 provides that: "Freddie Mac will reimburse the Servicer in most instances where the Servicer must pay expenses that are, or may become, a First Lien priority on the property or that if not paid would result in the termination of Freddie Mac's interest in the property, as provided in the Guide." Section 9701.10(b) states that:

> If applicable State law creates a lien priority over the Mortgage lien for condominium . . . assessments assessed before the foreclosure sale date, then Freddie Mac will reimburse the Servicer for its payment of [such] assessments assessed prior to the foreclosure sale date, in an amount equal to the lesser of the actual amount advanced or [specific provisions for Florida and Connecticut omitted]. For Mortgages secured by property in all other States . . . no more than six months (or any lesser amount provided by State statute).[10]

In this case, the servicer failed to pay the amount of the delinquent assessment that primes the Freddie Mac mortgage lien in accordance with the Guide. Had the servicer done so, it would have protected Freddie Mac's first lien position, been reimbursed by Freddie Mac, and complied with its obligations under the Guide. Instead, it defaulted on its obligations and now is trying to

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[9] Guide, § 9301.27 (emphasis added). Notably, Section 9301.27 was amended, effective May 4, 2020, to expand the obligations of a servicer to include paying utility bills and to clarify applicability to the different forms of community association, but the underlying requirement is unchanged. *Compare* § 9301.27 (effective March 2, 2016), *with* § 9301.27 (effective May 4, 2020). The fact that Freddie Mac can, and has, amended the Guide, and has not substantively amended the provision that acknowledges the potential for unpaid association assessments to result in the subordination of Freddie Mac's interest in the property is further evidence that Freddie Mac understood and explicitly consented to the obligation to pay the six months of fees that the limited priority lien secured.

[10] Both the December 9, 2019 version of Section 9701.10 and the amended version, effective on May 4, 2020, vary depending on the date of the note, but the substance of the provision in both versions is identical other than to clarify the types of community associations included and to accommodate longer priority periods in Florida (12 months) and Connecticut (9 months).

shift the loss to the condominium association which did nothing wrong and needs the assessment income to provide basic services to the residents of the condominium. Upon default by the servicer, Freddie Mac has broad remedies under Section 3601.1 of the Guide, including in pertinent part:

> In addition to any other remedies it may have at law or in equity, for any Mortgage it purchased, Freddie Mac may require the Seller or Servicer to: Indemnify Freddie Mac and hold it harmless for any loss, damage or expense (including court costs and reasonable attorney fees) that it may sustain, and/or . . .
>
> Set off any amounts owed by a Seller/Servicer to Freddie Mac against any other funds that Freddie Mac owes to a Seller/Servicer, such as workout incentives, expense reimbursements or any other amounts.

"Indemnity has been described as the 'obligation resting on one party [the indemnitor] to make good a loss or damage another party [the indemnitee] has incurred.' . . . [I]t may be based on an express contract, wherein one party agrees to indemnify the other."[11] "Where the language of the agreement is clear, plain, and unambiguous, courts have enforced indemnity agreements literally, according to their terms. Thus, if the contract clearly shows that the parties intended that one party indemnify the other in a given situation, the courts will carry out that intention."[12] In this case, the Guide's indemnification requirement transfers risk of loss—the risk that Freddie Mac's mortgage loan would lose its lien priority—from Freddie Mac to the servicer.[13]

The provisions of the Guide ensure that any loss due to the servicer's failure to maintain

[11] 6 Damages in Tort Actions § 50.01, Introduction (2020). Although discussed in the context of a transfer of tort liability, the principles and case law discussed are equally applicable to the indemnity and transfer of financial responsibility to the seller/servicer contained in the Guide.

[12] *Id.* § 50.02, Contractual Indemnity.

[13] "The transfer of risk from insured to insurer is effected by means of the contract between the parties . . . and . . . is complete at the time the contract is entered." *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 130 (1982), *cited with approval in United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 503 (1993) (noting that the test for transferring risk presumes "actual performance of an insurance contract").

the first lien position of Freddie Mac's mortgage is borne by the servicer and not Freddie Mac. Thus, there is no loss of a federal interest and HERA does not apply. It would be bad public policy to allow the servicer to shift this loss to innocent homeowners because of a failure by Freddie Mac to enforce its own contractual right.

II. HERA DOES NOT PREEMPT THE D.C. CODE UNDER THE SUPREMACY CLAUSE BECAUSE FEDERAL AND STATE LAW OPERATE IN HARMONY WITHOUT CONFLICT

The Banks and FHFA argue that HERA § 4617(j) and D.C. Code § 42-1903.13(a)(2) are in conflict and, therefore, the Supremacy Clause requires that HERA preempts.[14] They argue that HERA requires consent to association foreclosure sales, and FHFA refuses such consent.[15] While FHFA's authority to assert such claims is uncertain,[16] its argument fails because Freddie Mac has explicitly consented to the limited priority association lien (1) as a matter of policy by its role in drafting and supporting the UCA and (2) by its long-standing practice of requiring loan servicers to protect the first lien priority of its mortgage loans under the Guide. Further, FHFA's preemption theory violates the due process clause of the Constitution resulting in an unconstitutional taking, and this court must avoid upholding a constitutional violation.

Presumption Against Preemption. A preemption analysis begins with the judicial assumption that the state's historic police powers are not to be superseded by federal law,

[14] MSJ 13-15, ECF No. 48; FHFA Br. 5, ECF No. 58.

[15] MSJ 22-23; FHFA Br. 13-14, 19.

[16] The Ninth Circuit, in a case involving the False Claims Act, recently held, "Fannie Mae and Freddie Mac are private companies, albeit companies sponsored or chartered by the federal government." *United States ex rel. Adams v. Aurora Loan Services, Inc., et al.,* 813 F.3d 1259, 1260 (9th Cir. 2016). The court further stated, "Nor does [FHFA's] conservatorship transform Fannie Mae and Freddie Mac into federal instrumentalities. We agree that the FHFA has 'all the rights, titles, powers and privileges of' Fannie Mae and Freddie Mac . . . . However, this places FHFA in the shoes of Fannie Mae and Freddie Mac, and gives the FHFA *their* rights and duties, not the other way around." *Id*. at 1261 (citations omitted).

particularly in an area traditionally regulated by state law such as real property; in short, FHFA must overcome a presumption against preemption.[17] The cases relied on by FHFA are of limited use because they do not apply this presumption but focus narrowly on the "consent" language of HERA.[18]

FHFA asserts that "while Freddie Mac is in conservatorship of the FHFA, its 'property,' including its lien interests, is not 'subject to . . . foreclosure' without FHFA's consent."[19] Seizing upon a single sentence in the 9th Circuit's decision in *Berezovsky v. Moniz*, 869 F.3d 923 (9th Cir. 2017), FHFA goes on to argue that it must have "affirmatively consented."[20] However, the term *affirmative* does not appear in HERA. FHFA and the Banks add *affirmative* because they would like this Court to exclude consideration of implied consent, contending that HERA creates "express preemption" because it "specifically names and precludes actions on property that typically take effect by operation of law," thus creating protections that "clearly manifest its intent to displace state law."[21]

Alternatively, FHFA argues "conflict preemption," contending HERA would still preempt because "state law is naturally preempted to the extent of any conflict with a federal statute."[22] The Banks argue that "conflict preemption occurs 'when it is impossible for a private party to comply with both state and federal law or when state law stands as an obstacle to the

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[17] *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992).

[18] *See* FHFA Br. 5 (*citing Skylights LLC v. Byron,* 112 F. Supp. 3d 1145 (D. Nev. 2015)).

[19] FHFA Br. 3 (quoting HERA); *see also* MSJ 4, 11, 22-23.

[20] FHFA Br. 19; *see also* MSJ 11 ("Here, it is Plaintiff's burden to show that FHFA affirmatively consented.").

[21] FHFA Br. 5 (citing *Skylights*, 112 F. Supp. 3d at 1153); *see also* MSJ 12 (citing same).

[22] *See* FHFA Br. 6 (quoting *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 372 (2000)); *see also* MSJ 13-14 (quoting same).

accomplishment and execution of the full purposes and objectives of Congress.'"[23]

FHFA and Freddie Mac Consent. FHFA's insistence on consent overlooks the fact that FHFA has stepped into the shoes of Freddie Mac, including its policy and practices. Freddie Mac explicitly consented to the limited lien priority by its role in drafting the UCA and protected itself against loss by contractually transferring the risk to the servicer in its Guide. Thus, Freddie Mac accepted that states would adopt the limited lien priority and required servicers to take specific measures to protect the first lien priority of its mortgage loans. Further, Freddie Mac (and its conservator) (1) failed to amend its Guide regarding association lien priority; (2) failed to require consent to foreclosure; and (3) failed to establish a procedure for associations to seek consent.[24]

As discussed below, preemption is not applicable because Freddie Mac and FHFA have consented; thus, the federal and state laws operate in harmony and without conflict. The Banks' problem is that they failed to pay the amount necessary to maintain the priority of Freddie Mac's lien. FHFA's problem is that Freddie Mac failed to enforce its own Guide. This court should not allow the Banks and FHFA to shift the loss to innocent homeowners.

A. Freddie Mac consented to the limited lien priority by virtue of its role in drafting the Uniform Condominium Act.

Analyzing whether preemption applies here must include consideration of the long-standing policy of Freddie Mac, dating back to the late 1970s, embracing and consenting to the limited lien priority by virtue of its active participation in drafting the UCA. When FHFA became conservator in 2008, it stepped into the shoes of Freddie Mac, including its public policy of consent, upon which all parties have relied for four decades. The Banks and FHFA prefer to ignore

[23] MSJ 14 (citing *PLIVA, Inc, v. Mensing,* 564 U.S. 604, 633 (2011)).

[24] *See supra* Part I (discussing continuing consent in the various revisions to the pertinent sections of the Guide).

this reality in arguing for the financial benefit of the Banks.

After the UCA became available in 1980, twenty-four jurisdictions adopted its § 3-116 limited lien priority provision or a variation.[25] All of these provisions, including paragraph (2) of D.C. Code § 42-1903.13(a), modeled on the UCA, strike an equitable balance between a condominium association's ability to collect delinquent assessments and a lender's interest in preserving its first lien on an individual condominium unit.[26]

1. Freddie Mac Embraced the Limited Lien Priority's Purpose. Freddie Mac and Fannie Mae were active participants as advisors to the Uniform Law Commission ("ULC") drafting committee that produced the UCA in 1977 and adopted it in 1980.[27] The UCA drafters, with Freddie Mac among the advisory group, described the purpose of the limited lien priority:

> To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. . . . [A]s to prior first mortgages, the association's lien does have priority for 6 months' assessments based on the periodic budget. . . . [T]he 6 months' priority for the

[25] Alabama, Alaska, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Washington, West Virginia, and Puerto Rico. *See* FCAR, *Community Association Fact Book for 2018: Comprehensive Association Data and Information* (2019), at 27 (Sec. 8.2), 40 (Sec. 12.3), https://foundation.caionline.org/wp-content/uploads/2019/07/FB_Narrative_2018.pdf.

[26] *See* UCA § 3-116 cmt. 2. *See also* Report of the Joint Editorial Board for Uniform Real Property Acts, *The Six-Month "Limited Priority Lien" for Association Fees Under the Uniform Common Interest Ownership Act*, at 1 (June 1, 2013) [hereinafter "JEB Report"], https://www.caionline.org/Advocacy/StateAdvocacy/PriorityIssues/PriorityLien/Documents/UCIOA_Lien_Priority_Report.pdf. The ULC established the Joint Editorial Board for Uniform Real Property Acts ("JEB") consisting of members from the ULC, the ABA Section of Real Property, Probate and Trust Law, and the American College of Real Estate Lawyers, responsible for monitoring ULC's uniform real property acts. *SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.2d 408, 413 (Nev. 2014).

[27] Other advisors to the drafting committee included the U.S. Department of Housing and Urban Development, the Veterans Administration, the Mortgage Bankers Association of America, the American Bankers Association, the American Land Title Association, the National Association of Home Builders and the National Association of Realtors®. *See* ULC, Official Comments to UCA (1980).

> assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of mortgage lenders. As a practical matter, mortgage lenders will most likely pay the 6 months' assessments . . . rather than having the association foreclose on the unit.[28]

Freddie Mac clearly acknowledged the benefit of the limited lien priority in providing for it in the Guide. Yet, it wasn't until 2015—seven years after its creation—that FHFA issued a statement suggesting that HERA §4617(j) requires affirmative consent and contending it has never given (and will never give) consent.[29] But FHFA's statement ignores the fact that Fannie Mae and Freddie Mac, both of which are under FHFA's conservatorship, actively participated in the development of the UCA. Based on their direct role in preparing the UCA, both Freddie Mac and Fannie Mae were intimately familiar with—and supported and consented to—limited lien priority for unpaid condominium association assessments.

2. Limited Lien Priority Protects Lenders. Henry Judy, who was General Counsel for Freddie Mac and actively participated in drafting the UCA, published a detailed analysis in 1978, recognizing that an association's ability to collect assessments affects not only the homeowners but also all other mortgage lenders having loans in the community.[30] Each homeowner in a condominium is obligated to pay assessments to the association, which relies on full and prompt payment to operate, maintain, repair and replace, and insure the common property.[31] This approach recognizes that the association is an involuntary creditor required to advance services in

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[28] UCA § 3-116 cmt. 2.

[29] FHFA, Statement on HOA Super-Priority Liens Foreclosures (April 21, 2015) [hereinafter "2015 FHFA Statement"], *available at* https://perma.cc/V8AB-KVPE. *See also* FHFA Br. 14 n.4.

[30] Henry L. Judy & Robert A. Wittie, *Uniform Condominium Act: Selected Key Issues*, 13 REAL PROP., PROB. & TR. J. 437, 475 (1978). James Murray, then General Counsel and subsequently chief executive officer for Fannie Mae, also participated in the drafting of the UCA, including the lien priority. Mr. Judy's successor, Maude Mater, also participated as an advisor.

[31] JEB Report, *supra* note 26, at 1.

return for a promise of future payments, and the owners' default in these payments could impair the association's financial stability and its practical ability to provide services.[32]

The drafters of the UCA limited lien priority struck a functional balance between protecting the association's financial integrity and the legitimate expectations of first mortgage lenders:

> Fundamental to that belief was the assumption that, if an association took action to enforce its lien and the unit/parcel owner failed to cure its assessment default, the first mortgage lender would promptly institute foreclosure proceedings and pay the prior six months of unpaid assessments to the association to satisfy the limited priority lien – thus permitting the mortgage lender to preserve its first lien position and deliver clear title in its foreclosure sale.[33]

Thus, Freddie Mac and mortgage lenders have a lengthy history of explicit consent to the statutory lien priority in the D.C. Code and in states with such statutes. Freddie Mac used its Guide to protect itself by requiring the servicer to maintain the lien priority of Freddie Mac loans.

B. Freddie Mac consented to the limited lien priority through its practice in the Guide requiring loan servicers to protect its assets.

The preemption analysis must also consider how Freddie Mac implemented its policy of consent to the limited lien priority in its Guide which specifies how sellers and loan servicers must preserve the first lien priority of Freddie Mac's mortgages.

1. Seller/Servicer Guide Consistent with State Law. Freddie Mac's Guide acknowledges that states have adopted limited lien priority statutes and provides specific steps to protect the priority of Freddie Mac's assets. The Guide evidences Freddie Mac's decades-long practice of consent that satisfies HERA and harmonizes federal and state laws. The issue here is not conflicting laws, but rather that Freddie Mac failed to enforce its contract and require the servicer to protect the first lien priority of its loans by complying with the Guide. Rather than pursuing

[32] *Id.*

[33] *Id.* at 4.

claims against the loan servicer, FHFA and Freddie Mac now contend that HERA and state law are in conflict, seeking to impose the loss on a condominium association and its homeowners.

The Guide requires loan servicers to avoid an association foreclosure that would extinguish a Freddie Mac mortgage by paying the delinquent assessment. As described in Part I above, the servicer is required to pay pre-foreclosure assessments included in an association's six-month lien priority and be reimbursed by Freddie Mac.[34] The servicer is authorized to recover any payments made to associations from Freddie Mac.[35] The sole risk to Freddie Mac is the six months' portion of assessments for which it agreed to reimburse the servicer.

2. Seller/Servicer Guide Never Amended. In its twelve years as conservator, FHFA has never instructed Freddie Mac to change such directives to preclude association foreclosure sales despite multiple revisions of the pertinent sections of the Guide.[36] Despite decades of consent to the limited lien priority by virtue of the provisions of the Freddie Mac Guide, neither FHFA nor Freddie Mac revised the Guide to indicate that HERA precluded the lien priority of a condominium

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[34] *See supra* pp. 4-7.

[35] Guide, § 9701.10: "If applicable State law creates a lien priority over the Mortgage lien for condominium . . . assessments assessed before the foreclosure sale date or the settlement date of the deed-in-lieu of foreclosure, then Freddie Mac will reimburse the Servicer for its payment of regular condominium . . . assessments assessed prior to the foreclosure sale date or the settlement date of the deed-in-lieu of foreclosure, in an amount no greater than the lesser of:

- The actual amount in regular assessments advanced by the Servicer
- The maximum amount in regular assessments that, per the project declaration or bylaws, would take priority over the Mortgage
- The maximum amount in regular assessments that, per applicable State statute, would take priority over the Mortgage."

[36] With respect to notice of sales (*see* FHFA Br. 21 n.5), because mortgages are registered on the private Mortgage Electronic Registration Systems, Inc., rather than recording in the public records, lenders are in a better position to request notice of association foreclosure on a property than the association is to locate the lender. Brief of Amicus Curiae the Legal Services Center of Harvard Law School and Law Professors in Support of the Appellee, *County of Montgomery Recorder v. MERSCorp Inc, et al.,* No. 14-4315 (3rd Cir. filed Mar. 23, 2015).

association's assessment lien.

Notably, the 2015 FHFA Statement "confirm[ing]" that it has not consented, and will not consent in the future, followed a 2014 decision by the Nevada Supreme Court that the state's statutory limited lien priority created a "true" lien.[37] But as evidenced above, FHFA's statement did not "confirm" anything at all—rather, it reflected a dramatic departure from decades of Freddie Mac's policy and practice as reflected in the Guide. The fact that neither Freddie Mac, nor FHFA, ever took this position or amended the Guide to reflect it until after a judicial decision upholding association lien priority demonstrates that the 2015 FHFA statement was not a "confirmation" of a prior position, but a self-serving declaration made years after HERA's enactment in order to avoid decades of Freddie Mac's policy and practice of consenting to lien priority in an attempt to avoid similar rulings in other states.[38]

Nevada is not alone in holding that the association's lien is a "true" lien. The Rhode Island Supreme Court held a condominium association's statutory lien priority extinguishes a prior-recorded first mortgage upon foreclosure by the association.[39] The Court concluded that "[r]egardless of whether or not lenders choose to employ these safeguards, the bottom line is that 'statutory principles of priority, not the monetary value of the respective liens, control.'"[40] Thus, a foreclosure of the association's lien extinguishes the otherwise first-mortgage lien.[41]

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[37] *See SFR Invs. Pool 1,* 334 P.3d at 413 ("the superpriority piece of the HOA lien carries true priority over a first deed of trust").

[38] Members of the United States Congress described FHFA's statement as "reflect[ing] a new interpretation of HERA" and "a significant shift in policy several years after the enactment of HERA." *See* Letter from Several U.S. Senators and Members of Congress to FHFA 3 (May 12, 2016), attached hereto as **Exhibit 3** and *available at* https://perma.cc/SN8B-85DL.

[39] *Twenty Eleven, LLC v. Michael J. Botelho, et al*., 127 A.3d 897 (R.I. 2015).

[40] *Id.* at 904.

[41] *Id. See also Drummer Boy Homes Ass'n, Inc. v. Britton*, 47 N.E.3d 400, 406-410 (Mass. 2016); *Chase Plaza Condo. Ass'n Inc. v. J.P. Morgan Chase Bank, N.A.*, 98 A.3d 166, 172-177 (D.C. Ct.

3. Property Law is a State Domain. Property law traditionally has been a domain for the states, and the state courts repeatedly have demonstrated an understanding of the important role of the lien priority for community associations in the market. For example, in Massachusetts, prior to amending its lien priority statute in 1992, "the first mortgagee had little incentive to initiate a foreclosure action against the unit owner because its security interest was not in jeopardy."[42] The court noted that Massachusetts law as amended provides that: "when a condominium association initiates a lien enforcement action, it can obtain the so-called 'super-priority' status over a first mortgagee for six months' worth of common expenses."[43]

Accordingly, after four decades of policy and practice, Freddie Mac and FHFA cannot argue that the state statutory limited lien priority now "involuntarily extinguish[es]" an FHFA property interest.[44] Through Freddie Mac's long-standing practice in the Guide, it has exhibited consent to the priority of the six-month portion of the association's lien—consent that flows to FHFA as conservator.[45] HERA does not preempt state law because the two laws operate in harmony and without conflict.

C. Requiring affirmative consent before an association may foreclose on its limited lien priority would constitute a taking of property without due process for homeowners and their associations.

FHFA contends that no association may foreclose a limited lien priority without FHFA's

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App. 2014); *Summerhill Village Homeowners Ass'n v. Roughley*, 289 P.3d 645, 647-648 (Wash. Ct. App. 2012).

[42] *Drummer Boy*, 47 N.E.3d at 407.

[43] *Id.*

[44] FHFA Br. 5-6, ECF No. 58.

[45] R. Wilson Freyermuth & Dale A. Whitman, *Can Associations Have Priority over Fannie or Freddie?*, ABA PROB. & PROP., July/August 2015, at 30 ("FHFA's consistent conduct as conservator for the GSEs has manifested FHFA's effective consent to state law lien priority and enforcement rules validating association lien foreclosure sales[.]").

affirmative consent but provides no process to request approval nor criteria for consideration of an application.[46] Practically speaking and as discussed more fully in Section III.B.2 below, this would force associations to wait for the servicer to foreclose. Freddie Mac's own Guide acknowledges that foreclosures may take more than two years in many states, presuming the lender initiates foreclosure at the earliest possible moment.[47] In fact, many lenders defer foreclosure, avoiding payment of association assessments and putting the burden on the non-defaulting homeowners. Taking away the association's ability to collect these unpaid funds is a significant taking without any due process.

Without due process, HERA preemption invites a colorable takings claim. The court should favor an interpretation that avoids creating a constitutional issue rather than one that raises a potential constitutional violation.[48] Therefore, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the court will construe the statute to avoid such problems, unless such construction is plainly contrary to the intent of Congress."[49] Moreover, as noted above, in this case if Freddie Mac enforces its contract with loan servicers, the federal and state laws operate in harmony and, thus, avoid a constitutional takings violation.

Despite the impact on homeowners, FHFA argues that an association cannot foreclose on its limited lien without affirmative consent (which it refuses to grant), forcing associations to wait for the mortgagee to foreclose, which may take years. While it insists on consent, FHFA fails to

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[46] *See* 2015 FHFA Statement, *supra* note 29.

[47] *See* Freddie Mac's Bulletin 2016-5 (Servicing) Guide Updates (March 9, 2016), http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll1605.pdf.

[48] *See U.S. v. Espy,* 989 F. Supp. 17, 39 (D.D.C. 1997) ("[T]he court must construe statutes to avoid constitutional infirmities whenever possible." (citation omitted)).

[49] *Saadeh v. Farouki*, 107 F.3d 52, 58 (D.C. Cir. 1997).

provide a process for an association to seek consent, and states that it will never consent anyway.[50]

Freddie Mac has operated for decades under its Guide acknowledging state limited lien priority laws and specifying steps to protect its lien priority. FHFA now insists that consent is required but has failed to amend the Guide to provide a procedure for an association to seek consent and has failed to set criteria under which such an application would be considered. Without such procedures, preemption by HERA would constitute a taking of property without due process.

FHFA mistakenly relies on the statute governing the Federal Deposit Insurance Corporation ("FDIC") to argue that the Supremacy Clause allows HERA to preempt state law.[51] FHFA overlooks important distinctions between FDIC and FHFA. First, federal courts apply state law to matters of lien priority applicable to FDIC, including an "involuntary lien" on an FDIC property.[52] FDIC is protected against state and local tax liens, not private party liens such as community association liens. In *McFarland*, the protected interest was an asset of the FDIC, a governmental entity.[53] Here, other than the six months' assessments for which Freddie Mac would reimburse the lender, the interest being protected is not a public interest but is either the profits or losses of private lenders (if Freddie Mac made the loan servicer bear the loss for violating Freddie Mac's Guide) or non-governmental entities (if Freddie Mac bore the loss). Thus, the public policy for FDIC does not apply here to protect Freddie Mac or, by extension, FHFA. Second, FDIC provides a process for affected parties to seek consent. By contrast, FHFA has only said that "it will not consent in the future." Jurisprudence relating to FDIC does not support FHFA's argument that HERA preempts state law under the Supremacy Clause.

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[50] *See* 2015 FHFA Statement, *supra* note 29.

[51] FHFA Br. 9-10 & n.2.

[52] *Federal Deposit Ins. Corp. v. McFarland*, 243 F.3d 876, 885 (5th Cir. 2001).

[53] *Id.* at 886-88.

As noted in Section II.B.2 above, FHFA issued a statement in April 2015 that it would not consent to an association foreclosure. In reaction, several U.S. Senators and Congressional representatives wrote FHFA describing the impact on associations of the "no consent" policy and asked for a delay until the FHFA solicited and considered public comments.[54] FHFA rejected the request.[55] In short, not only did FHFA fail to provide an application process, but it flatly refused to seek public comments on the subject. There would be no due process.

Further, preemption by HERA would create undue and unnecessary financial hardships on homeowners—increased assessments, reduced maintenance and loss of property value, with no procedure to avoid or minimize the consequences. Such preemption would constitute a taking of homeowner property rights and interests without due process.

The due process claim was raised in *Berezovsky*, but the court declined to consider it for lack of standing because it was raised by the party who acquired the condominium unit at the association's foreclosure sale, rather than the association itself.[56] Here, the association is a party and has standing.

Applying the Supremacy Clause should avoid creating a constitutional issue rather than raise a potential constitutional violation. Here, the federal and state laws operate in harmony when Freddie Mac enforces its contractual remedies in the Guide, thereby avoiding a due process claim.

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[54] *See* **Exhibit 3**, Congressional Letter to FHFA; *see also*, Ausra Gaigalaite, *Priority of Condominium Associations' Assessment Liens vis-à-vis Mortgages: Navigating in the Super-Priority Lien Jurisdictions*, 40 SEATTLE U. LAW REV. 841, 862 (2017).

[55] *See* Response Letter from FHFA Dir. Melvin A. Watt (June 12, 2016), attached as **Exhibit 4**.

[56] *Berezovsky*, 869 F.3d at 927 n.2 ("Berezovsky's counsel conceded his due process argument seeks to vindicate the association's property rights, not his own, and so he lacks standing to raise this argument.").

III. COMMUNITY ASSOCIATIONS PROVIDE ESSENTIAL SERVICES THAT BENEFIT HOMEOWNERS AND LENDERS AND REQUIRE FINANCIAL STABILITY WITH EFFECTIVE REMEDIES TO RECOVER UNPAID ASSESSMENTS

Public policy requires rejecting HERA preemption because it would have severe impacts on homeowners across the country, the financial stability of their community associations and homeownership itself. Associations deliver three core services: governance, community, and business[57] , many of which are traditionally furnished by cities. As local governments rely on real estate taxes to provide public services backed by a senior lien position, the UCA's limited lien priority recognizes association reliance on assessments backed by a limited but senior lien position. In many jurisdictions local governments require that developers create community associations to provide these services because the local government does not have the resources to do so.[58]

A. Community Associations Are Self-Governing Organizations That Provide Essential Services Benefiting Homeowners and Lenders.

Condominiums, planned communities and cooperatives are real estate developments created under state law and recorded documents and operated by a "community association."[59] The owners have a mandatory obligation to pay assessments to pay for essential services.[60]

1. Services and Functions. Associations furnish insurance and maintain infrastructure and buildings, including streets, snow and ice removal, storm water management, trash collection,

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[57] FCAR, *Community Association Fact Book for 2018: Comprehensive Association Data and Information* (2019), at 11 (Sec. 5.1), https://foundation.caionline.org/wp-content/uploads/2019/07/FB_Narrative_2018.pdf.

[58] Land costs, new concepts in planning and zoning, economies of scale for developers, and the costs for local government to extend infrastructure are economic drivers contributing to the growth of community associations. *See generally,* Donald R. Stabile, Community Associations: The Emergence and Acceptance of a Quiet Innovation in Housing, at 9-25 (Greenwood Press 2000).

[59] Wayne S. Hyatt, Condominium and Homeowner Association Practice: Community Association Law, at 19 (ALI-ABA 3rd ed., 2000).

[60] *Id.* at 7-8.

public lighting, green space and recreational amenities.[61] Some associations provide heating and cooling of homes and even sewer service. These services protect property values and benefit all interested parties, including lenders as well as homeowners and local governments.

2. Growth of Community Associations. The community association form of homeownership has grown rapidly: in 1970, the nation had 10,000 associations with 700,000 housing units and 2.1 million residents. By comparison, in 2019 these numbers exploded to an estimated 350,000 associations with 27 million housing units and 73.5 million residents—at least one in every four Americans.[62] Association operations add billions of dollars to the economy.[63] This growth is attributable to important benefits provided by community associations:

- Maintain and repair infrastructure and recreation facilities historically provided by local governments, thus easing the financial burden of municipalities.
- Offer economies of scale in construction and operation and provide lower-cost entry housing for many homebuyers.
- In addition to infrastructure noted above, *condominium* associations repair and replace common elements, i.e., roofs and other components and systems.
- Maintain home values that protect lenders' security with tax benefits for local government.

3. Societal Value of Homeownership. Community associations foster homeownership by promoting a sense of community and encouraging community investment. They also build social capital by incentivizing households to improve the quality of their communities which is capitalized into home values. Longer tenure encourages investments in the community.

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[61] FCAR, *Large-Scale Association Survey Results*, CMTY. ASS'N INST. (June 2016), https://foundation.caionline.org/wp-content/uploads/2017/06/large_scale_survey.pdf.

[62] *Id*. Homeowner associations account for approximately 54-60%, condominiums for 38-42%, and cooperatives for 2-4%.

[63] FCAR estimates that in 2018, $95.6 billion in assessments were collected from homeowners; associations were responsible for $6.28 trillion in home values, $27.3 billion was contributed to reserves for repair and replacement of streets, roofs and other components, and a value of $2.29 billion in services was provided by volunteer directors and committee members.

Homeowners will consume benefits over a longer time, have a greater sense of community by higher participation in local elections and solving local problems, are more likely to invest in local amenities such as gardening and upkeep of their property, and develop trust and shared activities with neighbors.[64]

B. Homeowners Fund Associations and Rely on Effective and Timely Means to Collect Unpaid Assessments to Operate with Financial Stability.

Associations foster vibrant communities that enhance the quality of residential life for millions of homeowners. A fundamental objective is to protect and preserve property values, which benefits Freddie Mac as the holder of mortgage loans secured by the property.

Recognizing that associations are involuntary creditors providing vital services in return for a promise to pay, the governing documents impose a mandatory obligation to pay assessments, secured by a continuing lien on the property. Since the association cannot stop or interrupt its services, it has authority to collect the debt by equitable foreclosure of its assessment lien.

Homeowners rely on the association having effective and timely means to collect unpaid assessments to ensure financial stability—analogous to property taxes, which are essential to local government services and which enjoy the most senior lien position. The UCA drafters determined that a functional balancing of association and lender interests called for a limited lien priority and determined, in 1980, that six months of regular assessments was sufficient for the lender to undertake prompt foreclosure proceedings and pay the six months of assessments to satisfy the limited lien priority and preserve the lender's first lien position.

> The drafters further understood – based on circumstances then existing – that the first mortgage lender's foreclosure proceeding would likely be completed within six months (particularly in jurisdictions with nonjudicial foreclosure) or a

[64] Edward L. Glaeser & Denise DiPasquale, *Incentives and Social Capital: Are Homeowners Better Citizens?* (Coase-Sandor Institute for Law & Economics, Working Paper No. 54, 1998), *available at* https://chicagounbound.uchicago.edu/law_and_economics/260/.

> reasonable period of time thereafter, minimizing the period during which unpaid assessments would accrue for which the association would not have first lien priority.[65]

Today, however, Freddie Mac provides for long delays by its "foreclosure timelines," i.e., the time a servicer may take to proceed to a sale. In 2015, Freddie Mac extended the number of days for its foreclosure timelines in 34 states. A sample follows[66]:

	Freddie Mac's Old Timeline (Nov. 1, 2014)	Freddie Mac's New Timeline (Aug. 1, 2015)
Connecticut	750 days	810 days
Delaware	780 days	960 days
Florida	810 days	930 days
Hawaii	840 days	1,080 days
Maine	690 days	990 days
Maryland	660 days	720 days
Nevada	690 days	900 days
Oregon	600 days	1,080 days
Rhode Island	660 days	840 days
Vermont	810 days	900 days
Washington	660 days	720 days

During this long delay, the unit owner is either unable or unwilling to pay, and the mortgagee is not legally obligated to pay prior to acquiring title.[67] An association's budget deficit would continue to grow. As the JEB notes, "If it takes 24 months for a mortgagee to complete a foreclosure, but the association has a first priority lien for only the immediately preceding six months of unpaid assessments, the consequences for the association can be devastating."[68]

HERA preemption would leave homeowners and their associations with a mere "payment priority" in which they could not recover the amount unless and until the lender conducts a

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[65] JEB Report, *supra* note 26, at 4.

[66] *See* Freddie Mac's Bulletin 2016-5 (Servicing) Guide Updates (March 9, 2016), http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll1605.pdf.

[67] JEB Report at 4.

[68] *Id.*

foreclosure sale and sufficient equity exists in the property. A growing shortfall created by Freddie Mac's lengthy foreclosure timelines would result in either (1) declining maintenance and repair, thus reducing property values and compromising the collateral of all lenders in the community or (2) increased assessments for the other owners who already are paying their fair share, which would also affect their ability to repay mortgage loans to lenders in the community.[69] Freddie Mac's own General Counsel wrote on this very issue in 1978:

> [I]t is clear that if defaults in payment of assessments are serious enough to result in reassessments against non-defaulting unit owners, serious, adverse consequences may be experienced by the non-defaulting unit owners, by their creditors, and by the community at large. If such consequences are to be avoided, some protection in the nature of a lien priority must be provided.[70]

If the "true" lien becomes a mere "payment priority" and "the mortgage lien . . . enjoyed priority over the association lien, the association might never collect on past due assessments and might be at significant risk with respect to future assessments—especially if, as became increasingly common, banks delayed in foreclosing . . . . "[71] Association foreclosure sales would be futile because potential buyers would lose interest in purchasing property at such sales if the unit remains subject to the first mortgage or deed of trust, even though the lender slept on its rights and failed to pay the modest amount of the association's limited priority lien.

In short, HERA preemption would create a subsidy for the Banks, providing a second bailout at the expense of innocent homeowners in associations. With no duty to pay assessments, lenders would enjoy a "free ride" on the backs of homeowners. "This benefit arguably constitutes unjust enrichment of the mortgage lender, particularly to the extent that the lenders enjoy this

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[69] JEB Report at 1, 4. *See also* Freyermuth & Whitman, *supra* note 45 at 30.

[70] Judy & Wittie, *supra* note 30, at 483.

[71] Stewart E. Sterk, *Maintaining Condominiums and Homeowner Associations: How Much of a Priority?*, 93 Ind. L.J. 807, 809 (2018).

benefit by virtue of a conscious decision to delay instituting or prosecuting a foreclosure."[72]

CONCLUSION

No federal interest is involved here because Freddie Mac transferred the risk of loss to the servicer through specific protective measures in its Guide. The Guide reflects the importance of associations being able to collect assessments essential to delivering services to homeowners—which also benefits lenders. The servicer's failure to perform under the Guide, and Freddie Mac's failure to enforce the Guide, are not an excuse to shift this burden to innocent homeowners.

Moreover, HERA and the D.C. Code are not in conflict because HERA consent is met by Freddie Mac's long-standing policy and explicit Guide provisions protecting its mortgage lien priority. Despite multiple amendments to the Guide since FHFA became conservator in 2008, these provisions have not been altered, affirming that the limited lien priority is acceptable and that servicers must protect Freddie Mac's lien priority or indemnify Freddie Mac for any loss.[73]

Public policy dictates that HERA should not preempt state limited lien priority statutes because it would transfer financial burdens to homeowners. The limited lien priority is vital to an association's ability to furnish essential services. HERA preemption would raise serious due process issues and convert the "true" lien priority to a mere "payment priority," forcing homeowners to pay more while enduring long delays in bank foreclosures. This subsidy would yield the unintended result of another bailout for the Banks, this time on the backs of homeowners.

For all the above reasons, *amicus curiae* CAI respectfully urges this Court to deny the Banks' Motion for Summary Judgment as a matter of law.

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[72] JEB Report at 6; *see generally* Andrea Boyack, *Community Collateral Damage: A Question of Priorities*, 43 Loy. U. Chi. L. Rev. 53 (2011).

[73] Guide, §§ 9301.27, 9701.8, 9701.10; *see also supra* note 2.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2020, a true and correct copy of the foregoing was filed through the Court's ECF system and electronically served upon all parties of record.

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