Case Number 20-2026

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JUDITH A. SISTI

Plaintiff – Appellee

v.

FEDERAL HOUSING FINANCE AGENCY
FEDERAL HOME LOAN MORTGAGE CORPORATION
NATIONSTAR MORTGAGE, LLC

Defendants – Appellants

On Appeal from the United States District Court for the District of Rhode Island
Case No. 1:17-cv-00005
The Honorable John J. McConnell, Jr.

BRIEF OF AMICIS CURIAE NATIONAL CONSUMER LAW CENTER IN SUPPORT OF APPELLEE, FOR AFFIRMANCE

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INTEREST OF AMICIS CURIAE[1]

The National Consumer Law Center, Inc. ("NCLC") is a Massachusetts non-profit organization specializing in consumer law, with historical emphasis on consumer credit. NCLC is recognized nationally as an expert in consumer credit issues, including mortgage lending. It has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts for over forty years. NCLC is the author of numerous manuals and reports detailing mortgage lending and foreclosure practices and regularly advises and issues recommendations to the Consumer Financial Protection Bureau on these issues.

The amicus brief of NCLC is desirable because of its extensive expertise in the area of foreclosure practices by loan owners and mortgage servicers in state and federal venues. The matters asserted by NCLC are relevant to the disposition of this case because they provide the court with information about foreclosure practices and procedure which will assist the court in understanding the practical

[1] No party's counsel authored this brief in whole or in part, or contributed money intended to fund its preparation or submission. No entity or person, other than NCLC or its counsel, contributed money that was intended to fund preparing or submitting this brief. All parties have consented to the filing of this amicus brief.

ramifications of its decision in this matter and which underscores why the District Court's decision is proper and should be affirmed.

This brief supports the position of the Appellee and argues for the affirmance of the decision of the Rhode Island District Court.

All parties have consented to the filing of this amicus brief.

SUMMARY OF ARGUMENT

Every state has provision for some form of judicial foreclosure process. That process is mandated as the exclusive means for home foreclosures in many states. In certain states, lenders can choose to foreclose either through a non-judicial or judicial process, with Rhode Island being one. Courts have routinely held that, when a governmental entity is the foreclosing party, it must foreclose using the state's judicial procedures. This outcome is consistent with the due process standards applicable to governmental units. As an agency of the United States, the Federal Housing Finance Agency ("FHFA") is bound by these due process standards. These standards apply to FHFA as a federal agency and to the Government Sponsored Enterprise Freddie Mac acting at the direction of FHFA.

Almost all of the federal instrumentalities owning mortgage loans employ independent contractor servicers to perform the servicing functions on those loans. When those servicers, acting as agents for the federal loan owners commit violations of statutes, regulations or mortgage contract provisions in their servicing

activities, the *Merrill* doctrine deprives homeowners of the rights that they would have under common law agency principles to assert claims and defenses against the federal loan owners in foreclosure actions. Thus, the judicial process for foreclosures, utilized by federal loan owners to meet their due process obligations, provides a necessary level of judicial oversight to protect homeowners from being victimized in federal foreclosures by the wrongful conduct and misdeeds of the mortgage servicers.

The District Court holding that Freddie Mac, operating under the twelve years long conservatorship of FHFA, is a government instrumentality for Constitutional due process requirements is correct on its merits. The fact that they enjoy the protections of the *Merrill* doctrine accorded to all other federal agencies compels the conclusion that they must not have any lesser obligation to afford homeowners due process in foreclosures than those applied to other government entities when they foreclose loans that they own.

ARGUMENT

I. WHEN GOVERNMENTAL INSTRUMENTALITIES FORECLOSE, HOMEOWNERS ARE DEPRIVED OF CRTICIAL PROTECTIONS AGAINST MORTGAGE SERVICER MISCONDUCT DUE TO THE MERRILL DOCTRINE.

One might ask why it is fair or appropriate to require Freddie Mac and Fannie Mae[2] to utilize Rhode Island's judicial foreclosure process when private loan owners may employ its non-judicial process. This section of NCLC's amicus brief answers that question, explaining: (1) how the *Merrill* doctrine prevents aggrieved homeowners from asserting claims against Freddie Mac for the wrongful conduct of its mortgage servicers; (2) why application of the *Merrill* doctrine leaves homeowners with no protection or reasonable remedy when a Freddie Mac foreclosure is wrongfully conducted by its mortgage servicer; and (3) why placing upon the Freddie Mac the duty to utilize that state's judicial foreclosure process, is fair and appropriate public policy.

A. Governmental Instrumentalities, Including Freddie Mac, are Immune, under the *Merrill* Doctrine, from Homeowner Claims for Wrongful Servicer Conduct in Foreclosures.

[2] Often, Fannie Mae and Freddie Mac are referred to as Government Sponsored Entities, or GSEs. The focus of this amicus brief is upon Freddie Mac as one of the Appellants, but the arguments of this brief are equally applicable to Fannie Mae as one of the appellants in the companion case of *Boss v. Federal Housing Finance Authority, et al.,* Case No. 20-2025.

Normally, where a mortgage servicer, acting as agent for a non-governmental mortgage loan owner, breaches the terms of the mortgage contract or violates statutory or regulatory requirements in is servicing of mortgage, such breaches will result in the homeowner having claims for breach of contract damages or other claims against the loan owner. *Dupuis v. Federal Home Loan Mortgage Corporation*, 879 F.Supp. 139, 144 (D. Me. 1995) ("I conclude therefore that, under the *Restatement (Second) of Agency,* [the servicer] must be considered a general agent and that [the loan owner], as an undisclosed principal is subject to liability on agency law principles for [the servicer's breaches of contract.")

Those common law agency principles do not apply to foreclosures by governmental instrumentalities. Less than 18 months ago, this court paraphrased the Supreme Court's delineation of what has become known as the "*Merrill* doctrine" in *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947) as follows:

> The Court reasoned that "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." Id. at 384, 68 S.Ct. 1. From this seed, a principle sprouted: the federal government cannot be bound by the unauthorized acts of its agents.

Faiella v. Federal National Mortgage Corporation, 928 F.3d 141, 147 (1st Cir. 2019). Explaining further, this court said:

> Thus, the Merrill doctrine is designed, in part, to ensure

appropriate protection of the public fisc.

> We say "in part" because the doctrine also rests solidly "upon considerations of sovereign immunity and constitutional grounds — the potential for interference with the separation of governmental powers between the legislative and executive." Phelps v. Fed. Emerg. Mgmt. Agency, 785 F.2d 13, 17 (1st Cir. 1986). These foundational considerations are reinforced by public policy considerations. See Mendrala v. Crown Mortg. Co., 955 F.2d 1132, 1140 (7th Cir. 1992). All of these concerns come into especially bold relief where, as here, unauthorized acts by a private contractor could potentially bind the federal government.

Id. Finding that Freddie Mac's status as a governmental instrumentality does not differ from that of Fannie Mae, and adopting the Seventh Circuit holding in *Mendrala v. Crown Mortg. Co.*, 955 F.2d 1132, 1140 (7th Cir. 1992) that Freddie Mac was protected by the *Merrill* doctrine, this court held that "Fannie Mae is a federal instrumentality for purposes of the *Merrill* doctrine and thus cannot be held liable for the unauthorized acts of its agents." *Fialla,* 928 F.3d. at 149.

The Maine District Court decision in *Dupuis v. Federal Home Loan Mortgage Corporation*, 879 F.Supp. 139, 144 (D. Me. 1995) starkly illustrates the injustices to which homeowners can be exposed when the *Merrill* doctrine is applied. In *Dupuis*, Freddie Mac's mortgage servicer committed five egregious acts which the court found to be "clear breaches of contract, including a failure to disburse over $30,000 of loan proceeds to the borrower, failures to pay taxes and insurance out of the loan escrow account and other violations. *Id.* at 142. The court held that the servicer's actions "were all unauthorized and improper under the

[Freddie Mac] Sellers' and Servicers' Guide.' *Id.* After that string of failures, the Freddie Mac servicer went bankrupt, leaving Dupuis, with no recourse against the servicer. Dupuis sued Freddie Mac for damages, and it counterclaimed for the full $156,000 face amount of the note, even though the bankrupt servicer had breached its duty to advance of $30,000 of loan proceeds. The court agreed that "it would be unfair for FHLMC to have the benefit of [the servicer's] servicing of the note and mortgage without making FHLMC responsible for [the servicer's] excesses and failures," *id.* at 144, yet the court was forced to hold that "[d]espite FHLMC's liability at common law (federal or Maine), I conclude that the *Merrill* doctrine ultimately provides a complete defense to FHLMC or all of Dupuis' contract claims." *Id.* Thus, the court rejected Dupuis's claims for damages and ordered a show cause hearing as to "why judgment should not be entered on the FHLMC counterclaim [for the sums due on the note]" *Id.*at 147.

B. In Non-Judicial Foreclosures, Homeowners Have No Reasonable Protection against Mortgage Servicer Misconduct When the Merrill Doctrine Shields Freddie Mac From Liability for That Misconduct.

1. All Actions of Freddie Mac in the Foreclosure Process Are Conducted by Its Mortgage Servicers.

Freddie Mac services none of the mortgage loans it purchases from lenders. Rather, as *Dupuis* illustrates, it employs mortgage servicers to perform all mortgage servicing activities. The servicers, such as Nationstar Mortgage LLC in

this case, are contractually obligated to perform their servicing activities in accordance with the Freddie Mac's Single Family Servicing Guide[3] which requires the servicers to conduct foreclosures in accordance with statutory requirements and the contractual requirements of the mortgage. As Freddie Mac states in Section 8101.10 of the Guide, it considers its servicers to be independent contractors[4], which means that the Freddie Mac does not supervise or direct "the manner or means," *Dykes v. DePuy, Inc.,* 140 F.3d 31, 37-38 (1st Cir. 1998) (quoting *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 323-324, 112 S.Ct. 1344, 1348-49) (1992), by which the servicers handle individual foreclosure cases.

In any foreclosure of a Freddie Mac or Fannie Mae owned mortgage, it is the mortgage servicer which actually conducts each step in the foreclosure process. If a court finds that a non-judicial foreclosure was wrongfully conducted, it will be the servicer's failures to comply with statutory and mortgage requirements which constitute the wrongful conduct. For example, in an action by a homeowner for

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[3] Freddie Mac publishes its servicing guide at https://guide.freddiemac.com/app/guide/?gclid=CjwKCAiAxp-ABhALEiwAXm6IyQ-SiaMaKY_1l_SDEsiv09pTJdrDnpOSJg03etEM7FIEjKEkY1IZIhoCG7EQAvD_BwE&gclsrc=aw.ds

[4] See Freddie Mac Single Family Servicer Guide, Section 8101.10 (found at https://guide.freddiemac.com/app/guide/section/8101.10) stating "the Servicer contracts with Freddie Mac as an independent contractor to service Mortgages for Freddie Mac. The Servicer is not Freddie Mac's agent or assignee."

wrongful foreclosure of a Freddie Mac-owned loan, if the homeowner proves that she was not sent the written notice of default and right to cure required by the terms of the mortgage contract, it is the misconduct of the servicer in acting outside of the scope of its authority under the Freddie Mac Servicing Guide which will be the cause of the homeowner losing her or his home due to a wrongful foreclosure.

2. The Burdens of Proof in Judicial and Non-Judicial Foreclosures Are Diametrically Opposite.

There is a key distinction between the judicial and non-judicial methods of foreclosure which is of critical relevance. In a non-judicial foreclosure, Freddie Mac simply asserts its right to foreclose in a notice letter sent to the homeowner, states its intent to conduct a foreclosure sale in public newspaper advertisements, and then conducts a public sale of the home. If there is anything unlawful about that foreclosure effort, the burden is upon the homeowner to sue to stop the sale. The burden will be upon the homeowner to prove the unlawfulness of the foreclosure sale. Contrast this to a judicial foreclosure process where it is the loan owner which initiates the judicial foreclosure proceeding and must prove its standing to foreclose, that is has complied with all statutory and contractual conditions precedent, and that its business records properly establish the amount owed on the mortgage. Judicial foreclosures offer homeowners protections not available in a non-judicial foreclosure, such as a readily available forum to dispute

the mortgagee's claims. *Obduskey v. McCarthy & Holthus LLP,* 139 S Ct 1029, 1034, 203 L.Ed.2d 390 (2019).

3. If Freddie Mac is Permitted to Conduct Non-Judicial Foreclosures, Homeowners Are Left with No Reasonable Recourse for the Misconduct of Freddie Mac's Servicers.

Consideration of these issues might raise the question of why it is not enough to leave homeowners who are aggrieved by servicer misconduct to assert their remedies against the mortgage servicers who commit the misconduct in the foreclosure cases. The obstacles to the assertion of such claims are well illustrated in a recent decision from the Alabama District Court where the court rejected a homeowner's damages claims against Nationstar Mortgage, LLC where the central allegations were that Nationstar, as servicer refused to credit properly tendered loan payoff amounts, added unjustified fees to the loan account, wrongfully reported negative information to credit reporting agencies and wrongfully initiated foreclosure. *Nelson v. Nationstar Mortgage, LLC*, __F.Supp.__, 2020 WL 7029896 (S.D. Ala. 2020). The court rejected the homeowner's breach of contract claims because there was no privity between Nationstar and the homeowner. *Id.* at •4. It also rejected the homeowner's claim asserting Nationstar's failure to exercise reasonable care, holding that Alabama law does not recognize such claims against servicers. Then, relying upon this court's *Merrill* doctrine decision in *Faiella*, the court rejected all of the homeowner's claims against Fannie Mae. The homeowner

was left with no remedy against either Nationstar or Fannie Mae for servicer misconduct about which there was no factual dispute.

Numerous similar decisions from courts across the country have left homeowners with no recourse against loan owners where their servicers have committed multiple acts of servicing misconduct. For example:

- "Courts have consistently held that there is no contractual privity between a borrower and a loan servicer with respect to a note and mortgage, and therefore the borrower cannot prevail against the servicer on a breach of contract claim.") *In re Jackson*, 622 B.R. 321, 332 (D. Mass. 2020) (citations omitted).
- Likewise, tort claims for servicer negligence or wanton misconduct are have been held to be generally unavailable in homeowner suits against servicers. *Alfridi v. Residential Credit Solutions*, 189 F.Supp.3d 193, 199 (D. Mass. 2016); *Blake v. Bank of America, N.A.*, 845 F.Supp.2d 1206 (M.D. Ala. 2012); *Milton v. U.S. Bank National Association,* 508 Fed. Appx. 326 (5th Cir. 2013)
- Similarly, homeowners have been held to have no breach of fiduciary duty claims against servicers because "[t]he mere existence of a relationship between a mortgage servicer and borrower, without more, 'does not give rise

to a fiduciary duty to the latter.'" *Dyer v. Capital One, N.A.* __F.Supp.3d__, 2020 WL 6263647 (D. Mass. 2020) (citations omitted).

- Where the servicer's misconduct might violate the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p, (the "FDCPA") a homeowner will have no claim against the servicer under the FDCPA if the servicer was servicing the loan before the loan default occurred, 15 U.S.C. § 1692(a)(6)(F), or if the suit is not commenced within one year of the misconduct 15 U.S.C. § 1692k(d).
- Even if a cause of action can be found which may provide relief to a wronged homeowner, that homeowner may be left with no meaningful recourse where a servicer becomes insolvent or goes out of business. *Dupuis v. Federal Home Loan Mortgage Corporation*, 879 F.Supp. 139, 144 (D. Me. 1995).[5]

Under common law agency principles, in a foreclosure by a non-governmental loan owner, a homeowner having little to no recourse against the loan owner's servicing agent for its misconduct, will have full recourse against the agent's principle, the loan owner, which will be liable for its agent's misconduct.

[5] The FHFA, represented by the same counsel representing it in this appeal, filed an amicus brief in *U.S. Bank Trust, N.A. v. Jones*, 925 F.3d 534 (1st Cir. 2019), in which it argued on pages 10-11 of its brief that the GSEs will often find it nearly impossible to find witnesses from servicers in its foreclosure cases "because the servicers no longer exist."

However, if Freddie Mac, with its *Merrill* doctrine protections, is permitted to conduct non-judicial foreclosures in Rhode Island, homeowners there are left with no sufficient remedy for the servicers' misconduct.

II. JUDICIAL FORECLOSURE IS A STANDARD NATIONWIDE PROCESS.

As the Supreme Court recently noted, "[e]very State provides some form of *judicial* foreclosure: a legal action initiated by a creditor in which a court supervises sale of the property and distribution of the proceeds." *Obduskey v. McCarthy & Holthus LLP,* 139 S Ct 1029, 1034 (2019) (emphasis in original). Rhode Island, like all states, has a judicial foreclosure procedure. R.I. Gen. Laws § § 34-27-1. Freddie Mac could have followed Rhode Island's judicial procedures when it foreclosed on the Sisti home. Lenders are required to follow a judicial process to foreclose on a home in some of the nation's most populous states, including New York, Florida, Illinois, and Pennsylvania. 2 B. Dunaway, Law of Distressed Real Estate, Appendix 19A (Nov. 2020).

Judicial foreclosures are the default procedure available in every American jurisdiction. Approximately half the states allow non-judicial foreclosure as a supplemental option for lenders. 2 Dunaway § 17:1 and Appendix 17A (listing states where state laws permit lenders to foreclosure through non-judicial procedures); *Obduskey*, *supra* 139 S. Ct. at 1034 ("About half the States also

provide for what is known as *nonjudicial* foreclosure, where notice to the parties and sale of the property occur outside court supervision."). The New England states reflect the national division, with non-judicial foreclosures permitted in New Hampshire, Massachusetts, and Rhode Island, while residential mortgages can only be foreclosed through a judicial process in Connecticut, Maine, and Vermont. Rhode Island's non-judicial foreclosure procedures are codified at R.I. Gen. Laws § 34-11-22.

III. GOVERNMENTAL MORTGAGE OWNERS ARE ROUNTINELY REQUIRED TO COMPLY WITH CONSTITUIONAL DUE PROCESS REQUIREMENTS WHEN CONDUCTING FORECLOSURES.

Because non-judicial foreclosures often provide inferior procedural protections for homeowners, courts have routinely held that when the Government forecloses, it may not use a state's non-judicial option. *Anderson v. Alaska Housing Finance Corp*., 462 P.3d 19 (Alaska 2020); (foreclosure of Farmers Home Admin (FmHA) mortgage subject to due process constraints); *Ricker v. United States*, 417 F. Supp. 133 (D. Me. 1976), order supplemented 434 F.Supp. 1251 (D. Me. 1976).

In an early decision applying due process standards to the Government's conduct of a non-judicial foreclosure the Maine district court held that the USDA's foreclosure of a family farm was void. *Ricker,* 417 F. Supp. at 140. In foreclosing on the Rickers, the Government had followed what was then a permissible form of

non-judicial foreclosure under state law. According to the court, before the Government could take the borrowers' home, it must provide them with the opportunity for a hearing where they could challenge the Government's decision to foreclose. *Id.* at 139. The court rejected the Government's argument that, by signing loan documents allowing the Government to foreclosure in accordance with state law, the borrowers had waived their due process rights. *Id.*

In 2020, the Alaska Supreme Court applied the same due process standards in *Anderson v. Alaska Housing Finance Corp.*, 462 P.3d 19 (Alaska 2020). The foreclosing entity in *Anderson* was the Alaska Housing Finance Corporation, a state-controlled public corporation that enjoyed the state's sovereign immunity. *Id.* at 23. The Housing Finance Corporation followed the terms of the mortgage and state law in conducting a non-judicial foreclosure sale of the Andersons' home. According to the court, this action violated the Anderson's due process rights. *Id.* at 32-33. The court held that the homeowners had not waived their rights to notice and a hearing before a foreclosure sale. *Id.* at 29. The ability to bring an affirmative lawsuit to stop a sale did not excuse the due process violation. *Id.* at 31-32. The court rejected the Housing Corporation's contention that it was not a government actor subject to due process requirements. The legislature created the Housing Corporation to further specific government objectives and the agency was subject

to government control, including to governmental appointment of its board members. *Id.* at 27.

IV. JUST AS CONSITUTIONAL REQUIREMENTS PROTECT FREDDIE MAC UNDER THE *MERRILL* DOCTRINE, SO TOO MUST CONSTITUTIONAL REQUIREMENTS PROHIBIT FREDDIE MAC FROM UTILIZING RHODE ISLAND'S NON-JUDICIAL FORECLOSURE PROCESS.

FHFA insists that it must be treated like any private party enforcing rights under a contact. According to FHFA, "Mr. Sisti neither alleges nor could allege that FHFA, in connection with the foreclosure at issue, exercised any power or authority beyond the private contractual rights it inherited as Freddie Mac's successor." (FHFA Brief p. 18). This is simply incorrect. The "private contractual rights" under the mortgage did not mandate that Freddie Mac foreclose on a home in Rhode Island by non-judicial means. FHFA, not the mortgage contract, prohibited Freddie Mac from using Rhode Island's judicial foreclosure procedures. FHFA ordered Freddie Mac to follow the non-judicial option for all Rhode Island foreclosures. FHFA imposed this obligation as part of its authority to regulate Freddie Mac. 12 U.S.C. § 4511 (FHFA Director "shall have general regulatory authority over each regulated entity . . . and shall exercise such general regulatory authority, including such duties and authorities set forth under section 4513 of this title, to ensure that the purposes of this Act, the authorizing statutes, and any other applicable law are carried out."). When the foreclosure of the Sisti home too place,

it was the Government that told Freddie Mac how it must exercise its "private contractual rights."

Under FHFA's view of its conservatorship powers, it is not clear whether it thinks it is subject to any authority at all. No one disputes that HERA gave FHFA significant powers. Under HERA, FHFA and by extension, Freddie Mac and Fannie Mae, are shielded from all regulatory oversight. These entities claim that no federal, state, or local authority can regulate their activities if they say they are carrying them out under HERA's conservatorship function. *Federal Housing Finance Agency v. City of Chicago,* 962 F.Supp.2d 1044, 1159-60 (N.D. Ill. 2013) (HERA's immunity bars municipality from charging fees, assessing penalties against Fannie Mae when it violates municipal registration ordinance designed to combat urban blight); *Leon County Fla. v. Federal Housing Finance Agency,* 700 F.3d 1273 (11th Cir. 2012) (HERA precludes judicial review of FHFA actions in implementing policy barring borrowers' participation in energy efficiency loan program). If courts, federal agencies, states, and localities cannot implement any redress against FHFA involving activities FHFA decides to call the exercise of its conservatorship functions, FHFA's routine use of the conservatorship label must be scrutinized carefully. As the court in *Leon County* noted:

> We recognize that when a directive is issued by the FHFA that applies across the board to an entire category of cases, it contains an aspect of rulemaking and should therefore be carefully examined to assure that the FHFA is not simply attempting to avoid its

> responsibility to give notice and provide an opportunity for public comment. The FHFA cannot evade judicial scrutiny by merely labeling its actions with a conservator stamp. Congress did not intend that the nature of the FHFA's actions would be determined based upon the FHFA's self-declarations because the distinction between regulator and conservator would be one without a meaning or effect.

Id. at 1278. FHFA's directive to *all* mortgage services of *all* Freddie Mac loans to employ non-judicial foreclosures instead of judicial foreclosures in *all* jurisdictions where they can do so was a national directive applicable to the broadest possible category of cases. FHFA cannot hide behind the claim of an impregnable conservatorship immunity to avoid the important constitutional implications inherent in this agency action.

The Fifth Amendment to the Constitution mandates that "no person shall be…deprived of…property, without due process of law." The due process clauses of the Fifth and Fourteenth Amendments protect "persons" exposed to a taking of property by the government—the amendments do not provide exceptions for government agencies such as FHFA and Freddie Mac. When a government agency forecloses as the owner of a mortgage loan, it is protected by the *Merrill* doctrine, but it must provide Constitutional due process to the homeowner with the opportunity for notice and hearing which can be done by utilizing states' judicial foreclosure process. Those judicial processes appropriately impose upon the governmental agencies the burden to prove their standing to foreclose, their

handling of the mortgage in accordance with statutory and contractual requirements, and their compliance state foreclosure statutes. While the *Merrill* doctrine bars homeowners from asserting defenses and counterclaims for damages against the federal agencies arising out of the misconduct of the agencies' servicers, homeowners at least do have the protections of a judicial process to ensure that the agencies' foreclosures are proper and properly conducted. Notwithstanding the *Merrill* doctrine, in a judicial foreclosure the borrower can prevail in a defense that asserts non-compliance with the terms of the mortgage contract and applicable statutes.

While private owners may utilize non-judicial foreclosure methods, in those cases there is no *Merrill* doctrine obstruction to the rights of homeowners to assert claims against those private loan owners when their servicers' misconduct themselves either preceding or during the foreclosure process.

NCLC recognizes "the fact that an entity is deemed not to be a federal instrumentality for a particular purpose does not signify that the entity should not be deemed to be a federal instrumentality for some other purposes." *Faiella v. Federal National Mortgage Association*, 928, F.3d 141, 148 (1st Cir. 2019). However, it is irrational, illogical and unjust to treat the federal instrumentality status of Freddie MAC and FHFA differently under the circumstances presented here. In foreclosures by federally related entities protected by the *Merrill* doctrine,

it is unjust to affected homeowners to treat FHFA and Freddie Mac differently from the other protected federal agencies. Due process cannot mean that such disparate treatment of homeowners exposed to Freddie Mac foreclosures is tolerable. Thus, the treatment of FHFA and Freddie Mac as federal instrumentalities for *Merrill* doctrine purposes means that they must be deemed to be federal instrumentalities for due process purposes.

CONCLUSION

The decision of the Rhode Island District Court should be affirmed.

DATED: January 22, 2021

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because (1) the brief contains 4645 words excluding parts of the brief exempted by Fed. R. App. P. 32(f): and (2) the brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14-point font proportionally spaced using Times New Roman font.

DATED: January 22, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2021, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I further certify that the following counsel for Appellant and Appellee are registered ECF filers and that they will be served by the CM/ECF System:

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