IN THE SUPREME COURT OF THE STATE OF NEVADA

FEDERAL NATIONAL MORTGAGE ASSOCIATION; AND GRANDBRIDGE REAL ESTATE CAPITAL LLC, Appellants, vs. WESTLAND LIBERTY VILLAGE, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND WESTLAND VILLAGE SQUARE, LLC, A NEVADA LIMITED LIABILITY COMPANY, Respondents.	Case No. 82174

APPEAL
From the Eighth Judicial District Court, Department IV,
The Honorable Kerry Earley, District Court Judge
Case No. A-20-819412-C

FEDERAL HOUSING FINANCE AGENCY'S REPLY IN SUPPORT OF MOTION TO INTERVENE

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INTRODUCTION

The Court should grant FHFA's Motion to Intervene.[1] In their opposition, Defendants refuse to engage on substance, contending only that the "Motion is fatally defective on procedural grounds," purportedly because "there is no statute, rule or case in the State of Nevada that supports such a request." Resp'ts' Opp'n to FHFA's Mot. to Intervene ("Opp.") at 1 & n.2. That is not correct. While intervention into a pending interlocutory appeal may be rare, the Court has ample authority to allow it, and nothing in Nevada law prevents the Court from granting FHFA's Motion here.

For purposes of the Motion, Defendants have waived all issues other than the Court's authority to allow any intervention into any appellate proceeding, but the Court may rest assured that intervention is substantively warranted in this unusual and important case. A federal statute provides that "no court may take any action to restrain or affect the exercise of powers or functions of FHFA as conservator." 12 U.S.C. § 4617(f). Yet that is exactly what the district court has purported to do here. The preliminary injunction applies not only to Fannie Mae—a direct party to the action—but to "persons exercising or having control over the affairs of Fannie Mae." By express federal law, 12 U.S.C. § 4617(b)(2)(A)(i), FHFA is presently the holder of all of Fannie Mae's rights, titles, powers, privileges and assets—"exercising or having control over the affairs of Fannie Mae." Congress vested FHFA with the power to "operate [Fannie Mae] with all the powers of [its] shareholders, …

[1] Capitalized terms are defined in FHFA's Motion to Intervene.

directors, … and officers," as well as to "perform all [of Fannie Mae's] functions in [Fannie Mae's] name," 12 U.S.C. § 4617(b)(2)(B)(i), (iii). Congress also vested the Conservator with the power to "preserve and conserve [Fannie Mae's] assets and property"—to which FHFA immediately succeeded by operation of federal law, *id.* at § 4617(b)(2)(A)(i)—and to "collect all obligations due [Fannie Mae]." *Id.* at § 4617(b)(2)(B)(ii), (iv). By attempting to restrict Fannie Mae's and all other Enjoined Parties' abilities to enforce the loans at issue, as well as to manage and collect on other unenumerated assets, the injunction undeniably prevents FHFA from exercising its statutory power to control Fannie Mae.. The injunction therefore purports to unlawfully restrain the Conservator's powers and functions in addition to the physical assets in Fannie Mae's conservatorship estate, thereby giving the Conservator an interest that fully supports intervention under NRCP 24—the governing standard—or any other plausible standard. As such, FHFA has an undeniable unique interest herein that renders its intervention meritorious and appropriate.

That FHFA's petition for a writ of prohibition remains pending is irrelevant. Defendants have yet to respond to the petition, and may well oppose it on the ground that this appeal is the proper vehicle to assess the preliminary injunction. Regardless, absent intervention, FHFA will remain an "enjoined" outsider to a continuing action that directly affects its interests and its statutory powers and protections as Conservator, as well as the Fannie Mae conservatorship estate to which FHFA holds all rights, titles, powers, privileges, and assets. *See* 12 U.S.C.

§ 4617(b)(2)(A)(i). Such an outcome would, among other things, present serious due process concerns.

FHFA respectfully submits that the Court should allow FHFA to intervene in this appeal.

ARGUMENT

I. The Court Has Ample Authority To Allow Intervention

NRS 12.130 provides that "[b]efore the trial, any person may intervene in an action or proceeding" if they have a sufficient interest. FHFA seeks to intervene "in an action" and "before the trial." Nothing in NRS 12.130 limits the Court's authority to consider or grant FHFA's motion. Nor does anything in the Nevada Rules of Appellate Procedure, which are silent on the matter of intervention in this Court or the Court of Appeals. Even if some provision purported to do so, or if the Rules' silence on the subject were assumed to disfavor intervention in more typical circumstances, the Rules expressly allow the Court to make case-specific accommodations where efficient and in the interest of justice. NRAP 1(c), 2.

II. *Stephens* Does Not Preclude FHFA's Intervention Here

Defendants rely on *Stephens v. First Nat'l Bank of Nev.*, 64 Nev. 292 (1947) to support their contention that FHFA's intervention in this appeal "plainly contravenes Nevada law governing the recourse available to non-parties in appellate proceedings." Opp. at 1. In Defendants' view, *Stephens* states a "general rule" that intervention into *any* appellate proceeding is impermissible. *Id.* at 2-3. That is not correct. In *Stephens*, the Court decided whether the United States Attorney for the District of Nevada could intervene into an appeal of a *final judgment*. 64 Nev. at

294. The issue of whether intervention into an interlocutory appeal—by an entity explicitly enjoined by the order on appeal and simultaneously seeking to intervene into the ongoing district court action, as FHFA is in this case—was not before the Court, and *Stephens* therefore cannot have decided it.[2]

Nor does the Court's rationale for declining to permit intervention in *Stephens* apply here. In finding "no power or jurisdiction in an appellate tribunal to … add[] new parties, or permit[] new issues … unless very exceptional circumstances exist," the Court stated the importance of maintaining a "clear line of demarcation between original and appellate jurisdiction." *Id.* at 298-99. That is sensible where an appeal is from a final judgment and the standard of review is plain error. In those circumstances, the "line of demarcation" between the trial and appellate courts' authority is sharp—the trial court has made final rulings, and the appellate tribunal is reviewing the trial court's decision for error, rather than evaluating the issues afresh.

That is not the case here. The district court has not ceded jurisdiction over the case—or even over the preliminary injunction—entirely to this Court. To the contrary, the Rules of Civil Procedure expressly permit the district court to "stay, suspend, [or] modify" the injunction "[w]hile [this] appeal is pending." NRCP 62(c).[3] And the issues FHFA's intervention would introduce are purely legal and

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[2] The same is true of *Gladys Baker Olsen Family Trust v. Olsen*, 109 Nev. 838 (1993), which Defendants note FHFA cited in its writ petition. *See* Opp. at 1.

[3] Defendants are in no position to argue that the district court lacks jurisdiction over the preliminary injunction; they have sought to enforce certain provisions while

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would be subject to *de novo* review. *See Sowers v. Forest Hills Subdivision*, 129 Nev. 99, 108 (2013) ("Purely legal questions surrounding the issuance of an injunction … are reviewed de novo."). Allowing intervention will thus not blur any otherwise-clear line of jurisdictional demarcation. As such, this case presents "very exceptional circumstances," *see* 64 Nev. at 299, that *Stephens* suggests would warrant intervention on appeal: The preliminary injunction expressly binds FHFA, a non-party, in violation of federal law; the issue is jurisdictional; and the legal issues FHFA will raise do not require the introduction of new facts or evidence. *Stephens* is also distinguishable because the party that sought to intervene there—the United States Attorney—"would neither gain nor lose … as the direct result of the litigation." *Id.* at 305. That is not the case here. FHFA will be restricted in its exercise of its statutory authority, in violation of federal law, if the injunction is upheld.

Defendants highlight certain broad statements from *Stephens*, such as "[t]he statute makes no provision for intervention in the supreme court, in any case, at any stage of the proceedings, or at all." Opp. at 2. As an initial matter, the absence of an express authorization is not equivalent to the presence of an express prohibition, and the Court has ample inherent authority to manage litigation efficiently and to effect substantial justice. *See Halverson v. Hardcastle*, 123 Nev. 245, 261-62 (2007)

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this appeal is pending and have vigorously opposed Fannie Mae's offer to post a bond in lieu of taking specific actions the injunction purports to require.

(recognizing "inherent authority" to "prevent injustice and to preserve the integrity of the judicial process"); NRAP 1(c), 2.[4]

As importantly, the Court's conclusion in *Stephens* that the phrase "before the trial" in NRS 12.130 "necessarily means that such intervention must be had in the district court," 64 Nev. at 304, makes sense only in the context of an appeal from a final judgment, where the district court proceedings have been concluded. As this Court recognizes in the context of NRCP 41(e), procuring a final judgment by means of a dispositive motion is equivalent to trial. *Monroe v. Columbia Sunrise Hosp. and Med. Ctr.*, 123 Nev. 96, 100 (2007) ("proceedings leading to a complete grant of summary judgment constitute a trial under NRCP 41(e)"). Accordingly, requiring intervention "before the trial" means that intervention must take place before final judgment. And in a typical case that—like *Stephens*—does not involve an interlocutory appeal, that means intervention must occur in the district court.

But the *Stephens* logic does not apply where, as here, a pre-trial interlocutory appeal is taken—there has been no final disposition, and therefore intervention in *either* Court would take place "before the trial."[5] And the cases Defendants claim

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[4] As *Halverson* recognizes, "[i]nherent judicial authority is not infinite." 123 Nev. at 263. But surely it encompasses the authority to allow an entity that a preliminary injunction would purportedly but unlawfully restrain an opportunity to be heard in ongoing proceedings regarding the injunction's validity. *See Edwards v. State*, 112 Nev. 704, 707 (1996) (Court has inherent authority to ensure due process).

[5] Indeed, the cases from other states and federal courts described in *Stephens*, *id.* at 308-10, involved parties seeking to intervene in appellate proceedings *after* the action had reached final resolution. *See Guaranty Tr. Co. of N.Y. v. Minn. & St. L.R. Co.*, 36 F.2d 747, 762 (8th Cir. 1929) (rejecting intervention by committee that "did

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demonstrate that the "general rule" announced in *Stephens* "remains unaltered," Opp. at 2-3, support only the principle that non-parties cannot appeal a final judgment or order. *See In re Wynn Resorts, Ltd.*, No. 80928, 2020 WL 3483757, at *2 (Nev. June 25, 2020) (non-party lacked standing to appeal from district court judgment); *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 448 (Nev. 1994) (same). They do *not* address whether appellate intervention is proper where no judgment has been entered and there remains a live dispute in the district court, as is the case here.

The Court should decline Defendants' entreaty to extend the *Stephens* bar to interlocutory appeals. *See* Opp. at 2 & n.3. Such a result would be inconsistent with the origin and purpose of Nevada's intervention statute, which indicate that it was meant to provide a flexible remedy in cases where a non-party has a substantial interest in the subject matter of the proceeding.

As the Court has long recognized, "Nevada is one of the states which have adopted the broader and more liberal type of [intervention] statute," *Bartlett v. Bishop of Nev.*, 59 Nev. 283 (1939), and the Court should construe it accordingly here. The statutory history confirms the point. Nevada's intervention statute, enacted in the late 1800s, provided that "any person shall be entitled to intervene in

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not participate in the trial of the suit"); *Walter Bledsoe Coal Co. v. Review Bd. of Empl.*, 42 N.E.2d 1021, 1022 (Ind. 1942) (en banc) (persons affected by judgment sought to intervene); *In re Determination of Relative Rights to Use of Waters of Deschutes River*, 108 P.2d 276 (Or. 1940) (intervention sought relating to order of state engineer); *Vaughan v. Latta*, 33 P.2d 795, 796 (Okla. 1934) (rejecting intervention that "came long after judgment in the trial court"); *Youngberg v. Youngberg*, 181 N.W. 835, 835 (S. Dak. 1921) (creditors could not intervene in the appellate court "after judgment"); *In re Chewaucan River*, 171 P. 402 (Or. 1918) (intervention sought in appeal from decree).

an action who has an interest in the matter in litigation …." *Harlan v. Eureka Min. Co.*, 10. Nev. 92, 94 (quoting Stat. 1869, p.287, Sec. 599). In codifying the statute in 1911, the Legislature amended it to allow intervention "*before* the trial," thereby establishing a *temporal* limitation, not a restriction on the forum in which intervention may take place. *See* 1912 Rev. Laws. 1453 ("Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation …"). Nevada and several other western and middle states enacted substantially similar statutory language in codifying the intervention remedy, which they adopted from Louisiana. *See* NRS 12.130; *Potlatch Lumber Co. v. Runkel*, 101 P. 396, 396 (Idaho 1909); *Dennis v. Kolm*, 63 P. 141, 142 (Cal. 1900); *Moreland v. Monarch Min. & Mill. Co.*, 178 P. 175, 175 (Mont. 1919); *see also Smith v. Gale*, 144 U.S. 509, 518 (1892).

Accordingly, this Court has and should continue to refer to Louisiana's code of practice and provisions similar to Nevada's in construing and applying its own intervention statute. *See Harlan*, 10 Nev. at 95; *Ryan v. Landis*, 58 Nev. 253 (1938) (citing cases from jurisdictions with "statute[s] similar to ours"). Decisions from those jurisdictions indicate that intervention was meant to be a flexible remedy liberally applied to effect justice. *See, e.g.*, *Braatelien v. Burns*, 19 N.W.2d 827, 828 (N. Dak. 1945) (North Dakota's intervention statute "is to be liberally construed"); *State ex rel. McKelvey v. Barnes*, 45 P.2d 293, 295 (Idaho 1935) ("The statute should be, and has been, given a liberal construction."). Louisiana permits intervention by third parties "when they allege that they have been aggrieved by the judgment." *E.g.*, *Patten v. Powell*, 16 La. Ann. 128, at *1 (1861); *State ex rel. Byerly v. Judge of*

Eighth Dist. Ct., 23 La. Ann. 768, 769 (1871) ("a third party may appeal from a judgment if he allege and show a direct pecuniary interest in a suit …"); LSA-C.C.P Art. 2086 ("A person who could have intervened in the trial court may appeal, whether or not any other appeal has been taken").[6]

It is well settled that "a state which adopts the provisions of a statute of another state" adopts not just its text "but also the construction placed upon it by the highest court of the state from which it is adopted." *Ex Parte Skaug*, 63 Nev. 101, 108 (1945); *accord State ex rel. Harvey v. Second Jud. Dist. Ct.*, 117 Nev. 754, 763 (2001). The Court should rely on the principles Louisiana and other western and middle states have announced to hold that nothing in NRS 12.130 restricts its authority to entertain and grant FHFA's motion to intervene.

The cases that Defendants cite from states that purportedly "lack permissive statutes allowing appellate intervention," Opp. at 3, do not support their opposition. For example, Oklahoma *does* permit intervention at the appellate stage under some circumstances, allowing an intervenor "admitted to an appeal … [to] become[] a party litigant with the right to raise and litigate independent issues." *Gettler v. Cities Service Co.*, 739 P.2d 515, 518 (Okla. 1987). And *In re Estate of Keen*, 488 S.W.3d 73 (Mo. Ct. App. 2016), involves an intervention statute dissimilar to NRS 12.130. *See* Mo. Rev. Stat. § 507.090.

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[6] Similarly, Oregon interpreted its similarly worded intervention statute to impose "no obstacle in granting the petition for intervention [on appeal]" notwithstanding that, "[r]ead literally, this section permits intervention only before trial." *Barendrecht v. Clark*, 419 P. 602, 604-05 (Or. 1966) (en banc) (discussing ORS 13.130, which has since been repealed).

III. NRS 12.130 Incorporates the Nevada Rules of Civil Procedure

Defendants' contention that the Court should deny FHFA's motion because the Nevada Rules of Civil Procedure "have no application to appellate proceedings before this Court," Opp. at 3-4, misses the point. Nevada's intervention statute specifies that "[i]ntervention is made as provided by the Nevada Rules of Civil Procedure," NRS 12.130(c), so those rules are relevant in assessing the proper procedure for intervention in this Court and the Court of Appeals, as well as in the district courts. *See* Mot. at 3. The fact that there is no parallel mechanism for intervention in this Court under Nevada's Rules of Appellate Procedure is not a reason to "limit the jurisdiction of the Supreme Court or the Court of Appeals as established by law." NRAP 1(b). Indeed, in *Lundberg v. Koontz*, 82 Nev. 360, 362-63 (1966), a writ-petition case, the Court assessed a motion "to intervene under NRCP 24(a)(2)" on the merits. Any suggestion that NRCP 24 applies only to district court proceedings would be inconsistent with that analysis. *See* Opp. at 3-4.

IV. FHFA's Writ Petition Has No Bearing on This Motion

Defendants claim that FHFA cannot intervene in this Court, yet they have argued in the district court that this Court's jurisdiction over the preliminary injunction precludes FHFA from intervening in the district court to challenge that order. *See* **Ex. A**, Limited Opp'n to FHFA's Mot. to Intervene at 15-16, *Fannie Mae v. Westland*, No. A-20-819412-C (Apr. 9, 2021). This heads-we-win, tails-you-lose position would prejudice FHFA and leave the Court in the position of potentially blinding itself to a dispositive federal statute.

Defendants suggest that because FHFA's pending petition for a writ of prohibition may provide an alternate avenue of recourse, FHFA's motion to intervene "is fatally defective on procedural grounds." Opp. at 1 & n.2, 4. But Defendants have not foresworn opposing the petition on procedural grounds, such as that this appeal is the proper vehicle to assess the preliminary injunction.[7] To the contrary, Defendants say only that they are reserving unspecified "respon[ses] to FHFA's substantive arguments," while conceding nothing about the writ petition's propriety. *Id.* at 1 n.2. In any event, the fact that FHFA has separately petitioned for a writ of prohibition does not limit its right to move for intervention in this appeal. *See Hamilton Solar, LLC v. First Jud. Dist. Ct., ex rel. Cty. of Carson City*, No. 57870, 127 Nev. 1139, at *1 (Mar. 21, 2011) (unpublished disposition) (denying "petition for a writ of mandamus [that would] allow petitioners to intervene in an appeal pending in this court" on grounds that petitioner could seek that relief via "a motion in th[e] appeal").[8] FHFA believes the writ petition is meritorious—and the Court has required a response—but the requested relief is discretionary and therefore

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[7] Defendant's answer to FHFA's petition is due on May 13, 2021.

[8] FHFA does not cite this case as a precedential legal authority, *see* NRAP 36(c)(3), but rather to show that it is unclear whether the Court will grant the relief requested in FHFA's petition. FHFA also notes that the relief sought in the *Hamilton* writ petition was materially different from the relief sought in FHFA's writ petition. The *Hamilton* petitioner sought an order allowing it to intervene into the pending appeal—the relief FHFA seeks in the motion at issue here, not in the pending writ petition. In the writ petition, by contrast, FHFA asks the Court to vacate or dissolve the preliminary injunction. *Hamilton* therefore does not speak to the relief FHFA seeks in the writ petition, but it does indicate that FHFA's motion to intervene into the pending interlocutory appeal was the appropriate procedural vehicle to seek that relief.

cannot be assumed. Nor can FHFA be certain that its motion to intervene in the district court as a co-counterclaim defendant—which Defendants have opposed—will be granted. FHFA as Conservator is entitled to pursue all appropriate legal avenues of relief from the unlawful injunction, in any court that has jurisdiction over the matter.

* * *

Although this Court does not frequently assess its own authority to permit intervention on appeal or grant such permission, it should grant FHFA's motion to intervene here. Over a century ago, the Nevada legislature joined other middle and western states in adopting an intervention remedy that was meant to be flexible and fair, and to effectuate justice for non-parties who were implicated in pending litigation. The Court should exercise that statutory power, and to the extent necessary its inherent discretion, to allow FHFA to intervene to defend the Fannie Mae conservatorship against a preliminary injunction that unlawfully restrains the Conservator's federal statutory powers.

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CONCLUSION

For the reasons provided herein and in FHFA's Motion, the Court should exercise its authority to allow FHFA to intervene in this appeal.

Dated this 23rd day of April, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to NEFCR 9(b)(d)(e), I certify that on April 23, 2021, a true and correct copy of the **FEDERAL HOUSING FINANCE AGENCY'S REPLY IN SUPPORT OF MOTION TO INTERVENE,** 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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