IN THE SUPREME COURT OF THE STATE OF NEVADA

FEDERAL NATIONAL MORTGAGE ASSOCIATION, Appellant, vs. WESTLAND LIBERTY VILLAGE, LLC, and WESTLAND VILLAGE SQUARE, LLC Respondents.	Case No. 82174

ANSWER TO AMICUS BRIEF

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VERIFICATION

Under penalties of perjury, the undersigned declares that he is counsel for Respondents Westland Liberty Village, LLC and Westland Village Square, LLC; that he knows the contents of this Answer to Amicus Brief; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and that as to such matters he believes them to be true. This verification is made pursuant to NRS 15.010 and NRAP 21(a)(5).

DATED this 30th day of August, 2021.

/s/ *J. Colby Williams*
J. COLBY WILLIAMS

RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons or entities described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal. Respondents Westland Liberty Village, LLC and Westland Village Square, LLC are Nevada limited liability companies wholly-owned by Westland QOF #1 LLC and Westland QOF #2 LLC, respectively. The latter two entities are wholly-owned by A&D Trust Holdings, LLC and AFT Industry NV, LLC, which are private entities held by family trusts. No Westland entity is publicly-traded or has publicly-traded owners. The following counsel and law firms have appeared for the subject Respondents in the action below: John Benedict, The Law Offices of John Benedict; John W. Hofsaess, In-House Counsel for Westland Real Estate Group (admitted *pro hac vice*); Brian Barnes, Cooper Kirk, PLLC (admitted *pro hac vice*); and John P. Desmond, Dickinson Wright, PPLC.

DATED this 30th day of August, 2021.

CAMPBELL & WILLIAMS

By /s/ *J. Colby Williams*
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RESPONDENTS' ANSWER TO AMICUS BRIEF

I. INTRODUCTION

FHFA's amicus brief represents yet another attempt to belatedly raise the argument that the underlying preliminary injunction violates the so-called "Anti-Injunction Clause" of the Housing and Economic Recovery Act ("HERA"), 12 U.S.C. § 4617(f).[1] This argument, however, was forfeited because it was not timely presented to the district court and does not implicate the Court's jurisdiction. Regardless, the arguments in FHFA's amicus brief are no more persuasive than the identical arguments FHFA made in support of its parallel petition for a writ of prohibition.

That is because the Anti-Injunction Clause only applies when FHFA acts within the scope of its conservatorship powers, and the federal statute under which FHFA operates "does not authorize the breach of contracts." *Sharpe v. FDIC*, 126 F.3d 1147, 1155 (9th Cir. 1997). FHFA has not demonstrated that the preliminary injunction prevents it from doing anything "necessary to put [Fannie Mae] in a sound and solvent condition." *Collins v. Yellen*, 141 S. Ct. 1761, 1776 (2021). And FHFA has made no showing that it took any affirmative action or gave Fannie any directive that would be affected by the preliminary injunction. For all of these reasons and

[1] Unless otherwise defined, capitalized terms used herein have the same meaning as those contained in Westland's Answering Brief filed concurrently herewith.

further reasons explained in detail below, the Anti-Injunction Clause does not provide a sound basis for overturning the district court's preliminary injunction.

II. COUNTERSTATEMENT OF THE ISSUES, CASE AND FACTS

For brevity and efficiency, Westland incorporates the Counterstatement of the Issues, Counterstatement of the Case, and Counterstatement of Facts sections from its Answering Brief as if set fully forth herein.

III. ARGUMENT

A. FHFA's Anti-Injunction Clause Argument Was Not Timely Presented to the District Court, and FHFA Cannot Belatedly Inject This Non-Jurisdictional Issue into Fannie Mae's Appeal Through the Filing of an Amicus Brief.

Although FHFA insists that Section 4617(f) bars all injunctive relief requested by Westland, neither FHFA nor Fannie Mae raised this issue until months after the district court entered the preliminary injunction that is the subject of this appeal. "A point not raised in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981); *see also, e.g.*, *Nelson v. Eighth Judicial Dist. Court*, 137 Nev. Adv. Op. 14, 484 P.3d 270, 272 n.4 (2021). With Fannie having forfeited any argument about Section 4617(f) by failing to timely raise it below, FHFA cannot inject this issue into the appeal through the filing of an amicus brief. *See Golden Gate Restaurant Ass'n v. City & Cty. of San Francisco*, 546 F.3d 639, 653 (9th Cir. 2008) (declining to consider arguments

"raised solely by an amicus, particularly when they were not raised before the district court").

FHFA attempts to avoid forfeiture by arguing that Section 4617(f) limits the courts' jurisdiction, but FHFA is wrong. In *Perry Capital v. Mnuchin*, 864 F.3d 591, 604 (D.C. Cir. 2017), FHFA's Anti-Injunction Clause defense was treated as a "merits" issue. *See also, e.g.*, *Roberts v. FHFA*, 889 F.3d 397, 403 (7th Cir. 2018). That is the correct approach under controlling U.S. Supreme Court precedent because a federal statutory provision must be "clearly labeled jurisdictional" to be jurisdictional. *Reed v. Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166, 130 S. Ct. 1237, 1247 (2010); *accord Sebelius v. Auburn Regional Medical Ctr.*, 568 U.S. 145, 153–55, 133 S.Ct. 817, 824-25 (2013) (federal statutes are non-jurisdictional absent "a clear statement" to the contrary).

The Anti-Injunction Clause's plain terms address the *remedies* available against FHFA without purporting to limit any court's jurisdiction: "[N]o court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or receiver." 12 U.S.C. § 4617(f). The absence of any express jurisdictional label in the Anti-Injunction Clause is particularly significant because, elsewhere in the same statute, Congress used such labels to restrict the claims that courts may hear. *See, e.g.*, 12 U.S.C. § 4617(b)(11)(D) (providing "no court shall have jurisdiction" over certain claims during receivership); *id.* § 4623(d) (providing

"no court shall have jurisdiction" to affect FHFA's capital classifications). When Congress uses jurisdictional labels in some provisions of a statute but declines to do so in others, the variation in usage must be given meaning.

To be sure, a handful of courts have characterized the Anti-Injunction Clause or the parallel provision of FIRREA, 12 U.S.C. § 1821(j), as a limitation on the federal courts' jurisdiction. *See Cty. of Sonoma v. FHFA*, 710 F.3d 987, 990 (9th Cir. 2013); *RPM Invs., Inc. v. RTC*, 75 F.3d 618, 622 (11th Cir. 1996); *Telematics Intl'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703, 704 (1st Cir. 1992). But none of those cases applied the standard the U.S. Supreme Court now uses to determine whether a federal statute limits jurisdiction, and most of them predate a 1998 decision in which the Supreme Court began using the word "jurisdiction" with far greater precision. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90–93, 118 S.Ct. 1003, 1010-11 (1998); *see also Scarborough v. Principi*, 541 U.S. 401, 413, 124 S.Ct. 1856, 1864-65 (2004) ("Courts, including this Court, . . . have more than occasionally misused the term 'jurisdictional' to refer to nonjurisdictional prescriptions." (cleaned up)). Nothing turned on the Anti-Injunction Clause's jurisdictional status in any of the cases FHFA cites, and "drive-by jurisdictional rulings" of this sort "have no precedential effect." *Steel Co.*, 523 U.S. at 91, 118 S.Ct. at 1011.

B. Section 4617(f) Does Not Apply When FHFA or Its Delegate Seeks Judicial Review.

While FHFA argues that this Court lacks jurisdiction to uphold the underlying preliminary injunction Order, FHFA actually seeks to overturn the *entire* Order. That overbroad request ignores that a substantial portion of the Order is simply the denial of Fannie Mae's own request for judicial relief seeking appointment of a receiver. APP1556-APP1568. Tellingly, HERA contains no provision that prohibits a court from acting when Fannie Mae is the party seeking affirmative relief. In other words, Fannie Mae made a general appearance and submitted to the district court's jurisdiction when it filed suit and affirmatively pursued the appointment of a receiver. *See e.g.*, *Hansen v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 650, 653, 6 P.3d 982, 983 (2000) ("[a] general appearance is entered when a person (or the person's attorney) comes into court as party to a suit and submits to the jurisdiction of the court.").

While 12 U.S.C. § 4617(f), limits certain court actions "[e]xcept as provided in this section *or at the request of the Director*" (emphasis added), the district court's Order is entirely consistent with the foregoing exception because the FHFA Director delegated the responsibility for most legal matters to Fannie Mae long ago. SA1232. Simply because the district court denied Fannie Mae's affirmative request for the appointment of a receiver and granted related counter-relief to Westland, FHFA should not be heard to claim after-the-fact that the court lacked jurisdiction. After

all, each of the cases Fannie Mae relies upon is easily distinguishable because the FHFA or FDIC were defendants in those matters, whereas Fannie Mae voluntarily invoked the district court's powers here.

C. The Anti-Injunction Clause Does Not Prohibit Equitable Remedies in Breach of Contract Cases.

HERA's Anti-Injunction Clause only bars equitable relief that would "restrain or affect the exercise of powers or functions of [FHFA] as conservator." 12 U.S.C. § 4617(f). Consistent with the statute's plain meaning, the Supreme Court recently held that this provision "applies only where the FHFA exercise[s] its powers or functions" as conservator. *Collins v. Yellen*, 141 S.Ct. 1761, 1776 (2021). When the agency "exceeds those powers or functions, the anti-injunction clause imposes no restrictions." *Id.* Thus, the preliminary injunction prohibiting Fannie Mae and related entities from violating Westland's contract rights does not run afoul of the Anti-Injunction Clause unless FHFA can show that it has the statutory authority as conservator to breach contracts. FHFA enjoys no such power.

Although FHFA cites a litany of other cases in which it successfully invoked the Anti-Injunction Clause, the case most on point and the appropriate starting place for the Court's analysis is *Sharpe v. FDIC*, 126 F.3d 1147, 1155 (9th Cir. 1997). In *Sharpe*, the Ninth Circuit held that the materially identical anti-injunction provision that applies to the FDIC allows equitable remedies in contract cases because the statute "does not authorize the breach of contracts." This Court favorably cited that

portion of *Sharpe* in *CML-NV Grand Day, LLC v. Grand Day, LLC*, 134 Nev. 925, 430 P.3d 530, 2018 WL 6016683 (Nov. 15, 2018) (unpub. disp.), and *Sharpe*'s reasoning applies with full force here. Like the statute at issue in *Sharpe*, HERA includes a subsection that specifically delineates the timing and procedure that the conservator must follow to repudiate contracts. *Compare* 12 U.S.C. § 4617(d), *with* 12 U.S.C. § 1821(e). "Although the statute clearly contemplates that [FHFA] can escape the obligations of contracts, it may do so only through the prescribed mechanism." *CML-NV Grand Day, LLC*, 2018 WL 6016683, at *2 (quoting *Sharpe*, 126 F.3d at 1155). FHFA exceeds its conservatorship authority when it breaches contracts without following that mechanism, and in such cases the Anti-Injunction Clause does not apply.

Sharpe's interpretation of the statutory text is buttressed by several additional considerations. Courts apply a presumption against federal preemption of state law, *see Rolf Jensen & Assocs. v. Dist. Ct.*, 128 Nev. 441, 446, 282 P.3d 743, 746 (2012), and to hold that FHFA is authorized by statute to breach contracts would preempt out of existence a broad swath of state law concerning the availability of equitable remedies in breach of contract cases that involve real property. Nothing in the statute's text even hints that Congress intended to displace state contract law except when FHFA exercises its limited authority to repudiate contracts, and the Supreme Court has held that the materially identical statutory regime that applies to the FDIC

leaves state law in place "except where some provision in the extensive [federal statutory] framework . . . provides otherwise." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87, 114 S.Ct. 2048, 2054 (1994). *Sharpe* also finds strong support in the canon of constitutional avoidance, for there would be a serious question under the Fifth Amendment's Takings Clause if the statute were interpreted to permit FHFA and Fannie to seize properties through foreclosure even when there has been no default on the underlying loan agreement. *See Waterview Mgmt. Co. v. FDIC*, 105 F.3d 696, 700 (D.C. Cir. 1997) (narrowly construing FDIC's statutory powers to avoid Takings Clause problem).

Under FHFA's own regulations, the agency's authority to repudiate contracts expired 18 months after it placed Fannie Mae into conservatorship in September 2008. *See* 12 C.F.R. § 1237.5(b). With FHFA's limited statutory authority to repudiate contracts having long ago expired, it follows that the preliminary injunction, which was grounded in Westland's contractual rights, was entirely consistent with Section 4617(f).

Anticipating this argument, FHFA cites cases in which federal courts declined to enjoin the FDIC from transferring the assets of failed banks despite claims that the challenged transfers would breach contracts. *See* FHFA Amicus Br. 19–20 (citing *Volges v. RTC*, 32 F.3d 50, 52 (2d Cir. 1994), *RPM Invs.*, 75 F.3d at 620–21, and *Mile High Banks v. FDIC*, 2011 WL 2174004, at *4 (D. Colo. June 2, 2011)).

But those cases are distinguishable from both this case and *Sharpe* because they turned on a separate statutory provision that authorizes the FDIC to transfer the assets of a failed bank during receivership "without any approval, assignment, or consent with respect to such transfer." 12 U.S.C. § 1821(d)(2)(G); *see also id.* § 4617(b)(2)(G) (materially identical provision of HERA). Because nothing in the preliminary injunction purports to enjoin FHFA from transferring the assets of Fannie Mae, this case is controlled by *Sharpe* rather than any of the other cases FHFA cites.

FHFA also attacks *Sharpe* by relying on out-of-context snippets from other cases to suggest that it "is not controlling outside of its limited context," *Meritage Homes of Nev., Inc. v. FDIC*, 753 F.3d 819, 825 (9th Cir. 2014), and that its reasoning is "unpersuasive," *LNV Corp. v. Outsource Services Mgmt., LLC*, 869 F.3d 662, 668 (8th Cir. 2017). Those statements, however, concern *Sharpe*'s separate discussion of the handling of administrative claims during receivership—an issue covered in Section IV.B of the *Sharpe* opinion that is not relevant in this conservatorship case. More recently, the Ninth Circuit reaffirmed "*Sharpe*'s reasoning as to whether FIRREA authorizes the unrestrained breach of contract," *Bank of Manhattan, NA v. FDIC*, 778 F.3d 1133, 1136–37 (9th Cir. 2015)—the distinct issue decided in Section IV.A of the *Sharpe* opinion, which FHFA ignores. In 2018, this Court followed Section IV.A of the Ninth Circuit's decision in *Sharpe*,

thus laying to rest any question about the continued vitality of that portion of the Ninth Circuit's opinion. *See CML-NV Grand Day, LLC*, 2018 WL 6016683.[2]

The remaining cases FHFA cites are not on point because they did not concern alleged breaches of contract. The cases FHFA cites about the Preferred Stock Purchase Agreements such as *Perry Capital* and *Roberts* all involved statutory claims rather than requests for equitable remedies to prevent a breach of contract. *See Jacobs v. FHFA*, 2017 WL 5664769, at *5 (D. Del. Nov. 27, 2017) (Preferred Stock Purchase Agreement case distinguishing *Sharpe* on this basis). Cases about FHFA's decision to prevent Fannie from purchasing mortgages encumbered by clean energy liens are inapposite for the same reason—none of those cases involved an alleged breach of contract as they instead concerned the use of Fannie's *own* assets when investing in new mortgages. *See, e.g.*, *Cty. of Sonoma*, 710 F.3d at 988-89; *Leon Cty. v. FHFA*, 700 F.3d 1273 (11th Cir. 2012); *Town of Babylon v. FHFA*, 699 F.3d 221 (2d Cir. 2012). The same is true for cases FHFA cites involving 12 U.S.C. § 1821(j) such as *Dittmer Properties, L.P. v. FDIC*, 708 F.3d 1011 (8th Cir. 2013) and *Hindes v. FDIC*, 137 F.3d 148 (3d Cir. 1998); those cases did not involve

[2] FHFA also suggests that the Supreme Court's decision in *Collins* called *Sharpe* into question, but it never explains how. *Sharpe* does not require courts to decide "whether the FHFA made the best, or even a particularly good, business decision," FHFA Amicus Br. 22 (quoting *Collins*, 141 S. Ct. at 1778), but only to determine whether a breach of contract falls within FHFA's time-limited statutory authority to repudiate contracts.

alleged breaches of contract and thus did not implicate the rule of *Sharpe*. This Court's decisions in *Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 133 Nev. 247, 396 P.3d 754 (2017) and *Saticoy Bay LLC Series 9641 Christine View v. Fannie Mae*, 134 Nev. 270, 417 P.3d 363 (2018) are even farther afield. Those cases concerned the foreclosure bar that appears in 12 U.S.C. § 4617(j)(3). Neither cite Section 4617(f), much less purport to apply it in a breach of contract case.

Finally, FHFA argues in passing that HERA authorizes it to breach contracts because "any contracting party has the power to decide whether to perform or to default and thereby incur liability for damages." FHFA Amicus Br. 18. This argument proves too much because it implies that equitable remedies should never be available to any party in a breach of contract case. Whatever Justices Scalia and Holmes thought about injunctions in breach of contract cases, Nevada law allows injunctions in contract cases, like this one, that concern the possession of real property. *See, e.g.*, *Dixon v. Thatcher*, 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987). Accordingly, except in the limited scenarios in which FHFA exercises its statutory authority to repudiate contracts, FHFA and Fannie Mae are subject to the full suite of remedies available under state law in breach of contract cases. In Nevada, those remedies include injunctions to prevent the rightful owner of real property from being ousted through a contractually impermissible foreclosure.

D. The Anti-Injunction Clause Does Not Apply Because Nothing in the Preliminary Injunction Prevents FHFA from Taking Any Action that Is Necessary to Put Fannie in a Sound and Solvent Condition.

In *Collins*, the Supreme Court ruled that for FHFA to exercise its conservatorship powers and invoke the Anti-Injunction Clause, "its actions must be necessary to put the regulated entity in a sound and solvent condition and must be appropriate to carry on the business of the regulated entity and preserve and conserve its assets and property." 141 S.Ct. at 1776 (internal quotation marks omitted). *Collins* marked a significant change in the law, for most (but not all) lower courts that had previously addressed this issue had concluded the Anti-Injunction Clause bars equitable relief against FHFA regardless of whether the agency's actions are necessary to restore Fannie Mae to soundness and solvency. *See, e.g.*, *Roberts v. FHFA*, 889 F.3d 397, 404 (7th Cir. 2018); *Robinson v. FHFA*, 876 F.3d 220, 229–30 (6th Cir. 2017); *Perry Cap.*, 864 F.3d at 608; *but see Collins v. Mnuchin*, 938 F.3d 553 (5th Cir. 2019) (en banc) (interpreting statutory regime to impose mandatory duty to seek to restore Fannie Mae to soundness and solvency).

The controlling authority on this point is the Supreme Court's recent decision in *Collins*—not the contrary lower court decisions FHFA cites. Accordingly, to establish the preliminary injunction violates HERA's Anti-Injunction Clause, FHFA must show the preliminary injunction prevents it from doing something "*necessary*

to put [Fannie Mae] in a sound and solvent condition." *Collins*, 141 S. Ct. at 1776 (emphasis added). For three reasons, FHFA cannot make that showing.

First, while this case is extremely important to Westland, it is not remotely material to Fannie Mae's financial condition. At year-end 2020, Fannie had four *trillion* dollars in assets, making it one of the largest financial institutions in the world. *See Fannie Mae 2020 10-K*, at 1, U.S. SEC (Feb. 12, 2021), https://bit.ly/3xvQCsD. The notion that the preliminary injunction prevents FHFA from doing anything that is *necessary* to the restoration of this behemoth cannot be taken seriously. FHFA was able to successfully invoke the Anti-Injunction Clause in *Collins* because the plaintiffs in that case challenged a transaction involving hundreds of billions of dollars and the basic terms of the United States Treasury Department's investment in Fannie Mae. *See Collins*, 141 S. Ct. at 1773–74, 1777. The sums at issue in this case are many orders of magnitude smaller, and FHFA has not even attempted to demonstrate that the preliminary injunction prevents it from taking steps necessary to return Fannie to soundness and solvency.

Second, far from being "appropriate to carry on the business of [Fannie] and preserve and conserve its assets and property," *id.* at 1776, the rule of law that FHFA seeks to establish in this case would be affirmatively harmful to Fannie Mae's long-term financial condition. At bottom, FHFA's argument is that the Anti-Injunction Clause categorically prohibits equitable remedies against Fannie Mae while it is in

conservatorship. In non-judicial foreclosure states such as Nevada, FHFA apparently believes that federal law entitles Fannie Mae to seize properties through foreclosure for any or no reason without regard to its contractual rights, and without following the statutory timing and protections for borrowers established by Nevada's Legislature in NRS Chapter 107 et. seq. If this extreme theory were to take root in the courts, it is doubtful that borrowers would want to do business with Fannie Mae in the future. The Nation's housing finance system is built upon a web of contractual agreements with Fannie Mae at the center. Preserving and conserving Fannie Mae's assets and property requires assurances to Fannie Mae's contractual counterparties that their rights will be honored during conservatorship.

Third, while FHFA may claim that the preliminary injunction interferes with its ability to conserve the assets of Fannie Mae, the Court must evaluate any such claim based on the specific facts of this case. This dispute arises out of Fannie's Mae's unilateral increased reserve demands rather than any monetary default by Westland. Indeed, at the time of the acquisition, Westland infused over $20 million in cash towards the purchase of the Properties, and it had spent an additional $3.5 million on capital improvements by the time this case was filed—all of which resulted in substantial equity for Westland and substantial security for Fannie Mae. Additionally, to alleviate any doubt and to prevent a financial default, Westland actually *overpaid* its mortgage by more than $550,000 since this dispute began

through December 2020. More importantly, the new PCA reports commissioned by Fannie Mae demonstrate that Westland's Repair and Replacement Reserve Accounts are now overfunded by hundreds of thousands of dollars such that FHFA cannot seriously contend that Fannie Mae's assets are at risk. For this reason as well, the preliminary injunction does nothing to interfere with FHFA's ability to carry out the rehabilitative conservatorship mission the Supreme Court recognized in *Collins*.

E. FHFA Cannot Invoke the Anti-Injunction Clause Because It Has Never Purported to Exercise Any of Its Conservatorship Powers in this Matter.

"[F]or section 4617(f) to bar judicial relief, [FHFA] must have ***acted*** . . . pursuant to its 'powers or functions.'" *Roberts*, 889 F.3d at 402 (emphasis added); *Suero v. Fed. Home Loan Mortg. Corp.*, 123 F. Supp. 3d 162, 171 (D. Mass. 2015) ("It is undisputed that courts have applied HERA's anti-injunction clause only where FHFA took clear, decisive and affirmative action—including issuing a formal directive to [Fannie Mae or Freddie Mac]."") (quotation marks omitted). The Anti-Injunction Clause does not apply here because nothing in the record indicates that FHFA has taken any affirmative action in this matter.

In *Suero v. FHFA*, the federal district court for Massachusetts ruled that the Anti-Injunction Clause "would not apply" to a challenge to Freddie Mac policies under state law unless "FHFA directed [Freddie] to adopt those policies." 123 F. Supp. 2d at 168–69. Although the court in *Suero* ultimately concluded after a factual inquiry that FHFA had issued a directive that triggered the Anti-Injunction Clause,

there is no evidence of any similar FHFA directive or affirmative action here. There is no allegation by FHFA or, more importantly, substantive evidence in the record demonstrating that Fannie Mae demanded increased reserve amounts from Westland, declared default, and commenced foreclosure proceedings pursuant to a directive or policy that was issued or promoted by FHFA. Nor is there any evidence that FHFA had any involvement in the events that led to this lawsuit.

FHFA's lack of involvement in this dispute makes sense given that FHFA broadly handed off responsibility for "normal business activities and day-to-day operations" to Fannie Mae shortly after placing it into conservatorship in 2008. SA1237. Notably, the responsibilities assigned to Fannie Mae by FHFA include, among other things, "decisions about individual mortgages, property sales, or foreclosures."[3] *Id.* FHFA likewise "lacks statutory authority to supervise activities by mortgage servicers" such as Grandbridge. SA1278, SA1285. Thus, FHFA cannot credibly claim it was exercising powers as conservator in connection with the

[3] The cases cited by FHFA in which courts refused to issue injunctions against an entity other than the conservator or receiver all involved transactions where the conservator or receiver itself was an active participant. *See, e.g.*, *Dittmer*, 708 F.3d at 1016 (FDIC sold note as part of receivership); *Bank of Am. Nat. Ass'n v. Colonial Bank*, 604 F.3d 1239 (11th Cir. 2010); *New Century Bank v. Open Sols., Inc.*, 2011 WL 3497279, at *3 (E.D. Pa. Aug. 8, 2011) (FDIC exercised its statutory authority to repudiate contract); *Furgatch v. Resol. Tr. Corp.*, 1993 WL 149084 (N.D. Cal. Apr. 30, 1993) (conservator itself sought to foreclose on deed of trust). These cases do not support the proposition that a federal conservator may passively sit on the sidelines while its ward breaches a contract and then parachute into the resulting litigation to limit the contractual remedies available to the injured party.

punitive measures exacted on Westland by Fannie Mae as it delegated the very responsibilities at issue in this case back to Fannie Mae more than a decade ago.

F. Vacating the Preliminary Injunction Would Do Nothing to Advance Federal Policy, But Would Irreparably Harm Westland.

FHFA concludes its amicus brief with a paean to the wisdom of Congress in enacting Section 4617(f) to ensure that conservators cannot be "hauled into court and forced to stop their activity every time an affected party questions a conservator's decision." FHFA Amicus Br. 24–25. When assessing the merits of FHFA's arguments, the Court should be guided by the statutory text and its own decision in *CML-NV Grand Day*—not broad characterizations of the statute's purpose invented by FHFA's lawyers. *Cf. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 726, 115 S.Ct. 2407, 2426 (1995) (Scalia, J., dissenting) ("'The Act must do everything necessary to achieve its broad purpose' is the slogan of the enthusiast, not the analytical tool of the arbiter."). That said, FHFA's policy argument actually underscores one of the reasons why Section 4617(f) does not apply in this case. In entering the preliminary injunction, the district court did not "question" anything FHFA has done. Indeed, FHFA had no substantive involvement in the events giving rise to this case until it voluntarily injected itself into the litigation through a flurry of tardy filings in this Court and the court below.

Moreover, to the extent that policy considerations influence the Court's assessment of FHFA's arguments, it must not lose sight of the troubling implications

FHFA's position poses for non-judicial foreclosure states such as Nevada. If FHFA is correct that the Anti-Injunction Clause is an absolute bar to equitable remedies in breach of contract cases, then no court could stop Fannie Mae from immediately foreclosing on every one of the "hundreds of thousands" of residential mortgages it owns across the State without regard to whether borrowers are current on their payments. FHFA Amicus Br. 1. While FHFA says that wrongfully foreclosed-upon property owners can always sue for damages, that is hardly a fitting remedy for homeowners who, based on FHFA's view of the law, are one arbitrary decision away from being thrown out on the street.

It is no answer to say that Westland is a commercial investor in real estate rather than the occupant of a single-family home with a mortgage owned by Fannie Mae. The sweeping interpretation of the Anti-Injunction Clause FHFA asks this Court to adopt would apply with equal force to every mortgage Fannie Mae owns or has securitized in Nevada. Moreover, this Court "has viewed the loss of real property as irreparable harm even where the real property's putative owner is a corporate entity, and where the real property is to be used for a commercial purpose." *Inv'rs v. Bank of Am., NA*, 585 Fed. Appx. 742, 743 (9th Cir. 2014) (applying Nevada law); *Thirteen S. Ltd. v. Summit Vill., Inc.*, 109 Nev. 1218, 1220, 866 P.2d 257, 259 (1993) ("Thirteen South has shown that it would lose title to real property [a vacant lot to be developed] in an extra-judicial sale. Thus, it has met its burden of showing

irreparable injury"); *Stoltz v. Grimm*, 100 Nev. 529, 533, 689 P.2d 927, 930 (1984) (finding "the subject matter of the contract was real property [a commercial mobile home park], and as such is unique"). The foregoing principle plainly applies here.

The subject apartments have been leased to numerous tenants, constitute a unique asset within Westland's Las Vegas-centered real estate portfolio, and generate significant rental income for Westland. Westland, moreover, is not a traditional real estate investment trust with an investment strategy that largely treats properties as fungible. It instead makes long-term investments in communities through unique parcels of real estate. If the properties are allowed to be transferred to a third-party purchaser through foreclosure, Westland will not only lose the significant monthly income gained through the leases it has negotiated, it will also be deprived of the substantial goodwill it has generated by the multi-million dollar investments already made through its dedicated staff of 32 employees who work at the properties. Toward that end, Westland has not only dramatically improved the buildings themselves, but also the overall quality of life in the communities. Westland would sustain irreparable harm to its reputation and beyond if it lost these properties after not missing a single periodic monthly payment. That irreparable harm would, in turn, would have a cascading effect as Westland would lose many if not all of the quality employees who work at these locations, and those employees would be at risk of losing their livelihoods through no fault of their own.

Unlike the out-of-state authority upon which FHFA misplaces reliance (*i.e.*, *Field v. Genova Capital Inc.*, No. 2:20-cv-09563-ODW, 2020 WL 6161450 (C.D. Cal. Oct. 21, 2020) and *In re Richmond*, No. 14-41678 (CEC), 2014 WL 5100705 at *4 (Bankr. E.D.N.Y. Oct. 10, 2014)), monetary damages are inadequate to remedy the above harm. Fortunately, Nevada law recognizes a unique interest in real property, the potential loss of which constitutes the type of irreparable harm required to obtain injunctive relief. The preliminary injunction should be upheld.

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IV. CONCLUSION

Neither Fannie Mae nor FHFA timely presented any arguments about the Anti-Injunction Clause to the district court. Accordingly, the arguments are not properly part of this appeal. Even if they were, FHFA's belated attack on the preliminary injunction is meritless for the reasons presented above and provides no basis for reversing the decision below. Respectfully, the district court's order should be affirmed.

DATED this 30th day of August, 2021

CAMPBELL & WILLIAMS

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Answer to Amicus Brief2, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the Nevada Rules of Appellate Procedure.

I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) as this brief was prepared in a proportionally spaced typeface using Times New Roman 14 pt font. I also certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) as it contains 5,025 words.

DATED this 30th day of August, 2021

CAMPBELL & WILLIAMS

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Counsel for Respondents

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 30th day of August 2021, I caused true and correct copies of the foregoing Respondents' Answer to Amicus Brief to be delivered to the following counsel and parties:

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