IN THE SUPREME COURT OF THE STATE OF NEVADA

FEDERAL HOUSING FINANCE AGENCY, in its capacity as Conservator for the Federal National Mortgage Association, Petitioner, vs. EIGHTH JUDICIAL DISTRICT COURT, Clark County, Nevada; and, THE HONORABLE KERRY EARLEY, Judge Respondents, WESTLAND LIBERTY VILLAGE, LLC; WESTLAND VILLAGE SQUARE, LLC; and FEDERAL NATIONAL MORTGAGE ASSOCIATION, Real Parties in Interest.	Case No. 82666

REPLY IN SUPPORT OF PETITION FOR A WRIT OF PROHIBITION

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INTRODUCTION

The Court should grant FHFA's Petition for a Writ of Prohibition.[1] In entering the preliminary injunction at issue, the "district court act[ed] without or in excess of its jurisdiction[,] and the petitioner lacks a plain, speedy, and adequate remedy at law." *Nev. State Bd. of Architecture v. Eighth Jud. Dist. Ct.*, 135 Nev. 375, 377 (2019). Defendants do not contest that FHFA lacks a plain, speedy, and adequate remedy at law, and their other arguments that the writ should not issue lack merit.

First, Defendants argue that section 4617(f)—which provides that "no court may take any action to restrain or affect the exercise of powers or functions of FHFA as conservator"—is not jurisdictional. That is incorrect. Section 4617(f) unambiguously denies courts the power—*i.e.*, the jurisdiction—to grant the kind of relief the district court purported to order. The injunction is therefore a proper subject for a writ relief.

Second, Defendants contend that section 4617(f) does not apply because Fannie Mae supposedly breached a contract. That is also incorrect. There has been no finding of breach here, but whether any party is in breach is beside the point: Injunctive relief purporting to require certain actions in relation to the contract would

[1] Capitalized terms are defined in FHFA's Petition for a Writ of Prohibition.

interfere with the Conservator's statutory powers to "operate" Fannie Mae and to "preserve and conserve" Fannie Mae's assets, which section 4617(f) prohibits.

Third, Defendants assert that section 4617(f) applies only where FHFA has affirmatively exercised its conservatorship powers. Defendants are mistaken. The statute bars relief that would "restrain or affect" the Conservator going forward, regardless of what the Conservator (or anyone else acting within the scope of conservatorship powers) did or did not do in the past.

Finally, Defendants argue that the injunction is proper under Nevada law. The Court need not reach any state-law issues, because the applicability of section 4617(f) is dispositive.[2] But the injunction also is invalid under Nevada law in any event: It impermissibly purports to bind FHFA as a non-party, and improperly purports to impose vague terms.

FHFA respectfully requests that the Court issue a writ of prohibition dissolving the district court's order and directing the district court not to issue any injunction that would restrain or affect the exercise of FHFA's statutory powers and functions as Fannie Mae's Conservator.

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[2] *See Collins v. Yellen*, --- S. Ct. ---, 2021 WL 2557067, at *9 (June 23, 2021) (noting courts' uniform application of section 4617(f) to bar injunctive relief when FHFA exercises its powers or functions as conservator).

ARGUMENT

I. Section 4617(f) Is Jurisdictional

Defendants do not contest that the Court can grant writ relief where a district court acts in excess of its jurisdiction. *See* Pet. for Writ of Prohibition ("Pet.") at 5, Ans. to Pet. for Writ of Prohibition ("Ans.") at 17. Instead, they argue that writ relief is unavailable here because section 4617(f) supposedly is a non-jurisdictional "limit[ation] [on] the *remedies* available for certain claims against FHFA." Ans. at 17-18.

That argument rests upon a false dichotomy. In a June 23, 2021 decision, the U.S. Supreme Court described section 4617(f) as "sharply circumscrib[ing] judicial review of any action that the FHFA takes as a conservator." *Collins*, 2021 WL 2557067, at *9. And, without any doubt, limitations on judicial review are quintessentially jurisdictional. *See Kucana v. Holder*, 558 U.S. 233, 245 (2010) (describing statute enumerating "'Matters not subject to judicial review'" as identifying matters "the federal courts lack jurisdiction to review"); *Barbosa v. U.S. Dep't of Homeland Security*, 916 F.3d 1068, 1074 (D.C. Cir. 2019) (a statutory "preclusion of judicial review … is a jurisdictional limitation on judicial power"). Thus, the fact that section 4617(f) limits a court's remedial power does not make it non-jurisdictional.

Indeed, as explained in the Petition, courts applying the substantively identical provision applicable to FDIC and RTC receivers, 12 U.S.C. § 1821(j), routinely describe it as a "jurisdictional" limitation. *See* Pet. at 9. *See also*, *e.g.*, *Bank of Am., N.A. v. Colonial Bank*, 604 F.3d 1239, 1241 (11th Cir. 2010) ("[Section] 1821(j) deprived the district court of jurisdiction to enjoin the FDIC because the preliminary injunction unlawfully restrained the FDIC's exercise of its receivership powers and functions"). As the U.S. Supreme Court has explained, "jurisdictional statutes speak about jurisdiction, or more generally phrased, about a court's powers." *United States v. Kwai Fun Wong*, 575 U.S. 402, 411 n.4 (2015). As a limitation on courts' powers, section 4617(f) has a jurisdictional effect.

Defendants erroneously argue that to qualify as a "jurisdictional" limitation, a statute must address subject-matter jurisdiction or personal jurisdiction, or otherwise refer to jurisdiction expressly. *See* Ans. 17-19. But this Court's prior decisions undeniably confirm that where a district court exceeds other statutory limitations on its authority, including statutory limitations on available relief, the transgression is jurisdictional and a writ of prohibition may issue. For example, in *Ham v. Eighth Jud. Dist. Ct.*, 93 Nev. 409 (1977), the Court issued a writ of prohibition preventing a judge from voluntarily disqualifying himself from pending proceedings after concluding that the judge lacked authority under NRS 1.230 to withdraw from the case. *Id.* at 424. The Court described the withdrawal as "clearly

without or in excess of the jurisdiction of the lower court." *Id.* There was no question that the district judge had subject matter or personal jurisdiction over the dispute raised in *Ham*. And in *Del Papa v. Stefan*, 112 Nev. 369 (1996), the Court held that a panel of Justices "acted in excess of their jurisdiction" in entering orders directing this Court's proceedings relating to judicial discipline be kept confidential. *Id.* at 373. There, too, the panel "had subject matter jurisdiction," but "it acted in excess of that jurisdiction under the First Amendment, NRS 1.090, and the [Administrative and Procedural Rules for the Nevada Commission on Judicial Discipline] in ordering that the proceedings … before this court be kept confidential." *Id.* at 376.

To the same effect, U.S. Supreme Court precedent confirms that statutory restrictions on a court's authority to award equitable relief are jurisdictional. For example, that court has described the Tax Injunction Act of 1937, 28 U.S.C. § 1341 ("TIA"), which provides that "district courts shall not enjoin, suspend or restrain the assessment, levy, or collection of any tax under State law"—but makes no express reference to jurisdiction—as a "jurisdictional bar." *Arkansas v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 823, 832 (1997). Likewise, in *California v. Grace Brethren Church*, 457 U.S. 393 (1982), the U.S. Supreme Court described the TIA as "divest[ing] the district court … of jurisdiction" to issue injunctive relief. *Id.* at 408. That court and the federal appellate courts have similarly described 26 U.S.C.

§ 7421(a)—a comparable provision barring actions "for the purpose of restraining the assessment or collection" of any *federal* tax, again without express reference to jurisdiction—as limiting courts' "jurisdiction." *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1963); *In re Walter Energy, Inc.*, 911 F.3d 1121, 1136 (11th Cir. 2018).

Nor are cases involving statutes limiting the relief available in taxation cases unique in that regard. To the contrary, the Ninth Circuit has explained that the federal Prison Litigation Reform Act, 18 U.S.C. § 3626, which mandates that "no longer may courts grant or approve [certain] relief" but does not mention jurisdiction, "operates … [to] restrict the equity jurisdiction of federal courts." *Gilmore v. California*, 220 F.3d 987, 998-99 (9th Cir. 2000). Cases applying the Johnson Act, 28 U.S.C. § 1342, make the same point. That statute provides that "district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State" public-utility regulator, but does not expressly label that limitation jurisdictional. Yet caselaw confirms that "the Johnson Act precludes federal court jurisdiction in actions seeking both declaratory and injunctive relief." *E.g.*, *US West, Inc. Tristani*, 182 F.3d 1202, 1207 (10th Cir. 1999).

The authorities Defendants cite as requiring a "clear statement" in statutes limiting jurisdiction, Ans. at 17, describe interpretive principles that are irrelevant

here. In both *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010), and *Sebelius v. Auburn Regional Med. Ctr.*, 568 U.S. 145 (2013), the Court was considering whether certain claim-specific statutory requirements delimited *subject-matter jurisdiction over a particular claim*. In *Reed Elsevier*, the Court considered whether a statutory requirement "deprives federal courts of subject-matter jurisdiction to adjudicate infringement claims involving unregistered works." 559 U.S. at 158. In *Auburn Regional*, similarly, the Court considered whether a 180-day statutory deadline precluded an administrative appeal, notwithstanding a regulation allowing for extensions upon good cause. 559 U.S. at 148-49. Neither decision addresses a statute categorically removing a court's *jurisdiction to grant specific forms of relief*. Whether a statute must be "clearly labeled jurisdictional" in order to limit court's subject matter jurisdiction over entire claims is irrelevant here, as no one challenges the district court's subject matter jurisdiction over any claim. By contrast, Defendants cite no authority—and FHFA is aware of none—imposing a "clear statement" requirement on statutes limiting courts' jurisdiction to grant specific forms of relief regardless of the underlying claim.

Likewise, Defendants' claim that *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998), ushered in an era of precision regarding the use of the term "jurisdiction" is not correct, as federal appellate decisions confirm. Among others, the *Gilmore* case discussed above was issued well after *Steel Co.*, yet treats a

provision that precludes certain relief—without referring expressly to jurisdiction—as "jurisdictional." Indeed, well after not only *Steel Co.* but also *Reed Elevier* and *Auburn Regional*, the U.S. Supreme Court issued a decision confirming that the Tax Injunction Act—which makes no direct reference to jurisdiction but instead, like section 4617(f), limits the relief courts may grant—is a "jurisdictional statute." *Direct Marketing Ass'n v. Brohl*, 575 U.S. 1, 12, 14 (2015). And just days before this brief was filed, the Ninth Circuit issued a decision again describing the Tax Injunction Act as a "jurisdictional bar" and a "broad jurisdictional barrier." *Big Sandy Rancheria Enters. v. Bonta*, --- F.3d ---, 2021 WL 2448226, at *6 (9th Cir. June 16, 2021).

Thus, contrary to Defendants' argument, an "express jurisdictional label," Ans. at 18, is not required for a statutory limitation on relief to be jurisdictional. That is because Congress need not "incant magic words in order to speak clearly" about jurisdictional limitations. *Auburn Regional*, 568 U.S. at 153. Courts may also consider "'context, including this Court's interpretations of similar provisions in many years past,' as probative of whether Congress intended a particular provision to rank as jurisdictional." *Id.* at 154 (quoting *Reed Elsevier*, 559 U.S. at 168). The *Auburn Regional* Court also noted that the "[k]ey to [its] decision" was that "filing deadlines ordinarily are not jurisdictional." *Id.* By contrast, as Defendants concede and as noted above, courts have ordinarily characterized 12 U.S.C. § 1821(j)—which

is substantially similar to 12 U.S.C. § 4617(f)—"as a limitation on the federal courts' jurisdiction." *See* Ans. at 18 (citing cases). Although Defendants suggest that only a "handful" of such decisions exist, there are many—including several issued after *Reed Elsevier* and *Auburn Regional*[3]—and Defendants have not identified any to the contrary. *See* Pet. at 9.

Indeed, authorities cited by Defendants confirm that section 4617(f) is jurisdictional. *See* Ans. at 17. For example, in *Perry Capital v. Mnuchin*, the D.C. Circuit analyzed section 4617(f)'s application after "turning to the merits," because the statute does not affect *subject-matter* jurisdiction over the claim, not because it is anything other than a jurisdictional limitation on courts' ability to grant certain relief. 864 F.3d 591, 604 (D.C. Cir. 2017). The court expressly recognized that distinction in analyzing another HERA provision, 12 U.S.C. § 4623(d), explaining that while it "*deprives courts of jurisdiction* 'to affect, by injunction or otherwise,

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[3] *See, e.g.*, *Jacobs v. FHFA*, 2017 WL 5664769 (D. Del. Nov. 27, 2017) (dismissing claims for injunctive relief for lack of jurisdiction under section 4617(f), and describing section 4617(f) and section 1821(j) as "nearly identical jurisdictional bar[s]"), *aff'd*, 908 F.3d 884 (3d Cir. 2018) (at page 889, the Third Circuit describes the district court decision it affirms as addressing "jurisdiction"); *Bulluck v. Newtek Small Business Finance, Inc.*, 2017 WL 8186594 (N.D. Ga. Sept. 19, 2017) (under section 1821(j), "the Court does not have jurisdiction to grant the requests for injunctive relief"); *Koppenhoefer v. FDIC*, 2014 WL 4748490 (C.D. Ill. Sept. 24, 2104) (under section 1821(j), "this Court lacked jurisdiction to award the particular type of relief [plaintiff] seeks"); *County of Sonoma v. FHFA*, 710 F.3d 987, 990 (9th Cir. 2013) (under section 4617(f), "courts have no jurisdiction" over claim for injunction); *Dittmer Properties, L.P. v. FDIC*, 708 F.3d 1011, 1020 (8th Cir. 2013) (discussing "anti-injunction jurisdictional bar of § 1821(j)").

the issuance or effectiveness of any classification or action of the Director under this subchapter[,]' … [t]hat language *does not strip this court of jurisdiction to hear this case*." *Id*. (emphases added). The *Perry* court then noted that section 4617(f)—the provision at issue here—is "nearly identical" to § 1821(j), the "statutory limitation on judicial review" that, as noted above, is routinely acknowledged to be jurisdictional. *See id.* at 605.

Nothing in *Perry* or in *Roberts v. FHFA*, 889 F.3d 397 (7th Cir. 2018) dispels the commonsense view that section 4617(f) is jurisdictional. At least two decisions relied on by both the *Perry* and *Roberts* courts held that section 4617(f) withdraws jurisdiction, and neither court distinguished them. *See County of Sonoma*, 710 F.3d at 990 (under section 4617(f), "courts have no jurisdiction" over claim for injunction); *Leon Cty., Fla. v. FHFA*, 700 F.3d 1273, 1276 (11th Cir. 2012) (describing section 4617(f) as a "jurisdictional bar"). And at least one court relying on the same decisions referenced in *Perry* and *Roberts* concluded that § 1821(j) is a jurisdictional limitation. *See Hanson v. FDIC*, 113 F.3d 866, 870 n.5 & 871 (8th Cir. 1997) (citing *Freeman v. FDIC*, 56 F.3d 1394 (D.C. Cir. 1995), and holding that § 1821(j) "limits the subject matter jurisdiction of federal and state courts"). Because section 4617(f) is a jurisdiction bar, writ relief is warranted.

In any event, whether section 4617(f) is "jurisdictional" is an academic question, as writ relief is "available to correct a district court's *arbitrary or*

capricious abuse of discretion [as well as] actions taken in excess of jurisdiction." *Hall v. Second Judicial Dist. Court*, 131 Nev. 1287, 2015 WL 1864249, at *1 (Nev. April 17, 2015) (unpublished disposition) (emphasis added).[4] To be sure, the "arbitrary or capricious" standard applies to petitions for writs of mandamus, but this Court has authority to construe the petition here as a request for such relief should the Court deem it "the more appropriate vehicle to challenge the district court's order." *State v. Eight Judicial Dist. Court*, 130 Nev. 1250, 2014 WL 3747225, at *1 n.1 (Nev. July 28 2014). Purporting to grant relief that a federal statute unambiguously precludes would qualify as an arbitrary or capricious use of discretion—and thus would warrant writ relief—even if section 4617(f) were incorrectly assumed to be non-jurisdictional.

II. Section 4617(f) Applies to Contract Claims

Defendants argue that FHFA acted outside the scope of its authority in "violating Westland's contract rights," and thus section 4617(f) cannot bar equitable relief to remedy that purported wrong. *See* Ans. at 19-23. But there has been no

[4] FHFA recognizes that NRAP 36(c)(3) restricts citation of unpublished decisions issued before January 1, 2016. The Court's jurisprudence on the availability of writ relief in similar circumstances is sparse, and Petitioner recognizes that the cited decisions are neither precedential nor entitled to any particular persuasive weight. The Court has authority under NRAP 1(c) and 2 to consider them in any way that would be useful.

contract claim made directly against FHFA nor any finding that either FHFA or Fannie Mae breached "Westland's contract rights," *id.* at 20.

Moreover, it is irrelevant if Fannie Mae breached a contract because any contracting party has the power to decide whether to perform or to default and thereby incur liability for damages. As a matter of hornbook law, "[v]irtually *every* contract operates, not as a guarantee of particular future conduct, but as an assumption of liability in the event of nonperformance." *United States v. Winstar Corp.*, 518 U.S. 839, 919 (1996) (Scalia, J., concurring); *see Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669, 682 (Cal. 1995) (quoting Justice Holmes: the "duty to keep a contract at common law means a predication that you must pay damages if you do not keep it—and nothing else").

This principle applies here. FHFA as Conservator has the statutory power to "operate" Fannie Mae and to "preserve and conserve" Fannie Mae's assets. *See* 12 U.S.C. § 4617(b)(2)(D); *Collins*, 2021 WL 2557067, at *9 (FHFA has "expansive authority in its role as a conservator," including the ability "to take control of the [Enterprises'] assets and operations, conduct business on [their] behalf, and transfer or sell any of [their] assets or liabilities"). Therefore, any potential breach within the scope of the conservatorship powers would not negate section 4617(f)'s statutory prohibition on enjoining the Conservator in the exercise of its powers. *See id.* at *9, *18 (holding that section 4617(f) applies whenever FHFA acts within scope of its

conservatorship powers and noting that the Conservator's "business decisions are protected from judicial review").

Federal appellate decisions applying the substantively identical provision in § 1821(j) confirm the point. For example, in *Volges v. RTC*, the court rejected the notion of an "implicit limitation" in § 1821(j) "that would give courts equitable jurisdiction to compel the RTC to honor a third part's rights as against RTC under state contract law." 32 F.3d 50, 52 (2d Cir. 1994). The proposed sale of the mortgages at issue fell under RTC's powers and functions as a receiver, and "[t]he fact that the sale might violate [plaintiff's] state law contract rights does not alter the calculus … [and] render [§ 1821(j)] inapplicable." *Id.* (citing similar holdings from other circuits). The district court therefore "did not have jurisdiction to enjoin the RTC from carrying out the planned disposition regardless of [plaintiff's] ultimate chance of success on his contract claim." *Id.* at 53.

Similarly, in *RPM Invs. Inc. v. RTC*, the court held that ordering specific performance of a contract would impermissibly "restrain or affect" the RTC in exercise of its statutory powers, explaining that "allegations that the RTC breached a contract does not affect our holding." 75 F.3d 618, 621 (11th Cir. 1996). And in *Gross v. Bell Sav. Bank PaSA*, the court held that "RTC was acting within its legitimate authority in withholding [plaintiffs'] deposits" and therefore injunctive relief under § 1821(j) would be "inappropriate." 974 F.2d 403, 408 (3d Cir. 1992).

As the federal court for the District of Colorado, relying on many of those same cases, explained in denying a motion to enjoin an FDIC receiver from selling a property in alleged breach of a contract:

> [T]he Court does not agree with Plaintiff that this Court has jurisdiction to enjoin the sale … on the basis that allowing the sale to go forward would be a breach of contract. … Rather, the Court finds that, regardless of whether the sale would breach any contract, such breach is immaterial to the Court's analysis of whether it has jurisdiction to enjoin the sale. … Because the Court cannot take any action that restrains the FDIC from executing its powers as receiver, it cannot grant … the injunctive relief requested.

Mile High Banks v. FDIC No. 11-cv-01417-WJM-MJW, 2011 WL 2174004 (D. Colo., June 2, 2011) at *4. The situation here is no different from these RTC and FDIC rulings.

Defendants' attempt to distinguish two of the many cases so holding—*Volges* and *RPM*—as "turn[ing] on a separate statutory provision that authorizes the FDIC to transfer the assets of a failed bank during receivership" is not persuasive. *See* Ans. at 22 (citing 12 U.S.C. § 1821(d)(2)(G)). The *Volges* court cited that provision only to explain that RTC acted within the scope of its powers when taking the challenged actions. 32 F.3d at 52. The court in *RPM* similarly cited § 1821(d)(2)(E) only to demonstrate that RTC had authority to dispose of a failed bank's assets. 75 F.3d at 620. Those cases reinforce the point that section 4617(f) applies unless

FHFA is acting outside the bounds of its authority. *See also Collins*, 2021 WL 2557067, at *9 ("agree[ing] with th[e] consensus" that section 4617(f) "prohibits relief where the FHFA action at issue fell within the scope of the Agency's authority as a conservator, but that relief is allowed if the FHFA exceeded that authority").

Defendants ultimately base their argument that "§ 4617(f) does not apply" to contract claims on *Sharpe v. FDIC*, 126 F.3d 1147 (9th Cir. 1997), a fact-specific decision that has not been and should not be read as establishing any such rule. *See* Ans. at 20-21. The Ninth Circuit and federal district courts within it have often distinguished *Sharpe* on various grounds, noting that it is an "unusual" case. *E.g.*, *McCarthy v. FDIC*, 348 F.3d 1075, 1078 (9th Cir. 2003); *Meritage Homes of Nev. v. FDIC*, 753 F.3d 819, 824-25 (9th Cir. 2014); *Delino v. Platinum Cmty. Bank*, No. 09-cv-00288-H(ABJ), 2010 WL 11508574 (S.D. Cal. June 9, 2010).

In any event, *Sharpe* stands only for the limited proposition that receivership-specific provisions of the corresponding FDIC statute "do[] not preempt state law so as to abrogate state law contract rights." *Sharpe*, 126 F.3d at 1155. That point was germane in *Sharpe* because there, the FDIC as receiver sought to avoid liability for full expectancy damages—the amount the bank in receivership had promised to pay under a settlement agreement the plaintiffs had fully performed. Specifically, although the contract specified that the bank would pay plaintiffs $510,000 and the bank had tendered cashiers' checks in that amount just before being placed into

receivership, the receiver stopped payment. It then construed the obligation as a "claim" subject to a receivership-specific administrative claims process, and "allowed" only $480,000—mostly in the form of a "receiver's certificate" that did not guarantee full payment. *Id*. at 1151. The Ninth Circuit reasoned that the "FDIC forced the Sharpes into the administrative claims process through which the Sharpes have received what might be construed as a partial damages award," and held that under those circumstances, "aggrieved parties to a contract breached by the FDIC [as receiver] are not subject to the FIRREA [administrative] claims process." *Id*. at 1154, 1157.

Here, by contrast, there is no allegation or plausible suggestion that FHFA is seeking to "abrogate state law contract rights," to limit the availability of full expectancy damages, or to force Defendants to present their counterclaim administratively rather than to this Court. Indeed, because there is no receivership in place, the FHFA administrative claims process analogous to the process at issue in *Sharpe* is completely irrelevant here. *See* 12 U.S.C. §§ 1821(d)(3)-(5), 4617(b)(3)-(5) (conferring power on FDIC and FHFA receivers, but not conservators, to "determine claims"). Thus, if Westland were able to establish a breach and the other elements of contract liability, section 4617(f) would not bar a fully compensatory monetary judgment against Fannie Mae under Nevada contract

law.[5] As a result, applying section 4617(f) here and dissolving the preliminary injunction as void for want of jurisdiction would comport with the Ninth Circuit's most recent description of *Sharpe*'s key holding—"that FIRREA does not permit the FDIC [receiver] *to avoid liability* for the breach of pre-receivership contracts …." *Bank of Manhattan, N.A. v. FDIC*, 778 F.3d 1133, 1137 (9th Cir. 2015) (emphasis added).[6]

Defendants observe that this Court has favorably cited *Sharpe* before, Ans. at 20, but fail to note that the Court cited *Sharpe* to support a different proposition: that FDIC "steps into the shoes" of a failed financial institution unless it elects to repudiate the bank's contracts under FIRREA's special mechanism. *CML-NV Grand Day, LLC v. Grand Day, LLC*, 134 Nev. 925, 2018 WL 6016683 (Nov. 15, 2018) (unpublished disposition) (discussing 12 U.S.C. § 1821(e)). That ruling is inapplicable here since there is no claim of repudiation. Nor could there be: FHFA's authority as Conservator to repudiate contracts only applies to pre-conservatorship

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[5] A different HERA provision bars punitive damages. 12 U.S.C. 4617(j)(4). But Nevada does not allow such awards on claims grounded in contract. *S.J. Amoroso Const. Co. v. Lazovich and Lazovich*, 107 Nev. 294, 298 (1991) ("Punitive damages are not available on the count for breach of contract"); *Sprouse v. Wentz*, 106 Nev. 597, 604 (1989) ("punitive damages must be based on an underlying cause of action not based on a contract theory") (citations omitted).

[6] The Ninth Circuit cited *Sharpe* in a more recent decision, *BKWSpokane, LLC v. FDIC*, 663 F. App'x 524, 527 (9th Cir. 2016) (unpublished), for a different point: that section 1821(j)'s bar applies where the receiver exercises the statutory power to disaffirm or repudiate.

contracts, i.e., those entered into *before* September 6, 2008, 12 U.S.C. 4617(d), and the contracts at issue here arose *after* that date.

Defendants' other *Sharpe*-related arguments exaggerate the conclusions the Court would have to reach in order to grant a writ of prohibition. A ruling in FHFA's favor will not require the Court to find that HERA preempts Nevada contract law, Ans. at 21, as fully compensatory damages remain available.[7] Finally, there is no danger that interpreting HERA to preclude the preliminary injunction will run afoul of the Takings Clause. *See* Ans. at 21. As explained above, Defendants have a complete remedy to be made whole in the form of damages, and disputes about investment properties are generally limited to monetary damages.[8] *See, e.g.*, *Field v. Genova Capital, Inc.*, No. 2:20-cv-09563-ODW-(JCx), 2020 WL 6161450, at *3 (C.D. Cal. Oct. 21, 2020) ("where … property that is the subject of the foreclosure is not the moving party's primary residence, and merely a rental property, courts have held there is no irreparable injury); *In re Richmond*, No. 14-41678 (CEC), 2014 WL 5100705 at *4 (Bankr. E.D.N.Y. Oct. 10, 2014) ("Absent special circumstances, the sale of commercial property does not create an irreparable harm, since any harm

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[7] Defendants' request for punitive damages is irrelevant to that conclusion. *See supra* n.5.

[8] Defendants insist that if section 4617(f) "was actually a viable defense to equitable relief," Fannie Mae would have raised it earlier. Ans. at 26. The timing of the argument has nothing to do with its merit.

due to the sale of the property or interference with the business can be remedied with monetary damages.") (internal quotations omitted).

III. Section 4617(f)'s Application Is Not Contingent on FHFA's Affirmative Exercise of Its Conservatorship Powers

Defendants argue that section 4617(f) does not prevent court action restraining or affecting FHFA's powers or functions unless FHFA has acted affirmatively, and "nothing in the record indicates that FHFA has taken any affirmative action or issued a directive to Fannie Mae in this matter." Ans. at 23-24. That argument finds no support in HERA's text or in the case law Defendants cite.

Defendants do not even try to square their proposed restriction on application of section 4617(f) with HERA's text. They could not do so in any event, because section 4617(f) contains no "affirmative act" prerequisite. The provision states: "Except as provided in this section or at the request of the Director, no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or receiver." The statute's prohibitive language—"no court may take any action"—is unqualified and absolute, as the U.S. Supreme Court confirmed in *Collins*. 2021 WL 2557067, at *9. And "[i]f the plain meaning of a statute is clear on its face, then [this Court] will not go beyond the language of the statute to determine its meaning." *Beazer Homes Nev., Inc. v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 120 Nev. 575, 579-80 (2004) (internal quotation marks omitted); *accord Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (courts presume that "a

legislature says in a statute what it means and means in a statute what it says there"). The Court should not usurp Congress's prerogative to define the jurisdictional limitation's scope by reading a requirement of a prior affirmative act into the statute.

Neither of the two cases Defendants cite in support of their argument imposes an affirmative action prerequisite on section 4617(f)'s application. Defendants point to language from *Roberts* indicating that "FHFA must have ***acted*** pursuant to its 'powers or functions'" for section 4617(f) "to bar judicial relief." Ans. at 23 (alterations and internal quotation marks omitted) (emphasis in original) (quoting *Roberts*, 889 F.3d at 402). But the *Roberts* court framed the section 4617(f) analysis as hinging on whether the Agency "*acted* a) pursuant to its 'powers or functions' and b) 'as a conservator or receiver,'" 889 F.3d at 402, because it was adjudicating whether a court could grant declaratory and injunctive relief with respect to an action FHFA *had already taken*. The "action" under review was not a prerequisite for applying section 4617(f), but rather was the basis for the lawsuit. The *Roberts* court did not hold that FHFA must have affirmatively acted for section 4617(f) to withdraw the district court's jurisdiction.

The other decision Defendants rely on—*Suero*, *see* Ans. at 23-26—similarly challenged an action Freddie Mac had *already* taken, namely, its refusal to sell the plaintiffs' foreclosed home to a particular lender. In fact, the *Suero* court rejected Defendants' argument that FHFA must have taken "affirmative action" or issued a

directive to Freddie Mac, holding instead that "the application of [section 4617(f)] is not confined to situations in which FHFA engages in affirmative acts by issuing specific directives or statements …." *Suero v. Freddie Mac*, 123 F. Supp. 3d 162, 171 (D. Mass. 2015). Rather, "by its own terms, [the statute] extends to any 'exercise of powers or functions of FHFA as conservator.'" *Id.* (alterations omitted) (quoting *Massachusetts v. FHFA*, 54 F. Supp. 3d 94, 99 (D. Mass 2014). The court applied section 4617(f) after finding that FHFA "exercised its statutory power as a Conservator," even though it "may not have 'acted' by issuing a formal statement or directive relative to the sales of the foreclosed homes." *Id.*

Roberts and *Suero* therefore do nothing to undermine Congress's clear directive that courts cannot "restrain or affect the exercise of powers and functions of the Agency as a conservator or receiver" even if those powers have not yet been exercised. *See* 12 U.S.C. § 4617(f). Even if the Court concludes that section 4617(f) contains an implied affirmative action requirement, FHFA has exercised its powers and functions as Conservator in defending Fannie Mae's need to preserve and conserve its assets in this case.

Defendants wishfully point to FHFA's delegation of responsibility for "normal business activities and day-to-day operations" to Fannie Mae as evidence that FHFA has not exercised its conservatorship powers here. Ans. at 24 (quoting SA02033). But a delegation of the day-to-day business operations by the

Conservator to its conservatee does not—and cannot—abrogate section 4617(f)'s protections. So long as the "powers or functions of the Agency as a conservator" are at play, a court cannot constrain them. In any event, FHFA as Conservator always has the ultimate control of Fannie Mae's operations, along with the power to reverse any actions of its conservatee. *See Suero*, 123 F. Supp. 3d at 173; SA02033 (FHFA "retains the right to review and reverse any delegated actions"). FHFA also "retains broad authority to review any activity or transaction at any time," including actions "that fall outside the eight non-delegated areas." SA02035. It has not—and legally cannot—relinquish Conservator responsibilities by delegating them. Finally, Fannie Mae's preservation of its assets "further [FHFA's] statutory mission as a protective conservator," and "[t]hat is enough to preclude judicial intervention." *Suero*, 123 F. Supp. 3d. at 174.

IV. The Preliminary Injunction Is Void Under Nevada Law

Defendants' rebuttals to FHFA's arguments that the preliminary injunction is also void under Nevada law, *see* Ans. at 26-29, are unpersuasive. *First*, Defendants contend that the preliminary injunction could bind FHFA prior to FHFA's intervention because FHFA is Fannie Mae's conservator. *Id.* at 26-27. Defendants' authorities do not support its view. In *Bowler* and *Ahlers*, the Court rejected arguments that a non-party that had acquired a party's interest in the property or right at issue were bound by a decree affecting the status of the property or right. *See*

Bowler v. Leonard, 70 Nev. 370, 376 (1954); *Ahlers v. Thomas*, 56 P. 93, 94 (Nev. 1899). The fact that FHFA "stands in the shoes" of Fannie Mae as conservator, *see* Ans. at 27, is not the kind of contractual privity described in those cases. *See Cacciapalle v. United States*, 148 Fed. Cl. 745, 780 (2020) (rejecting plaintiffs' argument that FHFA as conservator steps into an Enterprise's shoes for privity-of-contract purposes).

Defendants also rely on Nevada Rule of Civil Procedure 65(d), which authorizes injunctions against non-parties "in active concert or participation with" the parties bound by the order. Ans. at 27. But "NRCP 65(d) is not precisely on point, because it addresses the scope of enforcement of an injunction *after* the injunction has been properly issued." *Las Vegas Novelty, Inc. v. Fernandez*, 106 Nev. 113, 117 (1990). The injunction here was never properly issued as it is void under section 4617(f) and Nevada law.

Second, Defendants argue that Section 5(o) is not impermissibly vague because this Court found it not to be overbroad and because Fannie Mae can comply with its "straightforward terms." Ans. at 26-29. Those arguments fail. As an initial matter, this Court's ruling that Section 5(o) is not "overbroad" because it "only prohibits any adverse actions resulting from the purported default," *see* Order at 2, *Fannie Mae v. Westland Liberty Village, LLC*, No. 82174 (May 25, 2021), has no bearing on the question whether that provision is also "vague." The notion of

"overbreadth" relates to whether the injunction is properly *limited*, i.e., whether it broadly prohibits specific and identifiable activities that should be allowed. By contrast, the concept of "vagueness" goes to whether the injunction is sufficiently *precise, i.e.*, whether it clearly identifies the prohibited activities such that a reasonable party can understand what they are. *See Maheu v. Hughes Tool Co.*, 88 Nev. 592, 598 (1972).

Defendants' arguments that Section 5(o) is not vague because it includes "specific examples" of adverse actions and because the term "Westland" is "sufficient indicia" of the entities implicated, Ans. at 28, are unpersuasive. The examples in Section 5(o) are illustrative of a *different* requirement prohibiting Fannie Mae, FHFA, and all other Enjoined Parties from "discriminat[ing] against or blacklist[ing] any Westland entity on new loan or loan refinancing applications, *including by*" taking the actions Westland references. Separately, Section 5(o) prohibits Fannie Mae, FHFA, and all other Enjoined Parties from taking any unspecified "adverse action" against "any Westland entity" in relation to other loans. And Defendants have not attested (or suggested) that all or even most affiliates include the word "Westland." While Fannie Mae was able to find "at least forty active and inactive loans" with Westland and its affiliates, *see* Resp. at 28; SA02098, there may be other entities that are not obviously Westland affiliates.

Putting aside section 4617(f), the Court can issue the writ of prohibition based on the Nevada-law defects alone; the district court exceeded its jurisdiction in issuing a preliminary injunction that purports to bind a non-party to a provision too vague to enforce.

CONCLUSION

For the reasons provided herein and in FHFA's petition, and following the U.S. Supreme Court's guidance in holding that 12 U.S.C. § 4617(f) bars injunctive relief affecting the conservator's authorized functions, FHFA requests that the Court issue a writ of prohibition dissolving the district court's preliminary injunction and directing the district court not to grant any relief that would restrain or affect FHFA's federal statutory powers.

Dated this 24th day of June, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to NEFCR 9(b)(d)(e), I certify that on June 24, 2021, a true and correct copy of the **REPLY IN SUPPORT OF PETITION FOR A WRIT OF PROHIBITION,** was transmitted electronically through the Court's e-filing system to the attorney(s) associated with this case.

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

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

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

Dated: June 24, 2021.

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