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 NADIA KRALL, District Judge,

Respondents,

and

WESTLAND LIBERTY VILLAGE, LLC; WESTLAND VILLAGE SQUARE, LLC; and FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Real Parties in Interest.

Case No. 82666

SUPPLEMENTAL BRIEF IN SUPPORT OF ANSWER TO PETITION FOR WRIT OF PROHIBITION

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VERIFICATION

Under penalties of perjury, the undersigned declares that he is counsel for Real Parties in Interest Westland Liberty Village, LLC and Westland Village Square, LLC; that he knows the contents of this Supplemental Brief in Support of Answer to Petition for Writ of Prohibition; 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 6th day of October, 2021.

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

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I. INTRODUCTION

Westland's answer to FHFA's petition for a writ of prohibition outlined three independent grounds for denying the petition. First, a writ of prohibition may only issue to the district court if it acts without or in excess of its *jurisdiction*, and the federal statute that provides the principal basis for FHFA's petition is non-jurisdictional. Second, courts may enjoin FHFA from taking actions that exceed its statutory authority, and the agency does not have the statutory authority to foreclose on Westland's properties without a valid contractual basis. And third, the federal statutory limitation on injunctions against FHFA only applies when the agency takes some affirmative action—FHFA cannot use this statute as a basis for parachuting into a case in which it had no prior involvement in order to limit the available remedies. After Westland filed its answer, the United States Supreme Court decided *Collins v. Yellen*, 141 S. Ct. 1761 (2021), and this Court called for supplemental briefing on the impact of that decision. As explained in detail below, *Collins* strengthens many of Westland's previous arguments and does not undermine any of them.

Collins also provides a fourth reason for the Court to deny FHFA's petition. The Court in *Collins* said that to invoke the Anti-Injunction Clause in the Housing and Economic Recovery Act ("HERA"), FHFA must show that the injunction at issue would prevent it from doing something that is "*necessary* to put the regulated

entity in a sound and solvent condition." *Id.* at 1776 (emphasis added). FHFA cleared that hurdle in *Collins*, which was a lawsuit that concerned hundreds of billions of dollars and the basic terms of Treasury's investments in Fannie Mae and Freddie Mac. Unlike *Collins*, the outcome of this dispute over two Las Vegas apartment buildings could not have any conceivable effect on whether FHFA ultimately succeeds in returning Fannie Mae to a sound and solvent condition. For that reason, as well those explained in Westland's previous answer, the Anti-Injunction Clause does not apply.

II. ARGUMENT

A. *Collins* Does Nothing To Undermine Westland's Previous Arguments For Denial Of FHFA's Petition.

1. *Collins* Is Consistent With Treating the Anti-Injunction Clause as a Non-Jurisdictional Limitation on Remedies.

A writ of prohibition may only issue if the district court acted without or in excess of its jurisdiction. *Nev. State Bd. of Architecture v. Eighth Jud. Dist. Ct.*, 135 Nev. 375, 377, 449 P.3d 1262, 1264 (2019). Issuance of the writ is inappropriate in this case because the Anti-Injunction Clause does not deprive any court of jurisdiction but instead limits the *remedies* available for certain claims involving FHFA. *See* Ans. to Pet. for Writ of Prohibition at 17–19 (hereinafter "Ans."). The Supreme Court in *Collins* did not address whether Section 4617(f) is jurisdictional, so the controlling precedents on this issue continue to be the earlier Supreme Court

decisions discussed in Westland's prior briefs. *See Sebelius v. Auburn Regional Medical Ctr.*, 568 U.S. 145, 153–55 (2013); *Reed v. Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515–16 (2006).

In briefs filed after *Collins* was decided, FHFA has argued that the Supreme Court implicitly treated Section 4617(f) as jurisdictional when it said the statute "sharply circumscribed judicial review of any action that the FHFA takes as a conservator or receiver." *Collins*, 141 S. Ct. at 1775. But whether the Anti-Injunction Clause is jurisdictional was not briefed in *Collins*, and the Court had no reason to decide the question. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998) (explaining that "drive-by jurisdictional rulings . . . have no precedential effect").

In any event, FHFA is wrong to assume that every statutory limitation on judicial review is jurisdictional; to the contrary, "when Congress does not rank" a statutory limitation on judicial action "as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Arbaugh*, 546 U.S. at 515–16; *see, e.g.*, *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428 (2011) (statutory deadline for noticing appeal under Veterans' Judicial Review Act is non-jurisdictional); *Oryszak v. Sullivan*, 576 F.3d 522, 524–26 (D.C. Cir. 2009) (clarifying that important statutory limits on judicial review under the Administrative Procedure Act are "not . . . jurisdictional bar[s]"); *Hamdi ex rel. Hamdi v. Napolitano*, 620 F.3d

615, 628 & n.15 (6th Cir. 2010) (federal statute limiting judicial review required dismissal of claim but did not deprive courts of jurisdiction; "it is not the subject matter of Hamdi's complaint that the statute prohibits, but rather the relief that he seeks"). Absent a clear statement from Congress to the contrary, a federal statute that limits when judicial relief is available is non-jurisdictional.

To be sure, the presumption that statutory limitations on judicial review are non-jurisdictional may be overcome, as when Congress expressly states that "no court shall have jurisdiction to review" certain categories of agency action. 8 U.S.C. § 1252(a)(2) (treated as jurisdictional in *Kucana v. Holder*, 558 U.S. 233 (2010)). Some courts also treat federal statutes as jurisdictional if they "implicate[ ] sovereign immunity," which is a jurisdictional doctrine. *Barbosa v. United States Dep't of Homeland Security*, 916 F.3d 1068, 1072 n.6 (D.C. Cir. 2019). Simply put, as in 8 U.S.C. § 1252(a)(2), when a statute is jurisdictional a court does not have the power "to review." But here, under the Anti-Injunction Clause, judicial review is at most only limited—not removed altogether. As such, no language of the sort from *Kucana* or *Barbosa* appears in the text of Section 4617(f), and *Collins* does not imply otherwise. Accordingly, the Anti-Injunction Clause is not jurisdictional.

2. *Collins* Supports Westland's Argument That the Anti-Injunction Clause Does Not Apply When FHFA Exceeds Its Statutory Authority by Breaching a Contract.

As Westland has explained in its previous briefs, with limited exceptions not applicable here, FHFA exceeds its statutory conservatorship authority—and thus may be enjoined—when it breaches a contract. *See* Ans. at 19–23. Far from casting doubt on this argument, *Collins* confirms that when FHFA "exceeds [its] powers or functions" as conservator, the Anti-Injunction Clause "imposes no restrictions." *Collins*, 141 S. Ct. at 1776. As a result, the only question is whether FHFA has the statutory authority to foreclose on Westland's properties without any valid contractual basis for doing so. FHFA enjoys no such statutory power.

HERA "clearly contemplates that [FHFA] can escape obligations of contracts," but it may do so "only through the prescribed mechanism" that appears in 12 U.S.C. § 4617(d). *CML-NV Grand Day, LLC v. Grand Day, LLC*, 134 Nev. 925, 430 P.3d 530, 2018 WL 6016683 (Nov. 15, 2018) (unpublished disposition) (interpreting materially identical statute that applies to FDIC). Section 4617(d) limits the types of contracts that FHFA may repudiate and mandates that any repudiation occur "within a reasonable period following" the appointment of a conservator or receiver. 12 U.S.C. § 4617(d). Under FHFA's own regulations, its authority to exercise this limited power of contract repudiation expired many years before the events that gave rise to this lawsuit. *See* 12 C.F.R. § 1237.5(b). *Collins* did not

concern a breach of contract claim, and the *Collins* Court did not cite Section 4617(d)—much less discuss the scope of FHFA's statutory authority to breach contracts. Accordingly, the authorities cited in Westland's prior briefs on this issue remain good law. *See Sharpe v. FDIC*, 126 F.3d 1147, 1155 (9th Cir. 1997).

In other briefs, FHFA has attempted to rebut Westland's argument on this issue by emphasizing that *Collins* said the Anti-Injunction Clause does not permit courts to decide "whether the FHFA made the best, or even a particularly good, business decision." *Collins*, 141 S. Ct. at 1778. But in contrast to the shareholders' claim at issue in *Collins*, determining whether Fannie Mae breached its contract with Westland does not require the courts to second-guess FHFA's business judgments. FHFA's argument to the contrary misses the point. Congress provided a specific, limited power for FHFA to breach contracts, and that limited power no longer applies. Accordingly, FHFA's "business judgment" argument is simply an attempt to improperly extend this limited power with an additional exception that would sanction overreach by a government agency with clearly defined statutory powers.

3. *Collins* Supports Westland's Argument That FHFA Must Actively Participate in the Underlying Events to Invoke the Anti-Injunction Clause.

Collins says nothing to limit Westland's third argument in its answer to FHFA's petition: that Section 4617(f) only limits the remedies available in cases that concern transactions or events in which FHFA itself was an active participant. *See*

Westland Answer 23–26. *Collins* concerned active participation in the form of amendments to the terms of Treasury's investments in Fannie Mae and Freddie Mac, and those amendments were signed by FHFA's Acting Director after lengthy negotiations between FHFA and Treasury. *See Collins*, 141 S. Ct. at 1790. Still, the Court opined that "the anti-injunction clause only applies where the FHFA *exercised* its powers or functions . . . ." *Collins*, 141 S. Ct. at 1776 (emphasis added). Thus, the Court in *Collins* reiterated that FHFA may not use Section 4617(f) as a basis for limiting the available remedies in cases where, as here, FHFA had no role in the underlying events in dispute.

B. *Collins* Provides An Additional Basis To Deny FHFA's Petition.

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, as most (but not all) lower courts that had previously addressed this issue concluded that 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 Capital v. Mnuchin*, 864 F.3d 591, 608 (D.C. Cir. 2017); *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). Accordingly, to establish that the preliminary injunction violates HERA's Anti-Injunction Clause, FHFA must show that the preliminary injunction prevents it from doing something that is "*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 the financial condition of Fannie Mae. As of the end of 2020, Fannie Mae had four *trillion* dollars in assets, and it is 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.

Second, far from being "appropriate to carry on the business of [Fannie] and preserve and conserve its assets and property," *Collins*, 141 S. Ct. at 1776, the rule of law that FHFA seeks to establish 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, the upshot of FHFA's argument is that federal law entitles Fannie Mae to seize properties through foreclosure for any or no reason and 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.

Third, while FHFA may claim the preliminary injunction interferes with its ability to conserve Fannie Mae's assets, the Court must evaluate any such claim in the context of the specific facts of this case. As discussed in Westland's answer, this dispute arises out of Fannie's Mae's unilateral increased reserve demands rather than any monetary default by Westland. Indeed, when Westland acquired the properties at issue, it 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 not only timely made all monthly loan service payments agreed to in the loan agreements, but Westland actually *overpaid* its mortgage by more than $550,000 since this dispute began. More importantly, the new PCA reports

commissioned by Fannie 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's assets have been lost or are at risk. For these reasons, the preliminary injunction does nothing to interfere with FHFA's ability to carry out the rehabilitative conservatorship mission the Supreme Court recognized in *Collins*.

III. CONCLUSION

For the reasons set forth herein, Westland respectfully submits that the Court should deny FHFA's petition for writ of prohibition in its entirety.

DATED this 6th day of October, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 28.2, I hereby certify that this supplemental 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 font, double spaced, Times New Roman.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 2,251 words.

I further certify that I have read this supplemental 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 supplemental brief does not conform with the requirements of the

Nevada Rules of Appellate Procedure.

DATED this 6th day of October, 2021.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 6th day of October 2021, I caused true and correct copies of the foregoing **Supplemental Brief in Support of Answer to Petition for Writ of Prohibition** to be delivered to the following counsel and parties:

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