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, Judge Respondents, WESTLAND LIBERTY VILLAGE, LLC; WESTLAND VILLAGE SQUARE, LLC; and FEDERAL NATIONAL MORTGAGE ASSOCIATION, Real Parties in Interest.	Case No. 82666

FEDERAL HOUSING FINANCE AGENCY'S SUPPLEMENTAL BRIEF

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INTRODUCTION

FHFA petitioned this Court for a writ of prohibition dissolving a preliminary injunction that purports to bar Fannie Mae and anyone "having control over the affairs of Fannie Mae" from taking certain default actions related to two multifamily property-secured loans Fannie Mae owns and from taking any "adverse action" against any Westland entity in relation to any and all present and future loans not at issue here.

As FHFA explained in its primary briefing, its organic federal statute deprived the district court of jurisdiction to enter the injunction. Specifically, 12 U.S.C. § 4617(f)—part of the Housing and Economic Recovery Act enacted in 2008—prohibits courts from "tak[ing] any action to restrain or affect the exercise of powers or functions of FHFA as conservator." The preliminary injunction purports to do just that, and Section 4617(f) renders it void.

After briefing closed, the Court asked the parties to "provide supplemental briefing addressing the applicability of *Collins v. Yellen*, __ U.S. __, 141 S. Ct. 1761 (2021) to the issues raised in the petition." Sept. 15, 2021 Order at 1.

Collins confirms that Section 4617(f) voids the preliminary injunction.

ARGUMENT

In *Collins*, the United States Supreme Court held that Section 4617(f) broadly bars injunctive relief that could restrain or affect FHFA's statutory powers as Conservator. 141 S. Ct. at 1775-78. There was no dissent among the Justices as to the point that "Congress sharply circumscribed judicial review of any action that the

FHFA takes as a conservator…." *Id*. at 1775. It also agreed with the judicial "consensus" of every Court of Appeals "that has confronted this language" that Section 4617(f) "prohibits relief where the FHFA action at issue [falls] within the scope of the Agency's authority as a conservator." *Id*. at 1776. The Supreme Court then held unanimously that because "FHFA did not exceed its authority as a conservator" in taking the action at issue—entry into a contract that plaintiffs argued placed the Enterprises at greater financial risk—Section 4617(f) "bars" injunctive relief. *Id*. at 1778. The Court held that in determining whether to apply Section 4617(f), "[i]t is not necessary for us to decide—and we do not decide—whether the FHFA made the best, or even a particularly good, business decision." *Id*.[1]

Collins controls this case. The preliminary injunction at issue here purports to preclude the Conservator from, among other things, (1) initiating a foreclosure or taking certain other default mitigation steps to collect on the loans at issue, and (2) taking any action against any entity in the Westland portfolio of companies, if that action could be deemed adverse to such an entity, including Westland entities and properties outside Nevada. Because such actions lie at the heart of the Conservator's core statutory powers—the powers to "operate" Fannie Mae, to "preserve and conserve" Fannie Mae's assets and property, and to "collect … obligations and moneys due" Fannie Mae, *see* 12 U.S.C. § 4617(b)(2)(B)(i), (ii),

[1] Section II of *Collins* interprets Section 4617(f).

(iv)—Section 4617(f) precluded the district court from enjoining them. And under *Collins*, that conclusion holds *regardless* of whether any such actions would constitute "the best, or even a particularly good, business decision." 141 S. Ct. at 1778.[2]

I. *Collins* Confirms that Section 4617(f) Negates the Preliminary Injunction Because it Affects FHFA's Powers and Functions

Two elements of the *Collins* decision are germane. *First*, *Collins* confirms that Section 4617(f) is jurisdictional. And *second*, the decision confirms that Section 4617(f) protects the Conservator's operational business decisions from judicial restraint.

A. *Collins* Confirms that Section 4617(f) Is a Jurisdictional Limitation on Judicial Authority

In *Collins*, the Supreme Court described Section 4617(f) as "sharply circumscrib[ing] judicial review of any action that the FHFA takes as a conservator." 141 S. Ct. at 1775. Judicial action restraining or affecting FHFA's functions as conservator is allowed only if "authorized by one of [the] provisions" of HERA or

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[2] *Collins* also addresses a constitutional issue: Whether a different HERA provision—one purporting to protect Senate-confirmed FHFA Directors from removal other than for cause—was consistent with separation-of-powers principles. 141 S. Ct. at 1787 (discussing 12 U.S.C. § 4512). The Court concluded that it was not, and held that the removal provision was therefore unenforceable and invalid. *Id.* The Court did not, however, void any prior acts of the Agency or any of its Directors. *Id.* at 1788. The constitutional holding in *Collins* is irrelevant here. Defendants have not asserted a constitutional claim, nor have they challenged any act that FHFA or any of its Directors took while the removal provision was apparently in force.

"requested by the [FHFA] Director." *Id.* As FHFA discussed in its reply in support of the writ, limitations on "judicial review" are quintessentially jurisdictional. *See* Reply in Supp. of Pet. for Writ of Prohibition at 3. This Court has also recognized that jurisdictional questions include whether a court has the authority to award certain relief. *See, e.g.*, *Major v. State*, 130 Nev. 657 (2014) (whether the district court had authority to order restitution was a "jurisdiction[al]" question); *State v. Eighth Jud. Dist. Ct.*, 111 Nev. 1023 (1995) (holding "the district court exceeded its jurisdiction" where a statute relegated certain relief solely to the discretion of the Nevada Gaming Commission). As *Collins* holds, Section 4617(f) addresses precisely this question: the authority of a court to take certain actions and grant certain relief.

As a result, Section 4617(f) is jurisdictional, and any judicial order that conflicts with its terms is void ab initio and must be vacated.

B. *Collins* Confirms that Section 4617(f) Bars the Restraints the District Court Imposed

The U.S. Supreme Court's analysis also confirms that Section 4617(f) precludes injunctive relief that would restrain the specific Conservator powers and functions the preliminary injunction addresses. *Collins* notes that FHFA has "expansive authority" as Conservator, which includes "tak[ing] control of [Fannie Mae's] assets and operations," and "conduct[ing] business on its behalf." 141 S. Ct. at 1776 (citing 12 U.S.C. § 4617(b)(2)). The Court endorsed federal appellate

decisions that apply Section 4617(f) to "prohibit relief where the FHFA action at issue fell within the scope of the Agency's authority as conservator." *Id.* Thus, the *Collins* plaintiffs could not get judicial relief to change how FHFA chose to operate Fannie Mae and Freddie Mac.

Here, the preliminary injunction expressly intends to restrain Fannie Mae and the Conservator in the actions they may take either to (1) enforce and collect upon defaulted loans or (2) process and agree to underwrite new loans—the kind of activities secured lenders undertake often, and that inevitably involve the exercise of business judgment. Such activities lie at the center of the Conservator's core statutory powers—to "operate" Fannie Mae, to "preserve and conserve" Fannie Mae's assets and property, and to "collect … obligations and moneys due" Fannie Mae. 12 U.S.C. § 4617(b)(2)(B)(i), (ii), (iv). The injunction expressly applies to the Conservator, as it purports to bind the actions of any entity "having control over the affairs of Fannie Mae," which *Collins* acknowledged was FHFA's purview. 141 S. Ct. at 1776. But even putting aside that express reference, any restraint of Fannie Mae's business operations would inevitably restrain the Conservator: The Conservator not only has the exclusive statutory power to "operate" Fannie Mae, but also is Fannie Mae's sole statutory successor, holding all rights, titles, powers, privileges and assets of Fannie Mae. 12 U.S.C. § 4617(b)(2)(A), (B).

Because the preliminary injunction directly and unavoidably purports to limit

the Conservator's exercise of its statutory powers, the district court lacked jurisdiction to enter it, and Section 4617(f) requires that this Court dissolve it.

II. Defendants' Most Recent Interpretation of *Collins* Lacks Merit

The injunction at issue here restrains the "Enjoined Parties"—including Fannie Mae and any "persons exercising or having control over the affairs of Fannie Mae," which necessarily includes the Conservator—from taking "adverse actions" with respect to Defendants' entire portfolio nationwide and from engaging in contractual default remedies such as pursuing foreclosure on the multifamily properties at issue. Inj. §§ 1-3, 5(b)-(c), 5(d)-(o). Those prohibitions directly impact the Conservator's ability to "preserve and conserve [Fannie Mae's] assets and property," 12 U.S.C. § 4617(b)(2)(B)(iv); "collect all obligations and money due" Fannie Mae, *id*. at § 4617(b)(2)(B)(ii); "take over the assets of and operate [Fannie Mae] with all the powers of the shareholders, the directors, and the officers," *id*. at § 4617(b)(2)(B)(i); "conduct all business of [Fannie Mae]," *id.*; and "perform all functions of [Fannie Mae] in the name of [Fannie Mae]," *id*. at § 4617(b)(2)(B)(iii).

In other briefing before this Court and the district court, Defendants have presented a novel, unsupported argument that *Collins* implicitly holds that Section 4617(f) protects only those individual Conservator actions that are "necessary" to put Fannie Mae in a sound and solvent condition, thereby leaving virtually all of the Conservator's ordinary business acts subject to injunctive prohibition. That is not

correct, and the interpretation contradicts an undivided United States Supreme Court holding that all actions within the scope of FHFA's authority as Conservator are protected by Section 4617(f). *Collins* does not limit Section 4617(f)'s protection to only those Conservator actions that are "necessary" to rehabilitate the Enterprises. To the contrary, the Court held that Section 4617(f) barred the *Collins* plaintiffs' claim, while expressly *declining* to determine whether the action was "necessary." 141 S. Ct. at 1778. In any event, Defendants frame the issue far too narrowly by focusing on only the loans at issue—rather than the general power to collect on obligations—in relation to soundness and solvency. Even if HERA did impose a "necessary" requirement, it is "necessary" for the Fannie Mae conservatorship—like any ongoing financial enterprise—to collect on obligations in general if it is to continue business operations, return to a safe condition, and subsequently maintain soundness and solvency. And to collect on obligations under Nevada law, Fannie Mae exercises its default remedies.

A. Collins Does Not Impose a Necessity Requirement on FHFA's Powers and Functions

In a related appeal, Defendants have asserted that *Collins* radically changed the law, distorting Section 4617(f)'s application to only those FHFA actions that are "necessary to put the regulated entity in a sound and solvent condition." *See* Ans. to Amicus Br. at 12-15, *Fed. Nat'l Mortg. Ass'n v. Westland Liberty Vill.*, No. 82174 (Nev. filed Aug. 30, 2021) ("Ans. to Amicus Br.") (citing 12 U.S.C.

§ 4617(b)(2)(D)). Defendants then contend that because the loans at issue here will not make or break Fannie Mae, the activity the district court enjoined is not "necessary" to Fannie Mae's solvency. *Id*. at 13-14.

Defendants misread *Collins* in a futile attempt to avoid a valid federal law that preempted the preliminary injunction from its inception. Nowhere does the Supreme Court indicate even a scintilla of intent to upend a settled point of law: that Section 4617(f) applies without limitation "where FHFA exercise[s] its 'powers or functions' 'as a conservator or a receiver.'" *Id.* The Court "agree[d] with th[e] consensus" reflected in the many appellate cases that stand for that point—*Roberts v. FHFA*, 889 F.3d 397 (7th Cir. 2018), *Robinson v. FHFA* 875 F.3d 220 (6th Cir. 2017), and *Perry Capital LLC v. Mnuchin*, 864 F.3d 591 (D.C. Cir. 2017). All courts are barred by Section 4617(f) from restraining or affecting the FHFA's exercise of powers or functions within the scope of its authority as Conservator, including carrying on the business of its conservatee Fannie Mae, as is the case here.

Nothing in any of those cases, or in *Collins*, conditions the application of Section 4617(f) on a finding that the challenged action was "necessary." To the contrary, *Collins* held that in assessing whether Section 4617(f) applies, "*[i]t is not necessary for [the Court] to decide* … whether FHFA made the best, or even a particularly good, business decision when it [took the challenged action.]" 141 S. Ct. at 1778 (emphasis added). Instead, the Court "conclude[d] only that under the

terms of [HERA], the FHFA did not exceed its authority as a conservator, and therefore [Section 4617(f)] bars the … claim." *Id*. Thus, the Supreme Court applied Section 4617(f) to bar a claim, regardless of whether the challenged action was "necessary" to rehabilitate Fannie Mae and Freddie Mac.[3]

If, as Defendants contend, the Supreme Court had meant to impose a "significant change" by adding a necessity requirement to the Section 4617(f) analysis, Ans. to Amicus Br. at 12, it would have evaluated whether FHFA's action in *Collins* met that requirement. Indeed, it could not have held that Section 4617(f) applies without analyzing whether the FHFA action at issue was "necessary" to put the Enterprises in a sound and solvent condition, as neither the district court nor the Court of Appeals decisions addressed the question.[4] But that is exactly what the Supreme Court did. In consecutive sentences, the Court first held that it need not "decide … whether the FHFA made the best, or even a particularly good, business

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[3] The Supreme Court's acknowledgement that Section 4617(f)'s application does not turn on whether the Conservator's actions or business decisions are "particularly good," *Collins*, 141 S. Ct. at 1778, confirms that Defendants cannot substitute their judgment for the Conservator's in assessing how best to manage Fannie Mae's business decisions or its business relationship with Defendants.

[4] None of the lower courts' decisions analyzes whether an act or decision must be "necessary" to safety and soundness to fit within the Conservator's powers and functions. The Fifth Circuit's en banc decision—which the Supreme Court reversed—held that the challenged act did not fall within any of the Conservator's powers without analyzing whether an act that would otherwise fall within the Conservator's other enumerated powers must also be "necessary" to be valid. *Collins v. Mnuchin*, 938 F.3d 553, 582–83 (5th Cir. 2019).

decision," and then concluded that "FHFA did not exceed its authority as a conservator, and therefore [Section 4617(f)] bars the … claim." 141 S. Ct. at 1778. Thus, the *Collins* decision directly refutes Defendants' very strained interpretation.

Nor would Defendants' proposed "necess[ity]" requirement be sensible in any event. Under Defendants' reading, each act and decision by the Conservator that is not by itself "necessary" to returning Fannie Mae to a "sound and solvent condition" would be subject to judicial abrogation, even though the Conservator's authority to operate Fannie Mae encompasses everything from strategic policy decisions and actions concerning individual loans. This would yield absurd consequences, as it would negate the Conservator's power to take a series of individual actions that, collectively, could be crucial to the return to and continuation of sound operations at Fannie Mae.[5]

Defendants' far narrower interpretation finds no support in HERA's text. The U.S. Supreme Court explained that HERA grants the Conservator "expansive authority" to make business decisions with respect to the Enterprises—big or small—and Section 4617(f) applies to them all. *See* 141 S. Ct. at 1776. If Congress

[5] Defendants' position would be equally absurd in circumstances where any of several alternative strategies would preserve soundness and solvency. In such circumstances, the Conservator would need to do *something*, but *no particular act* would be "necessary" in and of itself, as the alternatives would also be effective. Indeed, *Collins* holds that "[c]hoosing to forgo [one] option in favor of [another] … [is] not in excess of FHFA's statutory authority as conservator." 141 S. Ct. at 1778.

had intended to limit Section 4617(f)'s application as Defendants suggest, it would have done so directly, but it did not.

Nor is there any textual basis to suggest that HERA's "necessary" clause somehow indirectly limits the Conservator's powers or disqualifies any of them from Section 4617(f)'s protection. *See* 12 U.S.C. 4617(b)(2)(D). To the contrary, Section 4617(b)(2)(D)(i) states that the Conservator "may"—not "must" or "shall"—"take such action as may be … necessary to put [Fannie Mae] in a sound and solvent condition." And in the very next sentence, the statute makes clear that the Conservator's powers are in fact far broader. Using the conjunctive "and," Section 4617(b)(2)(D)(ii) empowers the conservator also to "take such action as may be … appropriate to carry on the business of [Fannie Mae] and preserve and conserve [its] assets and property." Together, Section 4617(b)(2)(D)(i) and (ii) empower the Conservator to take such actions as are "necessary" and "appropriate" to maintain Fannie Mae's soundness and solvency.

As cases applying the U.S. Constitution's "necessary and proper" clause confirm, such language authorizes acts that are convenient or useful to the objective, rather than permitting only those acts that are logically or practically indispensable.[6]

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[6] One of this Court's earliest decisions states that view directly, holding that the clause empowers Congress "to pass all laws that may be necessary, proper, *convenient or useful*." *Maynard v. Newman*, 1 Nev. 271, 288 (1865) (emphasis in original. This Court has since applied the same reasoning to a non-constitutional

Footnote continued on next page

See, e.g., *McCulloch v. Maryland*, 17 U.S. 316, 419-20 (1819). In that landmark decision, the U.S. Supreme Court held that under the necessary and proper clause, "any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional" because "[t]he clause is placed among the powers of congress, not the limitations on those powers," and it therefore reflects "an additional power, not a restriction on those already granted." *Id*. The same is true here: The "necessary" and "appropriate" clauses of Section 4617(b)(2)(D) augment rather than restrict the Conservator's other express powers, including the powers to "operate" Fannie Mae and to "collect all obligations and money due" it.

There is no legal or historical basis for Defendants' contention that Congress intended for the judiciary to interfere with the Conservator's exercise of its powers and functions with respect to any action, regardless of value, that taken alone, is within the scope of the Conservator's authority.

B. *Collins* Does Not Support Defendants' Position that the Enjoined Acts Would Be Beyond FHFA's Statutory Powers

Defendants may also attempt to argue—as they have in the district court—that Section 4617(f) cannot apply to this case because the preliminary injunction seeks

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clause, concluding that the "necessary and proper" clause of NRCP 55(b)(2) is also broadly empowering rather than limiting, in that it conveys "an intent to give trial courts broad discretion in determining how [certain] hearings should be conducted." *Hamlett v. Reynolds*, 114 Nev. 863, 866 (1998).

to prevent Fannie Mae from breaching its contracts with Defendants and because the Conservator purportedly lacks authority to breach contracts outside of the limited repudiation procedure set forth in 12 U.S.C. § 4617(d). That is wrong.

Collins does not involve a breach-of-contract claim, and the decision therefore does not directly address Defendants' premise that the Conservator lacks statutory authority to breach contracts. The Supreme Court's decision nevertheless implies that Defendants' premise is incorrect. *Collins* recognizes only one limitation on Section 4617(f): that it does not preclude judicial review of conservator action that exceeds FHFA's statutory authority. 141 S. Ct. at 1744-45. And the Supreme Court acknowledged that FHFA's proper exercise of its conservator powers allowed it a great deal of flexibility: Unlike a typical conservator, FHFA can exercise its powers "in the best interests of the regulated entity *or the Agency*, … and, by extension, the public it serves." *Id.* (citing 12 U.S.C. § 4617(b)(2)(J)(ii)) (emphasis in original) (internal quotation marks removed). Accordingly, the Supreme Court held "it is not necessary for [courts] to decide … whether the FHFA made the best, or even a particularly good, business decision." 141 S. Ct. at 1778. It would be quite anomalous if the Conservator's express authority to operate Fannie Mae in the best interests of the *public at large* did not supersede *private contract parties'* ability to procure specific performance rather than damages, and nothing in HERA supports that position.

FHFA does not concede that Fannie Mae breached any contract in this case, but regardless, it could have done so without exceeding FHFA's authority as Conservator. *See Collins*, 141 S. Ct. at 1776 (Section 4617(f) applies except where FHFA "exceed[s]" its authority). Like any other party to a contract, Fannie Mae retains the right and power to breach contracts and potentially incur liability for compensatory 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"). When FHFA became Conservator, it succeeded to all of Fannie Mae's "rights, titles, powers, and privileges," 12 U.S.C. § 4617(b)(2)(A), and nothing in HERA suggests that Congress intended to disempower the Conservator from exercising all of Fannie Mae's pre-existing powers.

Nothing in *Collins* supports Defendants' argument that *Sharpe v. FDIC*, 126 F.3d 1147 (9th Cir. 2014), precludes Section 4617(f)'s application in contract cases.[7]

[7] As FHFA explained in its Reply, Defendants' response that Section 4617(f) does not apply to contract claims under *Sharpe v. FDIC*, 126 F.3d 1147 (9th Cir. 1997), is incorrect. Reply at 15-19.

See Reply at 15-19. *Collins* does not change the fact that in this case, unlike the FDIC in *Sharpe*, FHFA is not seeking to nullify state contract law rights, to limit Defendants' ability to collect expectancy damages, or to force anyone to present a claim to an administrative body rather than a court. FHFA is not trying to wield Section 4617(f) to preempt state contract law—it is trying instead to undo an unlawful restraint preventing it from taking lawful action. Thus, Defendants cannot make a valid argument that FHFA is acting outside of its authority under *Sharpe* or *Collins*.

In the end, no action that FHFA has taken, or that the preliminary injunction purports to preclude the Conservator from taking, exceeds FHFA's statutory authority as Fannie Mae's Conservator. Accordingly, this Court must order the district court to dissolve the injunction under Section 4617(f).

CONCLUSION

Collins indisputably holds that 12 U.S.C. § 4617(f) broadly bars injunctive relief that would affect the Conservator's exercise of its statutory powers. Because HERA expressly empowers the Conservator to "operate" Fannie Mae, to "collect all obligations and money due" Fannie Mae, and to "preserve and conserve" Fannie Mae's assets and property, *Collins*, as the supreme law of the land, fully supports FHFA's request that the Court issue a writ of prohibition dissolving the district court's preliminary injunction.

Dated this 6th day of October, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to NEFCR 9(b)(d)(e), I certify that on October 6, 2021, a true and correct copy of the **FEDERAL HOUSING FINANCE AGENCY'S SUPPLEMENTAL BRIEF,** 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: October 6, 2021.

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