IN THE SUPREME COURT OF THE STATE OF NEVADA

FEDERAL HOUSING FINANCE AGENCY, in its capacity as Conservator for the Federal National Mortgage Association, and FEDERAL NATIONAL MORTGAGE ASSOCIATION, Appellants, vs. WESTLAND LIBERTY VILLAGE, LLC, a Nevada Limited Liability Company; and WESTLAND VILLAGE SQUARE, LLC a Nevada Limited Liability Company, Respondents.	Case No. 83695

APPEAL

From the Eighth Judicial District Court
The Honorable Kerry Earley and Mark Denton, District Court Judges
Case No. A-20-819412-C

APPELLANTS' OPENING BRIEF

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Rule 26.1 DISCLOSURE STATEMENT

The Nevada Rules of Appellate Procedure do not require the Federal Housing Finance Agency, as a government agency, to file a disclosure statement with this petition. NRAP 26.1(a).

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made so the Justices of this Court may evaluate possible disqualification or recusal.

Federal National Mortgage Association ("Fannie Mae") states that it is a government-sponsored enterprise chartered by the United States Congress, does not have parent corporations, and is currently under conservatorship of the Federal Housing Finance Agency; according to SEC filings, no publicly held corporation owns more than 10% of Fannie Mae's common (voting) stock.

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JURISDICTIONAL STATEMENT

The Court has jurisdiction over this appeal under NRAP 3A(b)(3).

On November 20, 2020, the district court entered Westland Liberty Village, LLC's and Westland Village Square, LLC's (together, "Westland" or "Defendants") proposed written order for a preliminary injunction. The injunction covers not only plaintiff the Federal National Mortgage Association ("Fannie Mae"), but also non-party "Enjoined Parties," including "persons exercising or having control over the affairs of Fannie Mae," which necessarily includes the Federal Housing Finance Agency ("FHFA") in its role as Fannie Mae's Conservator. APP2613 ¶ 1. On June 14, 2021, FHFA—having intervened in the district court proceedings—moved to dissolve the preliminary injunction. On September 17, 2021, the district court entered an order denying the motion; the Notice of Entry of Order was filed on September 22, 2021. APP3445-54.

FHFA timely noticed this appeal on October 21, 2021. APP3455-64; *see* NRAP 4(a)(1) (notice of appeal must be filed "no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served").

ROUTING STATEMENT

The Court should retain this proceeding under NRAP 17(a)(9) because it originated in Business Court; under NRAP (a)(11) because it raises as a principal issue a question of first impression in Nevada state courts under the Supremacy Clause of the United States Constitution in the application of 12 U.S.C. § 4617(f); and under NRAP 17(a)(12) because a principal issue involves a question of statewide public importance as to whether a district court may enjoin FHFA and Fannie Mae from conducting Fannie Mae's operations while in conservatorship, in contravention of 12 U.S.C. § 4617(f).

INTRODUCTION

This appeal arises out of a suit Fannie Mae brought to enforce its security interests in two large apartment complexes in Las Vegas by seeking appointment of a receiver as allowed under the applicable deeds of trust in the event of defaults of the mortgage loans. The district court denied Fannie Mae's motion to appoint a receiver and instead granted Defendants' request for a preliminary injunction. The injunction prohibits Fannie Mae and other "Enjoined Parties," including FHFA as Fannie Mae's Conservator, from foreclosing on Defendants' properties, from implementing loan-administration and other actions that concern not only Defendants' two Las Vegas properties but also properties, loans, or loan applications of "any Westland entity," of which there are many, regardless of location inside or outside of Nevada or whether such entity is a party to the action. After intervening, FHFA moved to dissolve the injunction under 12 U.S.C. § 4617(f), but the district court refused.

Under federal law, that injunction cannot stand. Specifically, the Housing and Economic Recovery Act of 2008 ("HERA") mandates that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator …." 12 U.S.C. § 4617(f). Precluding

the Conservator and Fannie Mae from administering these loans as set out in the governing loan agreements—including declaring them to be in default and pursuing foreclosure—and from dealing with other unnamed Westland entities and properties unrelated to the loans at issue herein restrains and affects several of the Conservator's core powers. Those most directly affected include the powers to operate Fannie Mae, to preserve its assets, and to collect debts it is owed; the injunction effectively negates them as to this case. Thus, Section 4617(f)—a preemptive federal law—renders the preliminary injunction void *ab initio*.

The Court should reverse the district court's order refusing to dissolve the injunction, declare the injunction void, and direct the district court not to issue any relief that would restrain or affect the exercise of FHFA's statutory powers and functions as Fannie Mae's Conservator.

STATEMENT OF THE ISSUES

I. Did the district court err in not dissolving an injunction issued in contravention of 12 U.S.C. § 4617(f), a federal law that bars courts from imposing an injunction on FHFA as Conservator of Fannie Mae and the Fannie Mae conservatorship?

II. Is the limitation on injunctive relief in 12 U.S.C. § 4617(f), which provides that "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator," a jurisdictional bar rendering the subject injunction void *ab initio*?

STATEMENT OF THE CASE

This appeal arises from the district court's denial of intervenor FHFA's motion to dissolve a preliminary injunction issued by the district court. On November 20, 2020, the district court entered an order granting Defendants' motion for a preliminary injunction. Thereafter, FHFA intervened in this case and moved to dissolve the preliminary injunction and Fannie Mae joined the motion. On September 17, 2021, the district court entered an order denying FHFA's motion to dissolve the injunction. This appeal ensued, and on November 17, 2021, this Court issued its Order Removing Appeal from Settlement Program and Ordering Expedited Briefing.

FACTUAL BACKGROUND

I. Fannie Mae Under FHFA's Conservatorship

Congress chartered Fannie Mae to facilitate the nationwide secondary mortgage market to enhance the equitable distribution of

mortgage credit throughout the nation. *See* 12 U.S.C. § 1716; *City of Spokane v. Fannie Mae*, 775 F.3d 1113, 1114 (9th Cir. 2014). HERA established FHFA as the primary regulator of Fannie Mae and the Federal Home Loan Mortgage Corporation ("Freddie Mac") (together, "the Enterprises").

In September 2008, FHFA's Director placed the Enterprises into conservatorships, where they remain today. *See* 12 U.S.C. § 4617(a). As Conservator, FHFA succeeded to "all [of Fannie Mae's] rights, titles, powers, and privileges" regarding its property, 12 U.S.C. § 4617(b)(2)(A)(i), and has authority to "preserve and conserve the assets and property of [Fannie Mae]," *id.* § 4617(b)(2)(B)(iv); "collect all obligations and money due" Fannie Mae, *id.* § 4617(b)(2)(B)(ii); "take over the assets of and operate [Fannie Mae]," *id.* § 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.* § 4617(b)(2)(B)(iii).

HERA provides that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator." *Id.* § 4617(f).

II. The Litigation

A. Fannie Mae's Initial Claim

Fannie Mae sued Westland, after a severe drop in occupancy followed by an inspection of Westland's two multi-family properties ("the Properties") revealed that they needed $2.8 million in necessary repairs. APP0526; APP0834. The loan documents, under which Westland owes more than $37 million, explicitly provide that: (i) Fannie Mae has a right to inspect the Properties and a right to demand an increase in reserves to address property condition issues, and (ii) Westland's failure to increase the reserve upon such a demand constitutes a default. APP0085-86, 0289-90 (§ 6.02(d)); APP0118, 0322 (§ 13.02(a)(4)); APP0125-26, APP0329-30 (§ 14.01). They further provide that Fannie Mae is entitled to the appointment of a receiver upon default. APP0209-10, 0472-76(§ 3(e)).

Here, Fannie Mae exercised its rights to demand that Westland deposit $2.8 million in reserves for the Properties, but Westland did not do so. Accordingly, Fannie Mae initiated this action and applied for the appointment of a receiver to protect its security interests.

B. Westland's Request for a Preliminary Injunction

Westland opposed the Application for Appointment of Receiver and filed a Counter-Motion for Temporary Restraining Order and/or Preliminary Injunction ("Countermotion") seeking to prevent Fannie Mae from foreclosing on the Properties. Specifically, Westland requested that the court "prevent[] and enjoin[] Plaintiff from conducting any foreclosure proceedings, foreclosure sale, or appointing a receiver related to the Properties pending a determination of the rights and obligations of the parties pursuant to the [l]oan [a]greements." APP1448.

After hearing argument on October 13, 2020, the district court stated:

> Here is my ruling on the Plaintiff's Motion for Appointment of Receiver. I feel there is a factual dispute on whether there is a default by defendant [sic] in this case, so there is no mandatory statute that says I must … appoint a receiver, as I feel there is a dispute, a factual dispute whether there is or is not a default…. I'm denying it.
>
> As far as the Defendants' Countermotion for a Preliminary Injunction Regarding the Notice of the Foreclosure, I applied the [Rule] 65 standard as well as the NRS -- what's the other one? I always -- 33.010 standard. I do find that, at this point, there is irreparable harm and that standard is met because it is property. I also find that there is a reasonable probability of success on the merits as far as what --

> there's a question of fact as to whether there was a default, etcetera.

APP2546-47.

The court clarified that its ruling would only prohibit Fannie Mae from moving forward with foreclosure, and would not otherwise constrain its relations with Westland: "I'm stopping Fannie Mae from going forward with anything based on that Notice of Default" APP2548. The court also declined to make factual findings or legal conclusions because it concluded a factual dispute appeared on the record. APP2601-02.

Despite the limited scope of the ruling the district court articulated at the hearing, Westland tendered a proposed order imposing expansive relief neither sought in Westland's Countermotion nor addressed at argument. In addition to the ruling the district court had announced—denying the appointment of a receiver and enjoining any progress toward foreclosure—the proposed written order included a litany of injunctive relief that Westland had not previously requested, briefed, or argued. Specifically, the proposed order directed the Enjoined Parties[1] to:

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[1] The proposed order defines "Enjoined Parties" as "Fannie Mae, including, without limitation, Fannie Mae's servicers, agents, affiliates, representatives, officers, managers, directors, shareholders, members,

Footnote continued on next page

- "[R]emove[] from the title" of the Properties the Notices of Default and Election to Sell that had been recorded on July 8, 2020;
- Service the Westland loans in particular ways (e.g., "turn over to Westland the monthly debt service invoices for the Property," "process loan payments consistent with the terms of the loan agreement");
- Return funds Westland voluntarily paid "in excess of the non-default monthly debt service payments, which excess funds Westland paid between February 2020 and the present";
- Disburse loan collateral held in the Restoration Reserve Account, which totals more than $900,000;
- "[R]etract[] or strike[]" the Notice of Demand;
- Rescind the Notices of Default and Acceleration of Note, dated December 17, 2019; and
- Treat unspecified Westland entities—which are not parties to the action—favorably in relation to other or new loans, by

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partners, trustees, and other persons exercising or having control over the affairs of Fannie Mae." APP2613 ¶ 1.

> not "tak[ing] any adverse action against any Westland entity in relation to other loans, [or] discriminat[ing] against or blacklist[ing] any Westland entity on new loan or loan refinancing applications," including by "adding a fee to any loan quoted or adding an interest rate surcharge to such applications" regardless of business or regulatory necessity.

APP2613-16 ¶¶ 5(b), (e), (h), (o). Over Fannie Mae's objection, the court entered Westland's proposed order.

C. FHFA's Intervention and the Court's Denial of FHFA's Motion to Dissolve the Preliminary Injunction

After the preliminary injunction had been entered, FHFA intervened and promptly moved to dissolve the preliminary injunction ("Motion to Dissolve"), arguing that the injunction was void *ab initio* because Section 4617(f) deprived the district court of jurisdiction to grant it. APP3028-37; APP3008-22.

Following briefing on the motion, the district court heard oral argument on August 2, 2021, and on August 10, 2021, issued a one-paragraph minute order denying the motion and directing defendants' counsel to draft an order. APP3438. The district court followed up with a written order on September 17, 2021, stating that the district court was

"unpersuaded that dissolution of the subject preliminary injunction is warranted" in light of purportedly "extensive development of the issues" earlier in the district court proceedings—despite neither Section 4617(f) nor any other jurisdictional issue having been raised until FHFA's Motion to Dissolve—and because the injunction "is now the subject of extensive litigation on [Fannie Mae's] pending [interlocutory] appeal" of the order granting the preliminary injunction, which predated FHFA's involvement in the case and any assertion or discussion of Section 4617(f) in the action. APP3439-44.[2] This appeal followed.

STANDARD OF REVIEW

An order resolving a motion to dissolve an injunction is reviewed for abuse of discretion. *E.g.*, *Finkel v. Cashman Prof'l, Inc.*, 128 Nev. 68, 72-73 (2012). A district court abuses its discretion when it "disregards controlling law." *E.g.*, *Shores v. Glob. Experience Specialists, Inc.*, 134 Nev. 503, 505 (2018).

[2] FHFA moved to intervene into Fannie Mae's interlocutory appeal, but this Court denied the motion, leaving FHFA to participate as a non-party amicus instead.

SUMMARY OF THE ARGUMENT

In refusing to dissolve the preliminary injunction, the district court disregarded controlling federal law—Section 4617(f)—and thereby abused its discretion.

Under Section 4617(f), "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator." 12 U.S.C. § 4617(f). By enacting that provision, Congress "sharply circumscribed judicial review of any action that the FHFA takes as a conservator," leaving the Conservator's "business decisions … protected from judicial review." *Collins v. Yellen*, 141 S. Ct. 1761, 1775, 1785 (2021).

Here, the district court's injunction directly impacts the Conservator's exercise of its core statutory powers and functions, including the power to "operate" Fannie Mae, to "perform all functions of [Fannie Mae] in the name of [Fannie Mae]," to "collect all obligations and money due" Fannie Mae, and to take any action "appropriate to carry on the business of [Fannie Mae]." 12 U.S.C. §§ 4617(b)(2)(B), 4617(b)(2)(D). The injunction therefore conflicts directly with Section 4617(f).

Section 4617(f) applies regardless of whether the injunction purports to constrain the Conservator itself or only FHFA's conservatee, Fannie Mae. And Section 4617(f)'s plain language includes no exception for particular kinds of claims, for restraints on actions yet to be taken, or for business decisions that might be unnecessary, debatable, or even unwise. Because Section 4617(f) so clearly and directly articulates a broad bar against enjoining the Conservator's exercise of its powers and functions, arguments about the practical consequences of applying the statute at face value—including overblown and implausible parades of horribles—are beside the point. But even if the policy underlying Section 4617(f) were relevant, it is sound—federal conservators and receivers of large and complex financial institutions must be able to act swiftly and decisively without judicial interference, and regardless of the local jurisdiction in which an issue may arise.

FHFA properly raised Section 4617(f) by moving to dissolve the injunction, regardless of whether Fannie Mae could have asserted the statute earlier. Section 4617(f) is a *jurisdictional* constraint on courts' power. As such, it can be raised at any time. But regardless of Section 4617(f)'s status as a jurisdictional limitation, FHFA properly raised it in

its Motion to Dissolve. The injunction affects FHFA (directly as well as through Fannie Mae), but FHFA was not a party to the action when Westland's motion for preliminary injunction was made, argued, and granted. When that happened, FHFA promptly intervened and, joined by Fannie Mae, moved to dissolve the injunction. The district court's refusal to do so is properly subject to appellate review.

ARGUMENT

I. Section 4617(f) Bars the Preliminary Injunction

By its plain text, Section 4617(f) bars relief that would "restrain or affect" the Conservator's exercise of its powers and functions, including the Conservator's powers to "operate" Fannie Mae and to "collect all obligations and money due" it. *See* §§ 4617(f), 4617(b)(2)(B). Accordingly, Section 4617(f) "bar[s] claims for declaratory, injunctive, and other equitable relief" where FHFA acts "within its statutory authority as conservator," thereby "explicitly limit[ing] judicial review of claims that would hamper FHFA's conduct as a conservator." *Robinson v. FHFA*, 876 F.3d 220, 227 (6th Cir. 2017). Section 4617(f) functions as an "anti-injunction clause," and effects "a sweeping ouster of courts' power to

grant equitable remedies." *Id.*; *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 605 (D.C. Cir. 2017).

In enacting Section 4617(f), Congress established a policy that applies with equal force to both federal and state courts. As a Kansas state court held under the analogous Federal Deposit Insurance Corporation's ("FDIC") statute, "federal law deprives this court of jurisdiction" to order an FDIC receiver to rescind a sale of foreclosed property. *Security Sav. Bank v. Home Resort Inc.*, Nos. 103, 131, 2011 WL 2175933 (Kan. Ct. App. 2011); *see also Bobick v. Cmty. & Southern Bank*, 743 S.E.2d 518, 530 n.7 (Ga. Ct. App. 2013) (similar); *Stearns Bank, N.A. v. Burnes-Leverenz*, No. A11-1868, 2012 WL 3023405, at *6 (Minn. Ct. App. July 23, 2012) (similar).[3]

Here, the district court—apparently unaware of Section 4617(f)'s existence or its strictures—granted preliminary injunctive relief that

[3] Section 4617(f) is based upon the FDIC's similar anti-injunction provision, 12 U.S.C. § 1821(j), which appears in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). Courts faced with questions about Section 4617(f) therefore routinely look to cases interpreting and applying Section 1821(j) for guidance. *E.g.*, *Perry Capital*, 864 F.3d at 605-606; *Roberts v. FHFA*, 889 F.3d 397, 402-03 (7th Cir. 2018); *Jacobs v. Fed. Hous. Fin. Agency*, 908 F.3d 884, 895 (3d Cir. 2018).

Section 4617(f) precludes. The district court's subsequent refusal to dissolve the injunction under Section 4617(f) unequivocally disregarded controlling law—it did not even address the statute's substantive terms—and thereby constituted an abuse of discretion that this Court must correct.

A. The Preliminary Injunction Restrains and Affects Several of the Conservator's Core Powers

HERA "grants the FHFA expansive authority in its role as conservator." *Collins*, 141 S. Ct. at 1776. For example, the Conservator has broad statutory authority to, among other things, "operate" Fannie Mae, to "perform all functions of [Fannie Mae] in the name of [Fannie Mae]," to "collect all obligations and money due" Fannie Mae, and to take any action "appropriate to carry on the business of [Fannie Mae]." 12 U.S.C. §§ 4617(b)(2)(B), 4617(b)(2)(D). Congress also expressly provided that, as Conservator, FHFA possesses "all rights, titles, powers, and privileges . . . and assets of [Fannie Mae]." *Id.* § 4617(b)(2)(A).

The district court's injunction directly constrains the Conservator's exercise of these core statutory powers and functions. The injunction prohibits Fannie Mae and anyone "exercising or having control over the affairs of Fannie Mae"—which necessarily includes the Conservator—

from (1) "tak[ing] possession of any real or personal property" located at the two properties securing the loans, (2) "fail[ing] to turn over to Westland the monthly debt service invoices for the Property," (3) "fail[ing] to disburse or turn over to Westland any funds currently held or initially held in the Restoration Reserve Account," or (4) "tak[ing] any adverse action against any Westland entity in relation to other loans." APP2649-52, ¶¶ 1, 5(b), (e), (h), (o). The injunction prohibits activities furthering foreclosure on the Properties in default under the terms of the governing loan documents. APP2649-50, ¶¶ 1-3, 5(b)-(c). And the injunction forces a secured party to relinquish its cash collateral—held in the Restoration Reserve Account—without regard to its security interest. It also prohibits any Enjoined Party from taking undefined adverse actions with respect to Westland's entire portfolio, not just the two properties that are within this Court's jurisdiction. APP2649-52, ¶¶ 4, 5(d)-(o). Indeed, it prohibits any Enjoined Parties from "tak[ing] any adverse action against any Westland entity in relation to other loans, [or] discriminat[ing] against or blacklist[ing] any Westland entity on new loan or loan refinancing applications," despite the district court's lack of

jurisdiction over any Westland entity other than the two Defendants in the underlying action. APP2652, ¶ 5(o).

As would be true for any lender or loan investor, the loan-administration functions the injunction prohibits—including calling defaults and initiating foreclosures—sit at the heart of Fannie Mae's ability to operate, to carry on its business, and to collect obligations and moneys due it. And again, as with any lender or loan investor, setting and applying standards for assessing potential counterparties and credit opportunities is a power central to the entity's operations and conduct of business.

Section 4617(f) precludes judicial interference with the Conservator's ability to exercise these powers and functions—either by itself or through its conservatee Fannie Mae—yet that is exactly what the district court did. As a result, the injunction cannot stand. The Eighth Circuit's decision in *Tri-State Hotels, Inc. v. FDIC*, 79 F.3d 707 (8th Cir. 1996), illustrates the point. There, a borrower sought to rescind a loan agreement shortly before the FDIC placed the bank into receivership. Once the receivership was in place, the Eighth Circuit held that "[b]ecause FIRREA grants the FDIC the power to 'collect all

obligations and money due the institution,' 12 U.S.C. § 1821(d)(2)(B)(ii), rescinding the agreements would act as an impermissible restraint on the ability of the FDIC to exercise its powers as receiver," even if the bank had breached the agreements and rescission would therefore have been an available remedy but for the receivership. *Tri-State Hotels*, at 715.

The First Circuit's decision in *Telematics Intern., Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703 (1st Cir. 1992), is to the same effect. There, the plaintiff sought to enjoin FDIC as receiver from foreclosing on an asset the plaintiff had pledged as collateral. *Id.* at 705. The First Circuit explained that "[a]llowing Telematics to enjoin the FDIC would clearly restrain or affect the FDIC in the exercise of its powers as receiver to collect moneys due and to realize upon the assets of [the bank]." *Id.* at 705-06. The D.C. Circuit's decision in Freeman v. FDIC is another oft-cited example. *See* 56 F.3d 1394 (D.C. Cir. 1995). There, the Court held that the receiver's "broad powers," including the power to collect obligations, encompass "the power to foreclose on property held by the

failed bank as collateral, and no court may enjoin the exercise of that power." *Id*. at 1398-99.[4]

Numerous district court decisions make the same point. *E.g.*, *Nassirpour v. FDIC for IndyMac Bank, FSB.*, No. CV-08-7164-GHK, 2009 WL 10674164, at *4 (C.D. Cal. July 20, 2009) (concluding that, under Section 1821(j), the court is without power to enjoin foreclosure, and noting the receiver's authority to "collect all obligations and money due" and "preserve and conserve the assets and property"); *see Furgatch v. Resol. Tr. Corp.*, No. CIV. 93-20304 SW, 1993 WL 149084, at *2 (N.D. Cal. Apr. 30, 1993) (same, noting authority to "preserve and conserve the assets and property").

This case is no different. The preliminary injunction prevents FHFA and Fannie Mae from acting to collect on the debts Westland owes Fannie Mae, and therefore "restrain[s] or affect[s]" the Conservator's statutory powers to "operate" Fannie Mae, to "preserve and conserve its

[4] Other decisions squarely holding that Section 1821(j) bars injunctive relief against foreclosures include *Lloyd v. FDIC*, 22 F.3d 335 (1st Cir. 1994), and *281-300 Joint Venture v. Onion*, 938 F.2d 35 (5th Cir. 1991).

assets," and to "collect [an] obligation[]" due it. 12 U.S.C. §§ 4617(f), 4617(b)(2)(B).

B. Whether the Preliminary Injunction is Aimed at Fannie Mae, the Conservator, or Both Makes No Difference

Regardless of whether the preliminary injunction is expressly directed at Fannie Mae, FHFA as Conservator, or both, Section 4617(f) bars it. Although Fannie Mae remains an extant corporation that can and does litigate without FHFA's direct appearance, the Conservator is Fannie Mae's statutory successor and has ultimate authority over everything Fannie Mae does in conservatorship. *See* 12 U.S.C. §§ 4617(b)(2)(A), (B). As a result, all of Fannie Mae's actions necessarily embody exercises of the Conservator's statutory powers and functions, and any injunctive restraint on Fannie Mae will necessarily restrain or affect them.

For that reason, courts routinely conclude that Section 4617(f) bars injunctive relief against the Enterprises' business operations while under conservatorship. For example, several federal appellate courts have held that courts cannot enjoin the Enterprises from refusing to purchase a certain category of mortgages in accordance with FHFA's instruction.

See, e.g., *Cty. of Sonoma v. FHFA*, 710 F.3d 987, 992-93 (9th Cir. 2013); *Leon Cty. v. FHFA*, 700 F.3d 1273, 1278-79 (11th Cir. 2012); *Town of Babylon v. Fed. Hous. Fin. Agency*, 699 F.3d 221, 227 (2d Cir. 2012). The Ninth Circuit held that "FHFA carries on th[e] business [of the Enterprises] when it weighs the relative risks and benefits of purchasing classes of mortgages for investment." *Sonoma*, 710 F.3d at 993. Accordingly, a district court could not enjoin "[a] decision not to buy assets that FHFA deems risky [because it] is within its conservator power to 'carry on' the Enterprises' business and to 'preserve and conserve the assets and property of the [Enterprises].'" *Id.* (quoting 12 U.S.C. § 4617(b)(2)(D)(ii)). Similarly, the Eleventh Circuit affirmed dismissal of a complaint seeking injunctive relief "to prohibit the implementation of Fannie Mae and Freddie Mac's announced restriction" on purchasing certain mortgages because Section 4617(f) barred such relief. *Leon*, 700 F.3d at 1276.

Section 4617(f) also bars requests to enjoin or mandate activities of the Enterprises in conservatorship that concern individual properties. For example, a court determined that HERA barred equitable relief sought "in the form of an order directing Freddie Mac to sell" a particular

foreclosed property to a particular entity under state law. *Suero v. Freddie Mac*, 123 F. Supp. 3d 162, 170 (D. Mass. 2015). In a related case, the court held that "the application of [Section 4617(f)] is not limited to instances in which FHFA issues formal directives. Rather, by its own terms, it extends to any 'exercise of powers or functions of [FHFA] as a conservator.'" *Massachusetts v. FHFA*, 54 F. Supp. 3d 94, 99 (D. Mass. 2014) (quoting 12 U.S.C. § 4617(f)). In that case, too, the court held that it could not enjoin the restrictions Freddie Mac and Fannie Mae had announced concerning property sales because those activities were part of the Conservator's exercise of its powers to operate the Enterprises and preserve and conserve their assets. *Id.* at 99-102.

Cases applying the FDIC's analogous anti-injunction provision in Section 1821(j) support the conclusion that Section 4617(f) applies to the Enterprises. As one court reasoned in rejecting a proposed injunction to stop a foreclosure:

> FDIC succeeds to the rights of the Bank under [FIRREA]. Therefore, the FDIC has whatever power the Bank would have had regarding [plaintiff's] promissory notes. Thus, because [plaintiff] has defaulted, the FDIC has the power to take action against [plaintiff] on the basis of the notes, and enjoining the FDIC from doing so would violate section

> 1821(j) by restraining the FDIC in the exercise of such power.

Harrington v. FDIC, No. CIV. A. 91-12298-C, 1993 WL 294850, at *4 (D. Mass. Feb. 28, 1993); *see Zarate v. Amtrust Bank*, No. 2:13-CV-0659 KJM, 2013 WL 5934316, at *4-5 (E.D. Cal. Nov. 1, 2013) (Section 1821(j) barred an injunction concerning foreclosure activity); *Vegas Diamond Props., LLC v. La Jolla Bank, FSB*, No. 10-cv-1205-WQH-BGS, 2010 WL 4606461, at *5-6 (S.D. Cal. Oct. 29, 2010).

Moreover, courts routinely bar claims for injunctive relief concerning the activities of a financial institution under conservatorship, even when the claimant nominally sought to enjoin only the institution itself, because the anti-injunction statute "deprives the court of jurisdiction to enter orders against third parties 'where the result is such that the relief restrain[s] or affect[s] the exercise of powers or functions of the [FDIC] as a conservator or a receiver.'" *New Century Bank v. Open Sols., Inc.*, No. CIV.A. 10-6537, 2011 WL 3497279, at *4 (E.D. Pa. Aug. 8, 2011) (internal citations omitted) (alterations in original); *see also Bank of Am. Nat. Ass'n v. Colonial Bank*, 604 F.3d 1239, 1245-46 (11th Cir. 2010); *Vegas Diamond*, 2010 WL 4606461, at *5-6.

The same analysis applies here. Indeed, this Court has already held that another HERA provision, the Federal Foreclosure Bar (12 U.S.C. § 4617(j)(3)), protects property that Fannie Mae rather than the Conservator owns. *See Saticoy Bay LLC Series 9641 Christine View v. Fed. Nat'l Mortg. Ass'n*, 134 Nev. 270, 274 (2018); *Nationstar Mort., LLC v. SFR Invs. Pool 1, LLC*, 133 Nev. 247, 250-52 (2017). In the same vein, the Court held that the statute of limitations provision in HERA that extends the period for "any action brought by the Agency as conservator or receiver" governs claims brought by the Enterprises raising the Federal Foreclosure Bar. *Residential Credit Sols., Inc. v. SFR Invs. Pool 1, LLC*, 476 P.3d 436, 2020 WL 6742959, at *1 (Nev. 2020) (unpublished disposition) (holding 12 U.S.C. § 4617(b)(12) would apply if argument raised by Fannie Mae and its servicer was subject to a statute of limitations).

On a more practical level, construing Section 4617(f) to apply only to restraints imposed directly on the Conservator would make no sense and would conflict with the statute's purpose. The Conservator exercises its most important powers through its conservatees; it is, after all, conservatorship estate assets the Conservator has the power to preserve

and the conservatees' businesses the Conservator has the power to operate. If the conservatees are subject to injunctive restraint, the Conservator's powers are necessarily restrained and unlawfully affected.

C. No Exception to Section 4617(f) Applies Here

In the district court and in other related appeals, Defendants have tried to identify some exception to Section 4617(f)'s clear mandate into which the preliminary injunction might fit. But as *Collins* and other relevant decisions confirm, no exception to Section 4617(f) covers the relief the district court ordered.

1. Section 4617(f)'s Express Exception Does Not Apply Because Neither FHFA Nor Fannie Mae Requested the Injunction

Defendants have argued that Section 4617(f) does not bar the preliminary injunction because the injunction supposedly falls within an express exception for relief made "at the request of the [FHFA] Director." APP3058 (citing 12 U.S.C. § 4617(f)). No court has adopted Defendants' reading of that clause, which is so implausible as to border on frivolous.

To state what should be obvious, the exception does not apply here because the preliminary injunction was not entered "at the request of the Director." 12 U.S.C. § 4617(f). Defendants—not FHFA's Director or

anyone acting on the Director's behalf—requested the preliminary injunction. And not only did Defendants request the injunction, they drafted it—after the October 13, 2020 hearing—to include terms they never raised in briefing or at oral argument and that they submitted to the district court over Fannie Mae's objection. APP1436-47. At every stage, Fannie Mae opposed the preliminary injunction, and FHFA, at its first opportunity, asked the district court to dissolve it.

Nor did Fannie Mae, by filing this action, somehow "request" whatever injunctive relief the court might grant on other parties' claims, including the relief at issue, which Fannie Mae actively *opposed*. No authority supports that Orwellian position. The phrase "at the request of the Director" means that "any action to restrain or affect the exercise of powers or functions of [FHFA]," must be something the Director asks for. *See Request*, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/request (last visited Dec. 6, 2021) (a request is "the act or an instance of asking for something"). This Court's duty is to apply the federal statute as enacted; it cannot adopt a meaning that diverges so dramatically from the text.

No other interpretation would be sound or sensible. If FHFA or an Enterprise waived Section 4617(f) by seeking any type of judicial relief, the exception would swallow the rule: Neither Fannie Mae nor FHFA as Conservator could assert a claim in court without forfeiting Section 4617(f)'s protection as to counterclaims, which would then be pled as a matter of course. That absurd result would thwart Congress's intent to "sharply circumscribe[] judicial review" of FHFA's conservatorship activities, *Collins*, 141 S. Ct. at 1775, and "bar[] judicial interference with [FHFA's] statutorily authorized role as conservator," *Roberts*, 889 F.3d at 402.

2. Section 4617(f) Bars Injunctive Relief in Contract Actions

Because section 4617(f) applies only to relief that would restrain or affect the Conservator's "exercise of its powers or functions," it contains an implicit limitation: It does not bar judicial restraint of acts that would exceed the Conservator's statutory authority. *See Collins*, 141 S. Ct. at 1776 (citing cases). Below, Defendants contended that the implicit limitation applies here, arguing that the preliminary injunction "prohibit[ed] Fannie Mae and related entities from violating [Defendants'] contract rights," and that FHFA supposedly has no

"statutory authority as conservator to breach contracts" outside of the limited repudiation provision in 12 U.S.C. § 4617(d). APP3055.

That is wrong. Regardless of whether the Court credits Westland's contention that Fannie Mae breached a loan contract by calling a default—a contention Fannie Mae vigorously disputes—Section 4617(f) precludes the injunctive relief the district court ordered. As the D.C. Circuit held in a case Westland itself has cited to this Court,[5] "pleas for equitable relief" on "contract-based claims"—including "claims for breach of contract"—are "barred by 12 U.S.C. § 4617(f)." *Perry Capital* 864 F.3d at 633 & n.27 (remanding "only insofar as [those claims] seek damages").

a. Westland's Reliance on *Sharpe* Is Misplaced

Westland continually touts the Ninth Circuit's decision in *Sharpe v. FDIC*, 126 F.3d 1147 (9th Cir. 2014), claiming that it suggests Section 4617(f) "allows equitable remedies in contract cases because the statute does not authorize the breach of contracts." 126 F.3d 1147 (9th Cir. 2014); APP3055 (internal quotation marks omitted); Appeal No. 82666,

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[5] *See* Real Party in Interest's Ans. to Petitioner's Petition for Writ of Prohibition, Doc. 21-15225, at 17, *Fed. Hous. Fin. Agency v. Dist. Ct. (Westland Liberty Village, LLC)*, No. 82666 (Nev. May 27, 2021) (hereinafter "Writ Ans.").

Ans. Br. to Writ Pet. at 20-23 (Doc. No. 21-15225); Appeal No. 82174, Ans. to Amicus Br. at 6 (Doc. No. 21-25317). That is not correct.

To the contrary, in *Perry Capital* the D.C. Circuit unequivocally rejected such a reading of § 4617(f). There, the court—at the motion-to-dismiss stage—considered what forms of relief Section 4617(f) allowed on breach-of-contract and implied-covenant claims pled against Fannie Mae and FHFA. The court allowed these "contract-based claims" to proceed "only insofar as they seek *damages*," explaining that "pleas for equitable relief are *barred by 12 U.S.C. § 4617(f)*" as a matter of law. *Perry Capital*, 864 F.3d at 633 n.27 (emphasis added).

Other courts' interpretations of Section 1821(j) are to the same effect; indeed, all other federal courts of appeals agree with the D.C. Circuit, while none has adopted Defendants' interpretation of *Sharpe*. For example, in *Volges v. Resolution Trust Company* ("RTC"), the Second Circuit rejected the notion of an "implicit limitation" in Section 1821(j) "that would give courts equitable jurisdiction to compel the RTC to honor a third party's rights as against RTC under state contract law." 32 F.3d 50, 52 (2d Cir. 1994) ("[t]he fact that the sale might violate [plaintiff's] state law contract rights does not alter the calculus … [and] render

[Section 1821(j)] inapplicable"). Similarly, in *RPM Investments, Inc. v. RTC,* the Eleventh Circuit held that ordering specific performance of a contract would impermissibly "restrain or affect" the RTC in exercise of its statutory powers, notwithstanding "allegations that the RTC breached a contract." 75 F.3d 618, 621 (11th Cir. 1996). And in *Gross v. Bell Savings Bank PA SA*, the Third Circuit held that "RTC was acting within its legitimate authority in withholding [plaintiffs'] deposits" and therefore injunctive relief would be "inappropriate" under Section 1821(j). 974 F.2d 403, 408 (3d Cir. 1992). Likewise, the Fourth Circuit, in applying Section 1821(j), has explained that "[t]he mere fact that an action of [a conservator or receiver] may violate state contract law … does not entitle a … court to enjoin" it. *In re: Landmark Land. Co. of Carolina*, 110 F.3d 60, 1997 WL 159479, at *4 (4th Cir. 1997) (per curiam) (unpublished).

Cases holding that Sections 4617(f) and 1821(j) bar equitable relief even where the aggrieved party argues the Conservator's actions would violate a non-contractual legal requirement are also instructive. For example, in *National Trust for Historic Preservation. v. FDIC*, plaintiffs argued that an FDIC receiver's planned sale of the Dr. Pepper

Headquarters building in Dallas would violate statutory historic preservation requirements. 21 F.3d 469, 473 (D.C. Cir. 1994). The D.C. Circuit held that Section 1821(j) nevertheless precluded any injunction against the sale. *Id.*; *see also Ward v. Resolution Trust Corp.*, 996 F.2d 99, 103 (5th Cir. 1993) (Section 1821(j) applies "[e]ven if the [receiver] improperly or unlawfully exercised an authorized power of function"). There is no plausible reason why private contracts should be more sacrosanct than public law. Accordingly, Congress's determination that injunctive relief is not available to constrain federal conservators' and receivers' powers applies equally to contract cases.

In their attempt to square decisions holding that Sections 4617(f) and 1821(j) *do* bar relief relating to contracts with their theory that Sections 4617(f) and 1821(j) *do not* apply in contract cases, Defendants have previously suggested that such decisions "turn on" a provision authorizing the transfer of assets "without any approval, assignment, or consent." APP3056-57 (citing 12 U.S.C. § 4617(b)(2)(G) and § 1821(d)(2)(G)(i)(II)). Defendants suggest that the asset-transfer provision overrides the contract exception they posit, and that therefore

in contract cases like this one, where the asset-transfer provision is not implicated, Section 4617(f) does not apply.

Defendants are mistaken. While *some* of the cases, such as *RPM*, holding that the anti-injunction provisions of Sections 4617(f) and 1821(j) apply to contract claims involve the asset-transfer provisions Defendants cite, *many others* do not. The D.C. Circuit's decision in *Perry Capital* is a prime example. That case involved a dividend arrangement, not the sale or conveyance of a specific asset. Indeed, the D.C. Circuit noted that the act in question fell "squarely within [the Conservator's] statutory authority" to "operate" Fannie Mae and Freddie Mac, to "reorganize" their affairs, and to "take such action as may be … appropriate to carry on their business"—not the asset-transfer power Defendants assert as the key to escaping Section 4617(f)'s strictures. 864 F.3d at 607 (quotation marks, brackets, and citations omitted; ellipses in original; bracketed material added). Yet the D.C. Circuit unequivocally held that Section 4617(f) barred "equitable relief" on the investors' "contract-based claims." *Id.* at 633 n.27. Similarly, the First Circuit in *Telematics* applied Section 1821(j) where plaintiff sought to enjoin FDIC as receiver from foreclosing on an asset the plaintiff had pledged as collateral, not

from transferring any asset. *Telematics*, 967 F.2d at 707. The court held that enjoining the foreclosure would "clearly restrain or affect the FDIC in the exercise of its powers as receiver to collect moneys due …." *Id*. at 705-06.

Thus, even if Defendants' reading of *Sharpe* were correct, it would be an outlier that no other circuit has adopted and several have rejected. But a review of *Sharpe* itself and Ninth Circuit cases coming after *Sharpe* demonstrates that Defendants' broad reading of the decision is *not* correct. Instead, when read properly, *Sharpe* has no application here.

In *Sharpe*, the FDIC as receiver sought to avoid liability for the amount the bank in receivership had promised to pay under a settlement agreement the plaintiffs had fully performed. 126 F.3d at 1152-53. The *Sharpe* agreement specified that the bank would pay plaintiffs $510,000, and the bank had tendered cashiers' checks in that amount before being placed into receivership. *Id.* at 1150-51. Upon appointment as receiver, FDIC stopped payment. *Id.* at 1150. 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 1150-51. The

Ninth Circuit therefore 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 the receiver is not "free to breach any pre-receivership contract, keep the benefit of the bargain, *and then escape the consequences by hiding behind the* [*administrative*] *claims process*." *Id.* at 1154-1157 (emphasis added). The Ninth Circuit has since explained that *Sharpe* "is not controlling outside of its limited context" and stands for the limited proposition that "the FDIC may not breach a contract *and then compel the other party … to accept a receiver's certificate, as the result of the FDIC's claims process*, rather than the 'benefit of the bargain' provided for in the contract itself." *Meritage Homes of Nev., Inc. v. FDIC,* 753 F.3d 819, 825 (9th Cir. 2014) (emphasis added) (citations omitted); *cf. McCarthy v. FDIC*, 348 F.3d 1078 (9th Cir. 2003) (noting that *Sharpe* is "an unusual case").[6] Thus, where a party retains the ability to pursue a fully compensatory damages award, *Sharpe* has no application.

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[6] *See also McCarthy*, 348 F.3d at 1078 (noting that the FDIC in *Sharpe* breached a contract and then tried to "hid[e] behind the [administrative] claims process" without going through the statutorily authorized process of repudiating the contract (quoting *Sharpe*, 126 F.3d

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Here—unlike in *Sharpe*—there is no allegation or plausible suggestion that FHFA is seeking to force Defendants to present their counterclaim administratively rather than to this Court, or to limit the availability of full expectancy damages. Nor could there be: FHFA's conservatorship is *not* equivalent to a receivership, which if it occurred would be governed by separate sections of HERA. Because there is no receivership in place, the FHFA administrative claims process analogous to the process described in *Sharpe* is not at issue 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"). And while the Conservator has the statutory power to repudiate pre-conservatorship contracts in a way that could eliminate otherwise-available contract damages such as lost profits, FHFA could not exercise that power here as the loan agreements at issue are not pre-conservatorship contracts. *See* 12 U.S.C. § 4617(d); 12 C.F.R. § 1237.5(b). Thus, even if Westland could establish contract liability, the Conservator could not "force[]"

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at 1156)); *Deutsche Bank Nat. Tr. Co. v. FDIC*, 744 F.3d 1124, 1136 (9th Cir. 2014) (explaining that "the panel [in *Sharpe*] simply concluded that, because the plaintiffs were not creditors or depositors, their claims were not subject to [the statute's] administrative exhaustion requirements").

Defendants "into [any] administrative claims process through which [they could] receive[] what might be construed as a partial damages award," and Section 4617(f) would not bar a fully compensatory monetary judgment against Fannie Mae under Nevada contract law. *Sharpe*, 126 F.3d at 1154. As a result, *Sharpe* does not apply.

Nor does the fact that the Ninth Circuit sometimes cites *Sharpe* aid Defendants. For example, the Ninth Circuit's decision in *Bank of Manhattan, N.A. v. FDIC*, 778 F.3d 1133 (9th Cir. 2015), cites *Sharpe* as precedent, but does not support Westland's broad reading. In *Bank of Manhattan*, the Ninth Circuit noted that *Sharpe* "does not permit the FDIC to breach pre-receivership contracts *without consequence*," does not "authorize[] the *unrestrained* breach of contract," and "does not permit the FDIC to *avoid liability* for the breach of pre-receivership contracts." 778 F.3d at 1137 (emphases added). Thus, *Bank of Manhattan*, without disapproving of *Sharpe*, confirms that *Sharpe* applies only where a receiver seeks to avoid liability for a full expectancy remedy under a pre-receivership arrangement.

b. Section 4617(f) Does Not Allow Courts to Force Fannie Mae or the Conservator to Perform

Fannie Mae did not breach any contract in this case—occupancy rates indisputably dropped after Westland's assumption, fire damaged properties had not been repaired in accordance with the contracts, property condition assessments subsequently confirmed additional repairs were necessary, and Westland refused to reserve for those repairs—so Fannie Mae had every right to call a default. But the point is irrelevant, because Section 4617(f) precludes courts from forcing Fannie Mae or the Conservator to perform contracts rather than to become liable for expectancy 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").

Under HERA, FHFA as Conservator has the sole power to "operate" Fannie Mae and to "preserve and conserve" Fannie Mae's assets. *See* 12 U.S.C. § 4617(b)(2)(D); *Collins*, 141 S. Ct. at 1776 (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 implicating those powers would not forfeit Section 4617(f)'s statutory protection. *See Collins*, 141 S. Ct. at 1785 (holding that Section 4617(f) applies whenever FHFA acts within the scope of its conservatorship powers and noting that the Conservator's "business decisions are protected from judicial review").

If Section 4617(f) did not exist, or if Fannie Mae were not presently in conservatorship, an injunction mandating that Fannie Mae perform the contract as Defendants view its terms might conceivably be available if Defendants met the state-law requirements for such relief (which FHFA and Fannie Mae dispute). But Section 4617(f) does exist, and it unequivocally precludes such relief while Fannie Mae is in conservatorship. Indeed, Section 4617(f) would serve no purpose if it did

not supersede otherwise applicable law authorizing the remedies it forbids.

3. Section 4617(f) Applies Prospectively As Well As Retrospectively

In other briefing to this Court, Westland has contended that Section 4617(f) applies only if FHFA has already taken an "affirmative action" as Conservator—i.e., only retrospectively. Appeal No. 82174, Ans. to Amicus Br. at 15-17 (Doc. No. 21-25317). That is incorrect, and it conflicts directly with decisions holding that Section 4617(f) and Section 1821(j) bar declaratory relief that interferes with anticipated future acts of a conservator or receiver. *See, e.g.*, *Nat'l Tr. for Historic Pres.*, 21 F.3d 469 (Section 1821(j) barred injunction prohibiting FDIC's impending sale of property).

Section 4617(f)'s prohibitive language—"no court may take any action"—does not require any prior affirmative act. It is unqualified and absolute.[7] And where "the statutory language is 'facially clear,' this court

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[7] *See United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("'any' has an expansive meaning"); *Planned Parenthood Arizona Inc. v. Betlach*, 727 F.3d 960, 969 (9th Cir. 2013) ("[A]ny means all" unless Congress provides otherwise); *Matter of Est. of Ella E. Horst Revocable Tr., U/A/D 05/21/1991*, 478 P.3d 861, 865-66 (Nev. 2020) ("The 'word any' in a [procedural] statute usually means 'any and all'" (citation omitted));

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must give that language its plain meaning." *City of Sparks v. Reno Newspapers, Inc.*, 133 Nev. 398, 402 (2017) (citation omitted); *accord Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 461 (2002) (a court's "role is to interpret the language of the statute enacted by Congress"). The Court should not read a requirement of a prior affirmative act into the statute where none exists.

Defendants latch onto decontextualized snippets from a few cases applying 4617(f) retrospectively based on the claims at issue, but none of them includes anything suggesting that 4617(f) does not apply prospectively as well. APP3061-62. For example, *Roberts* indicates that FHFA "must have acted … pursuant to its 'powers or functions'" for Section 4617(f) "to bar judicial relief." *Roberts*, 889 F.3d at 402. But the *Roberts* court analyzed whether FHFA had "*acted*" with respect to its conservatorship powers and functions because the court was deciding

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Harris v. Garner, 216 F.3d 970, 985 (11th Cir. 2000) (in interpreting a statute, "'no' means 'no'"); *C.G.B. v. Wolf*, 464 F. Supp. 3d 174, 219 (D.D.C. 2020) (statutory language that "[n]o court may set aside any action or decision" "strips courts of jurisdiction to … set aside" any action or decision); see also *Volges*, 32 F.3d at 52 (Section 1821(j) stating "no court may take any action" is "broad[] and unequivocal[]"); *Pyramid Const. Co. v. Wind River Petroleum, Inc.*, 866 F. Supp. 513, 518 (D. Utah 1994) ("no court may take any action" in Section 1821(j) is "broad and all-encompassing language").

whether to award declaratory and injunctive relief with respect to a *past* action that FHFA *had already taken*. It was a given that the action in question was in the past, as the case concerned action that already occurred. The analysis instead turned on whether the challenged action was taken *pursuant to FHFA's conservatorship powers*, not whether FHFA had taken any action *at all*.

Similarly, the court in *Suero*, analyzed Freddie Mac's refusal to sell plaintiffs' foreclosed home to a particular lender, an action Freddie Mac had *already* taken. 123 F. Supp. 3d at 171. *Suero* rejected the notion that Section 4617(f)'s prohibition turns on FHFA's taking "affirmative action," holding instead that the statute's application "is not confined to situations in which FHFA engages in affirmative acts by issuing specific directives or statements …." *Id.* The court applied Section 4617(f) even though FHFA "may not have 'acted' by issuing a formal statement or directive relative to the sales of the foreclosed homes." *Id.*

4. Section 4617(f) Applies Regardless of Whether the Enjoined Acts Are Necessary to Soundness and Solvency

In its briefing at the district court and in the writ proceeding, Westland has contended that the Supreme Court's decision in *Collins*

"marked a significant change in the law," supposedly holding that Section 4617(f) applies only if the Conservator's actions are "necessary to put the regulated entity in a sound and solvent condition." APP3059; Appeal No. 82174, Ans. to Amicus Br. at 12 (Doc. No. 21-25317) (quoting *Collins*, 141 S. Ct. at 1776). Defendants then contend that because the loans at issue here will not make or break Fannie Mae, the loan-collection activity the district court enjoined is not "necessary" to Fannie Mae's solvency. APP3059-61; Appeal No. 82174, Ans. to Amicus Br. at 13-14 (Doc. No. 21-25317).

Defendants misread *Collins*, which nowhere indicates any intent to upend a settled point of law—that Section 4617(f) applies without limitation "where the FHFA exercise[s] its 'powers or functions' 'as a conservator or a receiver,'" *Collins*, 141 S. Ct. at 1776—and impose a new "necessary to soundness and solvency" requirement. To the contrary, the Court "agree[d] with th[e] consensus" reflected in the many appellate decisions—*Roberts*, 889 F.3d 397, *Robinson*, 876 F.3d 220, and *Perry Capital*, 864 F.3d 591—holding that Section 4617(f) bars courts from imposing any injunctive restraint on FHFA's exercise of its powers or

functions as Conservator, including performing all functions of its conservatee Fannie Mae. *See Collins*, 141 S. Ct. at 1776.

Nothing in any of those cases, or in *Collins*, conditions Section 4617(f)'s application on the "necessity" of the challenged action. 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 of assessing whether the agreement at issue was "necessary" to Fannie Mae's and Freddie Mac's soundness and solvency—as Defendants' position would require—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.*[8]

If the Supreme Court meant to impose a "significant change" by adding a necessity requirement to the Section 4617(f) analysis, it would

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[8] In *Collins*, five justices contributed opinions—Justice Alito authored the opinion for the Court, while Justices Thomas, Gorsuch, Kagan, and Sotomayor authored concurrences, some of which includes dissents as to portions of the decision not relevant here. 141 S. Ct. 1761. All nine Justices agreed that Section 4617(f) bars equitable relief that would interfere with acts within the Conservator's statutory powers. *Id.* at 1769, 1775-1778.

have done so expressly, not by implication as Defendants contend. And 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, because neither the district court nor the Court of Appeals decisions in *Collins* addressed that question.[9] But that is exactly what the Supreme Court did—it held that Section 4617(f) applies *without* performing any "necessary to soundness and solvency" analysis. Thus, *Collins* itself directly refutes Defendants' strained interpretation.

Nor is there any textual basis to suggest that HERA's "necessary" clause limits or disqualifies the Conservator's powers from Section 4617(f)'s protection. To the contrary, Section 4617(b)(2)(D)(i) states that the Conservator "may"—not "must" or "shall"—"take such action as may

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[9] None of the lower court decisions in *Collins* analyzes whether an act or decision must be "necessary" to safety and soundness for Section 4617(f) to apply, let alone whether the act in question actually *was* necessary. 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) (en banc).

be … necessary to put [Fannie Mae] in a sound and solvent condition." And in the 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 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) permit the Conservator to take "necessary" and "appropriate" actions 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 indispensable. *See, e.g.*, *McCulloch v. Maryland*, 17 U.S. 316, 419-20 (1819); *Maynard v. Newman*, 1 Nev. 271, 288 (1865). The same is true here: The "necessary" and "appropriate" clauses of Section 4617(b)(2)(D) augment rather than restrict the Conservator's express powers, including the powers to "operate" Fannie Mae and to "collect all obligations and money due" it. Another HERA provision, Section 4617(a)(6), confirms this interpretation by stating expressly that "[w]hen acting as conservator or receiver, the Agency shall not be subject to the

direction or supervision of any other agency of the United States or any State in the exercise of the rights, powers, and privileges of the Agency." HERA clearly gives FHFA full, *unlimited* discretion to act on behalf of Fannie Mae.

D. Congress Enacted a Clear and Comprehensive Bar, Thereby Precluding Judicial Re-Evaluation of Policy Interests

The Supremacy Clause of the Constitution makes federal law the "supreme Law of the Land" and "the Judges in every State shall be bound thereby." U.S. Const. art. VI, cl. 2. Under it, state courts have the responsibility to enforce federal law as "[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are." *Howlett By & Through Howlett v. Rose*, 496 U.S. 356, 367 (1990) (quoting *Claflin v. Houseman*, 93 U.S. 130, 136 (1876)); *see Brackeen v. Haaland*, 994 F.3d 249, 317 (5th Cir. 2021) ("[I]t is inherent in the Supremacy Clause's provision that federal law 'shall be the supreme Law of the Land' that state courts must enforce federal law."). Thus, this Court cannot disregard Section 4617(f) based on policy considerations.

1. Westland's Position Implies that the Court Can Second-Guess Congress

Applying Section 4617(f) here to bar the injunctive relief demanded by Defendants will advance the important policy goals of Congress in passing HERA. HERA provides the Conservator with a variety of powers that, combined with Section 4617(f), ensures that the Conservator enjoys broad "managerial judgment" to make "hard operational calls" about "the necessity and fiscal wisdom" of particular measures, especially in light of "ever-changing market conditions." *Perry Capital*, 864 F.3d at 607-608, 613. Congress aimed "to enable [conservators and receivers] to act in a quick and decisive manner." *See Onion*, 938 F.2d at 39. To that end, in Section 4617(f) Congress made a policy determination to "sharply circumscribe[] judicial review" of FHFA's conservatorship activities, *Collins*, 141 S. Ct. at 1775, and "bar[] judicial interference with [FHFA's] statutorily authorized role as conservator," *Roberts*, 889 F.3d at 402. In doing so, Congress chose that the Conservator would be accountable for its actions in many ways, including through lawsuits for damages, but would not be subject to injunctive relief.

Westland may well disagree with the way Congress balanced the competing policy interests that bear on the powers and protections of

federal conservators and receivers, but any recourse must lie with Congress, not this Court. State courts may not "dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Howlett*, 496 U.S. at 371. "When Congress, in the exertion of the power confided to it by the Constitution, adopt[s] [an] act, it sp[eaks] for all the people and all the States, and thereby establishe[s] a policy for all [and] [t]hat policy is as much the policy of [the State] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State." *Id.* (quoting *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 57 (1912)); *see Printz v. United States*, 521 U.S. 898, 907 (1997) (stating that the Constitution "permit[s] imposition of an obligation on state *judges* to enforce federal prescriptions" (emphasis in original)).

Nor is it unusual that Sections 4617(f) and 1821(j) give a single entity—the federal conservator or receiver—authority to manage a troubled institution without injunctive oversight from courts all over the country. Federal bankruptcy, receivership, and conservatorship laws incorporate the policy determination that the state-law rights of parties with claims against a protected entity can be subordinated to the need

for a single authority—the conservator, receiver, or bankruptcy trustee—to administer the entity's affairs efficiently. *See, e.g.*, 11 U.S.C. § 362 (automatic stay provision limiting actions available against debtor or property of estate pending bankruptcy proceedings).

2. Section 4617(f) Embodies Sound Policy

Congress's grant to FHFA of broad discretion to act without judicial interference makes sense; by definition, conservators are appointed only in challenging circumstances—here, an entity critical to the national economy was at risk, ultimately receiving billions of taxpayer dollars. A conservator must make difficult choices, and its role would be unworkable if conservators could be hauled into court and forced to stop their activity every time an affected party questions a conservator's decision. Unlike a football game, activity in the nation's financial markets cannot be paused for "further review" of a disputed call. Section 4617(f) embodies Congress's policy judgment that enabling conservators to focus on the work Congress empowered them to do, without being constrained by injunctive relief of the sort the district court ordered, is paramount and preserves the most important public mission of Fannie Mae and FHFA to the benefit of the American public.

The First Circuit's decision in *Telematics*, a decision concerning Section 1821(j), succinctly provides additional practical analysis of these statutes' policy underpinnings:

> Allowing Telematics to enjoin the FDIC would clearly restrain or affect the FDIC in the exercise of its powers as receiver …. If such an injunction were permissible, creditors would be able to secure judicial review, in advance, of every action that the FDIC proposed to take, regardless of whether that action was clearly within the FDIC's statutory authority. Such judicial interference would dramatically limit the FDIC's ability to exercise its statutory powers efficiently and effectively.

967 F.2d at 705-06. *See also Hindes v. FDIC*, 137 F.3d 148, 160 (3d Cir. 1998) (Congress "intended [Section 1821(j)] to permit the FDIC to perform its duties as conservator or receiver promptly and effectively without judicial interference.").

Indeed, as the U.S. Supreme Court recently recognized, Congress intended the powers and protections accorded FHFA as Conservator to be particularly broad. *See Collins*, 141 S. Ct. at 1776. Accordingly, Congress deemed it wise to ensure that the Conservator's operation of the Enterprises could be flexible, innovative, and responsive to changes in a dynamic and nationally vital sector of the economy, by keeping it free from judicial restraint. The Court need only determine whether actions

fall within FHFA's authority as Conservator; if so, Section 4617(f) bars injunctive relief. *See Collins*, 141 S. Ct. at 1778.

3. Section 4617(f) Does Not Leave Defendants Without a Remedy

Congress did *not* determine that parties aggrieved by an exercise of Conservator power lack any judicial remedy. Such parties, including Defendants here—*if* they are able to prove a breach of contract—can be compensated by money damages. *See Perry Capital*, 864 F.3d at 633 & n.27 (holding that Section 4617(f) allows contract claims against Conservator to proceed "only insofar as [those claims] seek damages").[10]

A ruling in FHFA's favor on this appeal will also not require the Court to find that HERA preempts Nevada contract law. Damages remain available, and because Westland's Properties are investment assets rather than homestead real estate, injunctive relief is not available, even under Nevada law. Any alleged hardship Defendants may suffer is "purely economic in nature," and "[p]urely monetary

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[10] This is not to say that no monetary award could ever violate Section 4617(f). If, for example, a monetary award would be the functional equivalent of injunctive relief that restrains or affects the Conservator's powers or functions, Section 4617(f) would bar it. *See Jacobs*, 908 F.3d at 895-96.

injuries are not normally considered irreparable." *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211 (9th Cir. 1984).[11] But to whatever extent the federal preclusion of injunctive relief might be deemed to preempt any state-law doctrine, that is the intended purpose and effect of Section 4617(f).

And FHFA, as a federal agency, is accountable to Congress and to the President. *See Collins*, 141 S. Ct. at 1787. Thus, although Section 4617(f) bars injunctive relief, Congress neither left aggrieved parties without remedies nor made Fannie Mae and FHFA otherwise unaccountable for their actions. Westland's fear-mongering parade of horribles amounts to nothing more than overblown rhetoric.

II. FHFA's Assertion of Section 4617(f) in the Motion to Dissolve Was Proper

The timing of Fannie Mae's and FHFA's assertion of the Section 4617(f) jurisdictional bar is immaterial. Section 4617(f) imposes a

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[11] This Court's decision in *Stoltz v. Grimm*, 100 Nev. 529 (1984), could be read as contrary, in that it affirms an order requiring specific performance of a contract for the sale of an investment property. But no distinction between residential and investment property was asserted in *Stoltz*, and for the proposition that specific performance was available *Stoltz* relies on a case involving a homestead, not an investment property. *See id.* at 533-34 (citing *Carcione v. Clark*, 96 Nev. 808, 811 (1980)).

jurisdictional bar that can be asserted at any time. In any event as a non-party, FHFA did not have an opportunity to challenge the preliminary injunction before intervening, and therefore had no prior opportunity to raise the arguments to the district court contained in the Motion to Dissolve the preliminary injunction. And the preliminary injunction granted expansive relief that far exceeded the relief Defendants sought in their motion or addressed at the hearing on the motion, effectively obscuring the significance of the issue until after the injunction had been entered.

A. Section 4617(f) Embodies a Jurisdictional Limitation That Can Be Raised at Any Time

That parties can raise jurisdictional defects at any time is hornbook law. *See Clark Cty. Deputy Marshals Ass'n v. Clark Cty.*, 134 Nev. 924 n.1 (2018); *Att'ys Tr. v. Videotape Computer Prod., Inc.*, 93 F.3d 593, 595 (9th Cir. 1996). And Section 4617(f), which provides that "no court may take any action," is properly considered a jurisdictional provision. *Sonoma*, 710 F.3d at 990 (under Section 4617(f), "courts have no jurisdiction" over claim for injunction); *Leon*, 700 F.3d at 1276 (Section 4617(f) is a "jurisdictional bar").

This is evident not just from HERA's plain text, but also from persuasive and analogous case law, including the Supreme Court's recent *Collins* decision, which holds 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. In *Collins*, 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." *Id.* at 1775. Limitations on judicial review are quintessentially jurisdictional. *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").

It makes no difference that Section 4617(f) limits a court's power to award certain relief rather than its power to address particular claims. To the contrary, this Court has held that a court's grant of relief it lacks the power to award—even on a claim it has subject matter jurisdiction to decide—is not a mere substantive error but instead a jurisdictionally defective act. *Del Papa v. Steffen*, 112 Nev. 369, 373, 376 (1996).

If history is any guide, Defendants will argue that Section 4617(f) cannot be jurisdictional because it does not use the word "jurisdiction,"

contending that *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010), and *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145 (2013), require such a label. APP3052; Appeal No. 82666, Ans. Br. to Writ Pet. at 17 (Doc. No. 21-15225); Appeal No. 82174, Ans. to Amicus Br. at 3 (Doc. No. 21-25317). That argument would be wrong. Although legislatures should speak clearly when limiting courts' jurisdiction, they need not "incant magic words" to do so. *Auburn Reg'l*, 568 U.S. at 153. Indeed, after *Reed Elsevier* and *Auburn Regional*, the U.S. Supreme Court noted that "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) (emphasis added). In that decision, the Supreme Court explained that statutes—even those that would ordinarily be merely procedural, such as time bars—are properly considered "jurisdictional" if Congress "clearly state[s]" an intention to "cabin a court's power." *Id.* at 409 (citing *Auburn Reg'l*, 568 U.S. at 153). The Supreme Court again emphasized that Congress need not "incant magic words" to do so. *Id.* And of particular relevance here, the Supreme Court held that the provision in question (the limitations provision of the

Federal Tort Claims Act) was not jurisdictional because it did not "in any way *cabin* [*courts'*] *usual equitable powers*." *Id.* at 411 (emphasis added).

Thus, to the extent a clear statement about jurisdiction is required, an express limitation on "a court's powers"—such as a provision that "cabin[s] [courts'] usual equitable powers"— will suffice. Indeed, one of the cases Defendants relied on previously, *Reed Elsivier*, acknowledges the point by approvingly citing an earlier decision holding that "jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." 559 U.S. at 161 (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (internal quotation marks and citation omitted)).

Under that standard, Section 4617(f) easily qualifies as a "jurisdictional provision." Not only does it unambiguously speak to the power of the courts rather than to the rights or obligations of the parties, it expressly cabins courts' usual equitable powers: It unequivocally mandates that "*no court* may take *any action* to restrain or affect the exercise of [the Conservator's] powers or functions." 12 U.S.C. § 4617(f) (emphasis added). Under *Reed Elsivier* and *Kwai Fun Wong*, therefore, it is a "jurisdictional statute[]." Little wonder, then, that courts have

consistently described it and the substantially identical Section 1821(j) as limitations on jurisdiction, including in decisions issued after *Reed Elsevier* and *Auburn Regional*.[12]

B. The Motion to Dissolve Is Timely Even if Section 4617(f) Is Not Jurisdictional

Although Section 4617(f) plainly is jurisdictional, the Court need not so hold to deem the Motion to Dissolve timely and move on to addressing Section 4617(f)'s effect on the injunction. Regardless of Section 4617(f)'s jurisdictional nature, the Motion to Dissolve was timely because neither FHFA nor Fannie Mae is seeking to circumvent a purported failure to appeal the preliminary junction with the Motion to

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[12] *See, e.g.*, *Jacobs v. FHFA*, No. 15-708-GMS, 2017 WL 5664769, at *2-3 (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 at 889 (describing the district court decision it affirms as addressing "jurisdiction"); *Bulluck v. Newtek Small Bus. Fin., Inc.*, No. 1:16-CV-4326-SCJ-WEJ, 2017 WL 8186594, at *2 (N.D. Ga. Sept. 19, 2017) (under Section 1821(j), "the Court does not have jurisdiction to grant the requests for injunctive relief"), *report and recommendation adopted*, 2017 WL 8186595 (N.D. Ga. Oct. 4, 2017); *Koppenhoefer v. FDIC*, No. 1:13-cv-01237-SLD-JEH, 2014 WL 4748490 (C.D. Ill. Sept. 24, 2014) (under Section 1821(j), "th[e] Court lacks jurisdiction to award the particular type of relief [plaintiff] seeks"); *Dittmer Props., L.P. v. FDIC*, 708 F.3d 1011, 1020 (8th Cir. 2013) (discussing the "anti-injunction jurisdictional bar of [Section] 1821(j)").

Dissolve, and because the scope of the preliminary injunction was unexpected.

While "a party that has failed to appeal from an injunction cannot regain its lost opportunity simply by making a motion to modify or dissolve the injunction, having the motion denied, and appealing the denial," that is not the case here. *Gon v. First State Ins. Co.*, 871 F.2d 863, 866 (9th Cir. 1989).[13] FHFA was not a party to this litigation at the time the preliminary injunction was issued. FHFA is not trying to regain a lost opportunity; it is taking the first opportunity it has had within the case.[14] Thus, any limitations on the scope of review of motions to dissolve injunctions are inapplicable to FHFA.

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[13] "Federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts." *Executive Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53 (2002) (internal quotation marks omitted).

[14] As the Court knows, FHFA separately petitioned for a writ of prohibition, which is the only route by which a non-party can challenge a preliminary injunction. That appeal was argued before this Court on November 4, 2021, and is awaiting decision. *See* Pet. Writ of Prohibition, No. 21-08662, *Fed. Hous. Fin. Agency v. Dist. Ct. (Westland Liberty Village, LLC)*, No. 82666 (Nev. Mar. 26, 2021).

But even if such limitations were applicable, the limitations merely restrict the scope of the appeal to "new matter not considered when the injunction was first issued." *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1419 n.4 (9th Cir. 1984); *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000) (stating that, in reviewing denials of motions to dissolve injunctions, courts limit review to "new material presented with respect to the motion to dissolve"). That is precisely what is happening in this case. Here, because of the unexpected scope of the preliminary injunction and the fact that FHFA was not a party when it was issued, the arguments in the Motion to Dissolve (and therefore presented in this appeal) constitute "new matter not considered when the injunction was first issued," i.e., the applicability of 4617 (f). *See Sierra*, 739 F.2d at 1419 n.4.

Although the district court's order denying FHFA's Motion to Dissolve apparently rests in part on the premise that the issues had been "extensively litigated" before the preliminary injunction was entered, that is not correct. The district court record lacks any indication that Section 4617(f) had arisen in the case before entry of the preliminary injunction, and in fact it had not. The possibility that the district court

was simply unaware of Section 4617(f) before entering the injunction does not change the fact that the injunction violates binding federal law. Under Section 4617(f), the preliminary injunction is void *ab initio*, and the district court misapplied the facts (fully briefed) and the law (Section 4617(f)) in denying the Motion to Dissolve.

Further, although the Ninth Circuit has stated the *general proposition* that "a party seeking modification or dissolution of an injunction bears the burden of establishing that a significant change in facts or law warrants revision or dissolution of the injunction," *see Sharp*, 233 F.3d at 1170,[15] it has recognized an important *exception* that applies here. The Ninth Circuit later clarified that *Sharp* sets forth the "typical[]" requirement and "presumes that the moving party could have appealed the grant of the injunction but chose not to do so, and thus that a subsequent challenge to the injunctive relief must rest on grounds that could not have been raised before." *Alto v. Black*, 738 F.3d 1111, 1120 (9th Cir. 2013). Where the party seeking to dissolve the motion did not intervene until after the injunction was issued and had no prior

[15] This Court does not appear to have addressed the point, and therefore would likely look to Ninth Circuit decisions for guidance. *See Executive Mgmt.*, 118 Nev. at 53.

opportunity to challenge the grant of the injunction, the presumption does not apply and the "typical[] requirement" does not limit the review. *See id.*

FHFA had no opportunity to brief Section 4617(f) before the injunction was entered because it was not a party to the case. And because there was nothing in the record to reveal the extent of the injunctive relief Defendants would seek until they submitted their proposed order, Fannie Mae, which was a party, could not have anticipated the extent of the injunction's interference with FHFA's powers or functions. Finally, at no time before entry of that injunction was Section 4617(f) briefed.

[Continued on Next Page]

CONCLUSION

For the reasons provided herein, 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 and Fannie Mae request that the Court dissolve the district court's preliminary injunction and direct the district court not to grant any relief that would restrain or affect FHFA's federal statutory powers.

Dated this 7th day of December, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the OPENING BRIEF complies with the typeface and type style requirements of NRAP 32(a)(4)-(6), because this brief has been prepared in a proportionally spaced typeface using a Microsoft Word 2010 processing program in 14-point Century Schoolbook type style. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it contains approximately 12,091words.

Finally, I hereby certify that I have read the **APPELLANTS' OPENING 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.

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On December 7, 2021, I caused to be served a true and correct copy of the foregoing **APPELLANTS' OPENING BRIEF** upon the following by the method indicated:

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/s/ Nicole Whitney
An Employee of SNELL & WILMER L.L.P.

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