**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.



Supreme Court Case No. 83695

Dist. Court Case No. A-20-819412-B

# ANSWERING BRIEF

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## VERIFICATION

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

DATED this 27th day of December, 2021.

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

## RULE 26.1 DISCLOSURE

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

DATED this 27th day of December, 2021.

CAMPBELL & WILLIAMS

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## I. JURISDICTION

Westland disputes FHFA's jurisdictional statement. As explained in greater detail below, the Court lacks appellate jurisdiction over this appeal because FHFA seeks review of a ruling that was in substance an untimely motion for reconsideration under Nevada Rule of Civil Procedure 59. FHFA cannot extend the jurisdictional deadline to appeal a preliminary injunction by filing an untimely motion to "dissolve" the injunction and advancing arguments that could have been raised during the original preliminary injunction proceedings. *See Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1124 (9th Cir. 2005).

## II. ROUTING STATEMENT

Westland agrees with FHFA that this Court should retain this proceeding. This case originated in Business Court, *see* NRAP 17(a)(9), and raises an issue of statewide public importance concerning whether federal law entitles Fannie Mae to foreclose on mortgaged property even though the borrower is fully up to date on its mortgage payments and there is no valid basis for foreclosure in the mortgage contract, *see* NRAP 17(a)(12).

## III. INTRODUCTION

Through a flurry of procedurally improper filings in this Court and the district court, FHFA has belatedly sought to argue that the preliminary injunction in this case violates the so-called "Anti-Injunction Clause," 12 U.S.C. § 4617(f). FHFA has

attempted to press this argument through no less than *three* proceedings in this Court: an original action seeking a writ of prohibition; an amicus brief filed in an appeal taken by Fannie Mae; and, now, an appeal from a motion to dissolve the preliminary injunction that the district court denied as untimely. The common thread that runs through all these filings is that FHFA wants this Court to rule on the merits of its Anti-Injunction Clause argument without the benefit of a ruling by the district court on the merits of that argument. But this is a Court of review, not first view, and the volume of FHFA's filings cannot make up for the fact that its argument was not presented to the district court in a timely manner.

Of the various vehicles FHFA has used to seek a ruling from this Court on the merits of its Anti-Injunction Clause argument, this appeal is the least effective. Indeed, the Court does not even have appellate jurisdiction to review the district court's denial of FHFA's motion, which in substance was an untimely motion for reconsideration under NRCP 59. What is more, the district court did not have jurisdiction to consider FHFA's motion challenging the preliminary injunction at a time when that injunction was already the subject of a pending appeal to this Court. The Court should dismiss this appeal and reject FHFA's serial attempts to inject into appellate proceedings an issue that was not properly preserved below.

But if the Court overlooks the fatal procedural flaws in this appeal, FHFA's Anti-Injunction Clause argument should be rejected on the merits. Despite this

federal agency's claims to virtually unlimited power, no federal statute entitles it to foreclose on Westland's properties without a valid contractual basis for doing so.

## IV. COUNTERSTATEMENT OF THE ISSUES

1. Whether this Court has appellate jurisdiction to hear an appeal from the denial of a motion that was styled as a motion to "dissolve" a preliminary injunction yet raised issues and arguments that should have been addressed during the original preliminary injunction proceedings;

2. Whether the district court had jurisdiction to consider FHFA's motion to overturn a preliminary injunction that was the subject of a pending appeal in this Court;

3. Whether the district court abused its discretion in deeming FHFA's attack on the preliminary injunction to be untimely;

4. Whether 12 U.S.C. § 4617(f) empowers FHFA and Fannie Mae to foreclose on Westland's buildings without any valid contractual basis for doing so.

## V. COUNTERSTATEMENT OF THE CASE

This case arises out of a contract dispute between Westland and Fannie Mae relating to Westland's obligations under the mortgage contracts on two residential apartment buildings in the Las Vegas valley. Fannie Mae sued for the appointment of a receiver to take control of the buildings pending foreclosure, and Westland countered by arguing that Fannie Mae's suit was based on a misreading of the

mortgage contracts. After a hearing, the district court entered a preliminary injunction in Westland's favor. Among other things, the preliminary injunction forbade Fannie Mae from foreclosing on the buildings during the pendency of the lawsuit. In a separate appeal, Fannie Mae has asked this Court to overturn the preliminary injunction. *See Fed. Nat'l Mortg. Assoc. v. Westland Liberty Village, LLC*, Case No. 82174.

After the district court entered the preliminary injunction and Fannie Mae appealed, FHFA belatedly injected itself into the case. In a flurry of filings in this Court and the district court, FHFA argued that the district court's preliminary injunction violates the so-called "Anti-Injunction Clause," 12 U.S.C. § 4617(f). But FHFA waited too long to raise this issue and, in any event, FHFA's attacks on the preliminary injunction are without merit. At bottom, FHFA's argument is that the Anti-Injunction Clause entitles it to foreclose on the Westland properties even if there is no valid basis for doing so under the mortgage contracts. This is a radical interpretation of the Anti-Injunction Clause that has no basis in the statutory text or precedent. If accepted, FHFA's argument would entitle this federal agency to immediately foreclose on every home with a Fannie Mae or Freddie Mac mortgage in the State of Nevada, regardless of whether the homeowners are up to date on their mortgage payments.

## VI. COUNTERSTATEMENT OF THE FACTS

FHFA's "Factual Background" fails to provide the necessary factual basis for this Court's review, as it begins with one-page recitation of statutory citations about FHFA's role as conservator, a one-page overview of loan agreement provisions related to the purported default, a three-page review of the relief granted by the preliminary injunction order, and the recognition that the Motion to Dissolve was denied. Opening Brief ("OB") at 3-10. FHFA's factual submission fails to address any of the facts reviewed by the Court when ruling upon the preliminary injunction, and only highlights how FHFA had no involvement whatsoever in the events preceding the litigation. As such, we will provide the Court with the rest of the story before turning to the relevant procedural history.

### A. Westland Purchases the Properties.

On August 29, 2018, Westland Liberty Village, LLC and Westland Village Square, LLC (collectively "Westland") purchased adjoining multi-family communities located at 4870 Nellis Oasis Lane and 5025 Nellis Oasis Lane, Las Vegas, Nevada (the "Properties") for $60.3 million. SA027.[2] The Westland entities are affiliated with the decades-old Westland Real Estate Group, which employs approximately 500 people, and owns and operates over 38 communities in the Las Vegas valley. *Id*. In more than 50 years of operation, the Westland Real Estate

[2] Citations to "SA" refer to Respondents' Supplemental Appendix.

Group and its affiliates have never defaulted on a loan. *Id.*

As a condition of the purchase, Westland assumed loans of $29,000,000 and $9,366,000 (the "Loans") that were issued to the prior owner by Grandbridge Real Estate Capital, LLC ("Grandbridge"), the successor to SunTrust Bank, and assigned to Fannie Mae (other than for loan servicing) before Westland's purchase. *Id*.; APP0049-APP0191; APP0253-APP0453; APP2371. Westland paid the remainder of the purchase price in cash such that Westland has well over $20 million of equity in the Properties. *Id*. At the time of purchase, Fannie Mae reaffirmed the sufficiency of the combined total Repair Reserve and Replacement Reserve balances of $143,319.30 based on a property condition assessment ("PCA") performed by CBRE. APP1875-APP1880; APP1886; APP1896; APP2372. There is no dispute that Westland satisfied this reserve funding.

**B. Westland Rehabilitates the Properties at Great Expense.**

Notably, Fannie Mae agreed to the reserve amounts at the time of purchase with knowledge that the Properties had been in a distressed condition for years due to poor management, exceedingly high levels of crime, and physical disrepair. SA030-SA031; APP1454-APP1461; APP2372-APP2373; APP2429; APP2430. The Properties, in fact, received a nuisance abatement complaint from the Las Vegas Metropolitan Police Department due to high crime levels before Westland took possession of the Properties. *Id.* For that reason, Westland advised Grandbridge

prior to closing that a decline in occupancy would inevitably occur as evictions were necessary to address the high crime rate and the prior owner's poor management. *Id;*

From the date of purchase in August 2018 through September 2019, Westland invested $1.8 million solely on capital improvements, spent another $1.57 million on private security, took measures to clean up crime, added a dedicated 32-employee staff, and began improving integration with local community services. SA030-SA031. Westland's efforts in this regard received plaudits from multiple leaders and government bodies in the community, including a Clark County Commissioner, the Nevada State Apartment Association, and the Las Vegas Metropolitan Police Department. *Id*; APP1902; APP1904.

### C. The Improper Property Condition Assessment, and Fannie Mae's Demand for a $2.85 Million Reserve Deposit.

In mid-2019, Grandbridge, acting on behalf of Fannie Mae, demanded a PCA to which it was not entitled under the loan agreements. Fannie Mae acknowledged in the district court that this request was based on a reduced occupancy rate—which, again, only resulted from Westland's attempts to improve the Properties—when the loan agreements only allowed a PCA due to physical deterioration of the Properties.[3]

[3] This Appeal represents the first attempt by FHFA or Fannie Mae to recast the PCA demand as based on occupancy *and* a property inspection. Previously, Fannie Mae only cited a "decline in occupancy rates and potential for deterioration," APP2337, even though Section 6.03(c) of the Loan Agreements requires a finding that "the

APP0082, APP0087, APP2337. The contract language notwithstanding, Grandbridge retained an out-of-state vendor, f3, Inc. ("f3"), to perform a new PCA in September 2019 even though CBRE, a local vendor, had performed a PCA at the time of purchase just a year earlier. APP1329-APP1330.

On October 18, 2019, Fannie Mae (through Grandbridge) served a Notice of Demand (the "Demand") based on alleged maintenance deficiencies identified in f3's PCA reports. The Demand required Westland to deposit $2.85 million in the Replacement Reserve Account forthwith. APP1288-APP1301. Because Fannie Mae's "assessment" effectively meant the condition of the Properties deteriorated by $2.85 million in one year despite Westland's capital expenditures of $1.8 million during the same period, it was readily apparent that f3 artificially inflated the PCA by using different standards than those used by CBRE months earlier. Indeed, the PCA at the time of purchase determined that vacant units required routine maintenance without reserves whereas f3 did not categorize the same type of repair as routine maintenance and instead required $1.9 million be held in reserve for vacant units. APP1485 (fire damaged units only), APP1507-APP1511 (permitting vacant unit repairs as normal maintenance without reserves), APP1598, APP1619-APP1622 (permitting vacant unit repairs "on an as needed basis or as the units are

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condition of the Mortgaged Property has deteriorated" to conduct a PCA. *Id.*; *cf.* APP0087.

turned" and "as part of normal property operations" without reserves); *cf.* APP1329-APP1330, APP0536 (requiring $711,215 of reserves for the same type of vacant unit repairs), APP0847 (requiring $1,197,545 of reserves for the same type of vacant unit repairs). By adopting this approach, f3 caused the demanded reserves to skyrocket from $143,319.30 to $2.85 million even though the condition of the Properties had, by all accounts, dramatically improved since the initial PCA.

The loan agreements expressly prohibit Fannie Mae from making increased reserve demands on grounds the existing reserves are purportedly "insufficient." ***First***, "adjustment to deposits" for reserve schedules are permitted under Section 13.02(a)(3), but only at the time a loan is renewed or transferred, *i.e.*, at the time of purchase in August 2018 when Fannie Mae reduced the reserves. APP0117-APP0118.

***Second***, Section 13.02(a)(4) only permits increases in Required Repairs and Required Replacements that are explicitly listed in the loan schedules when the loan is issued or assumed as well as Additional Lender Repair or Additional Lender Replacements that are "*repairs of the type listed* on the Required Repair Schedule" or "Required Replacement Schedule" but not specifically identified. APP0118, APP0141. In this case, the scheduled items only identified a handful of minor repairs with a total value of $143,319.30 whereas Fannie Mae's $2.85 million demand requested wholesale changes far beyond that limited scope. APP1875-APP1880,

APP1886, APP1896, APP2372.

***Third***, Section 6.01(d) states the "condition of the Mortgaged Property" only applies to physical onsite conditions, including "the construction or condition of the Mortgaged Property or . . . any structural or other material defect" and "any damage other than damage which has been fully repaired." APP0082. There is no mention of occupancy levels. Similarly, under Section 6.03(c), Fannie Mae can only obtain a PCA when "the *condition* of Mortgaged Property has *deteriorated* (*ordinary wear and tear excepted) since the Effective Date*" of the loan. APP0087 (emphasis added). Fannie Mae, however, did not—and could not—produce any evidence establishing deterioration since the effective date of the loans as opposed to deterioration that already existed before Westland purchased the Properties. APP2319-APP2320. Put another way, the f3 report on which Fannie Mae's Demand was premised did not account for the baseline condition of the Properties at the time of purchase.

***Fourth***, assuming *arguendo* the PCA was properly conducted and the Demand was related to a condition listed in a schedule, Fannie Mae improperly failed to provide Westland an opportunity to complete identified repairs as required by Section 6.02(b)(3)(B) & (C) before mandating a multi-million dollar deposit. APP0083-APP0084, cf. APP1288-APP1301. Additionally, the reserve increase for required repairs was duplicative of the reserve increase for monthly replacement deposits attributable to deferred maintenance. APP2280-APP2284; *see* APP0118.

### D. Fannie Mae and Grandbridge Notice a Default and Commence Foreclosure Proceedings.

Westland responded to the Demand on November 13, 2019 by objecting on the foregoing bases, reaffirming that it had improved the Properties' condition through more than $1.8 million of renovations, and noting that Grandbridge failed to provide an opportunity to perform the alleged necessary repairs. APP2280-APP2284. Westland then attempted to resolve the dispute with Fannie Mae by providing its Strategic Improvement Plan for the Properties, which discussed Westland's ongoing plans to renovate the Properties, provided timelines for remaining renovations to be made, and addressed deficiencies identified by f3 that had already been corrected. APP1905-APP2227, APP2285-APP2288.

Westland's efforts to remedy the situation were summarily rebuffed when Fannie Mae's counsel forwarded a boilerplate Notice of Default and Acceleration of Note ("Default") on December 17, 2019 rejecting Westland's good-faith proposal and ignoring Westland's improvements to the Properties. APP1302-APP1310. Nearly seven months later, on July 14, 2020, Fannie Mae filed the Notice of Default and Intent to Sell alleging a default of the Loan Agreements because Westland did not deposit nearly $3 million into the Replacement Reserve Escrow Account upon Fannie Mae's unilateral demand. Incredibly, Fannie Mae took this action without seeking to re-inspect the Properties even though Westland had (i) invested an additional $1.7 million in capital improvements during the ten months since the

September 2019 PCA, and (ii) completed a large number of work orders to prepare vacant units for rental. SA031.[4] The prejudice to Westland is breathtaking.

**E. Bad Faith Loan Servicing**

Besides pursuing the deficient Default based on an improper PCA, Fannie Mae and Grandbridge routinely engaged in unscrupulous conduct when servicing the Loans. For example, contrary to Fannie Mae's prior assertions that Westland failed to disclose any improvements or repairs prior to f3's PCA or improperly denied access to the Properties, the evidence demonstrates that Westland made numerous reserve reimbursement requests that attached detailed support for work performed before and after Fannie Mae demanded a PCA in mid-2019. APP2373-APP2374. Grandbridge, however, repeatedly failed to respond to Westland's requests, did not process requests in a timely manner, and refused to release Westland's funds. *Id.* Moreover, Fannie Mae did not seek access to the Properties between the time of f3's PCA and the filing of the Related Action. SA028.

Additionally, in February 2020, Grandbridge (without notice) stopped sending loan statements and auto-debiting Westland's monthly debt service payments, which forced Westland to guess at its floating monthly payments at the

[4] Westland submitted more than 2,200 pages of work orders to the district court as evidence of these improvements. For brevity, Westland did not include this evidence in its Supplemental Appendix, *see* NRAP 30(b), but will do so should the Court request it.

risk a financial default. SA028-SA029. To ensure that a miscalculation did not result in a default, Westland began mailing its monthly payments plus an additional ten percent (10%). *Id.*; APP2292-APP2308. As a result, Westland overpaid its mortgage by more than $550,000 since February 2020. *See infra* at § III.J.

The most egregious example of Fannie Mae's and Grandbridge's misconduct was their refusal to release $951,407.55 of insurance funds from the Restoration Reserve earmarked for reconstructing two fire-damaged buildings at the Liberty Property. Westland completed the work at its sole expense and met all conditions for the release of Restoration Reserve funds well before the spurious Default. SA031. Fannie Mae, though, withheld all of the insurance funds on grounds it had no obligation to release funds after a self-proclaimed event of default has occurred. APP2544-APP2545 ("if there's any kind of a default . . . we don't have to do it"). Setting aside that no default occurred in the first place, Westland had requested reimbursement of insurance funds numerous times, including its largest request on October 18, 2019—two months before Fannie Mae noticed the purported default on December 17, 2019. APP2381-APP2394.

**F. Fannie Mae Files Suit and Seeks To Appoint a Receiver.**

Fannie Mae filed this lawsuit on August 12, 2020, and promptly moved for

the appointment of a receiver.[5] In response, Westland filed its counterclaim and moved for a preliminary injunction (supported by a fully-developed record of over 3,200 pages of exhibits and three sworn affidavits) to stop all foreclosure proceedings, negate the effects of the wrongful Default, and restore Westland's good name in the industry. APP1415-APP2308, APP2345-APP2449, SA025-SA033, *see also* n. 3. On October 13, 2020, the district court held a lengthy hearing, denied Fannie Mae's request for a receiver, and granted Westland's counter-motion for a preliminary injunction. APP2498-APP2550.

FHFA implies that Westland somehow duped the district court into signing an order that went far beyond the relief sought or ordered at the hearing. *See* Brief at 7. The 52-page transcript, however, establishes otherwise as Judge Earley repeatedly expressed shock at the positions espoused by Fannie Mae, stating on numerous occasions that Fannie Mae's position on holding the insurance reserve funds "makes no sense," that Fannie Mae was acting improperly by assuming a default, that Westland had performed under the contract and "did a lot," and that the district court was "stopping the Notice of Default" and anything "flowing" therefrom. APP2534-APP2525, APP2532-APP2534, APP2542-APP2548.

[5] Fannie Mae sought expansive receivership powers as evidenced by its 17-page proposed order listing 34 different "duties, rights, and powers" as well as eight separate acts that Westland would be enjoined from performing. APP0028-APP0046.

The parties submitted competing orders to the district court along with the hearing transcript and voluminous letters setting forth each side's positions as to content. APP2551-2655. The district court adopted Westland's proposed order in its entirety notwithstanding FHFA's present contention that the order exceeds the scope of the district court's ruling at the hearing. *See Mortimer v. Pacific States Savings & Loan*, 62 Nev. 142, 145 P.2d 733, 736 (1944) ("[The formal written order] must be taken as the best evidence of the court's decision. The fact that it was prepared by appellant is of no consequence. A court is presumed to read and know what it signs.").

In sum, the district court ordered Fannie Mae to cease any punitive conduct that was premised on the specious Default,[6] including that Fannie Mae is prohibited from clouding the title of the Properties, withholding billing statements, refusing to process reserve requests, executing a lien, refusing to service the loan payments, or taking adverse actions against Westland's affiliated entities if such actions are solely based on the purported Default.

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[6] FHFA contends the ruling was limited to a foreclosure based on the Notice of Default and Intent to Sell. OB at 7. But that argument was specifically rejected at oral argument. Fannie Mae's counsel inquired whether the ruling related to the "default or the foreclosure," and the Court responded it was stopping the default, which would include the proposed sale "[b]ecause that would . . . flow, from my reasoning." APP2548. Moreover, the district court ruled that a question of fact existed about whether a default had even occurred, not whether a notice of default and intent to sale was filed, so FHFA's argument is misplaced on that point as well. APP2547.

### G. Fannie Mae Asks This Court To Stay Enforcement of the Injunction.

After appealing the injunction order, Fannie Mae moved this Court to stay its enforcement. On February 11, 2021, the Court issued an order granting Fannie Mae limited relief. Specifically, the Court stayed enforcement of the provisions requiring Fannie Mae to remove the notices of default and election to sell from the Properties' titles pending resolution of Fannie Mae's appeal. It otherwise denied the motion and left the remainder of the injunction order in place, thereby prompting Fannie Mae to seek reconsideration of the Court's order. The Court denied the reconsideration motion on May 25, 2021.

### H. The FHFA's (Nonexistent) Role in the Underlying Events and the Related Action.

While expansive in its review of the case law interpreting HERA's Anti-Injunction Clause and the statutory scheme that permits FHFA to act as a conservator, FHFA's brief is conspicuously silent regarding its actual actions that purportedly contributed to Fannie Mae's mistreatment of Westland in this case—*i.e.* FHFA's supposed exercise of powers as conservator in this action. That is because FHFA had ***no*** role in the underlying dispute between Fannie Mae and Westland until it moved to intervene in the underlying action, and sought writ relief in late March 2021 after the injunction had been in place for months and had, in fact, been preliminarily reviewed by this Court as part of Fannie Mae's stay motion.

Specifically, there is no evidence in the record (either in this Court or the court below) that Fannie Mae engaged in the abovementioned actions in compliance with any policy or directive of FHFA. There is likewise no evidence in the record that FHFA directed, participated in, or endorsed Fannie Mae's misconduct towards Westland with respect to the Properties. There is, moreover, no evidence to suggest that FHFA even knew about the dispute between Fannie Mae and Westland until long after this litigation commenced in August 2020.[7]

## I. FHFA's Intervention in the District Court.

On March 26, 2021, FHFA moved to intervene notwithstanding that the preliminary injunction had been granted more than five months earlier. APP3023. On April 9, 2021, Westland filed a limited opposition to the Motion, and argued that the district court should restrict FHFA's ability to challenge prior rulings such as the preliminary injunction order. SA124-SA172. The district court granted FHFA's request for intervention on April 26, 2021, but allowed further briefing and an additional hearing regarding the limitations that should be placed on FHFA's intervention. APP2953-APP2963. At the hearing on May 6, 2021, the Court ruled

[7] Westland objects in advance to any attempt by FHFA to submit new evidence regarding a directive, policy or any other alleged involvement by FHFA in the underlying dispute. *See Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 671, 262 P.3d 705, 715 n. 7 (2011) ("We decline to consider this argument because Francis did not cogently raise the issue in his opening brief; rather, he raised it for the first time in his reply brief, thereby depriving Wynn of a fair opportunity to respond.").

it would permit FHFA intervention, but noted its ruling was "without prejudice to Defendants' substantive and procedural contentions," such as the untimeliness of any FHFA motion that mounted a collateral attack on the preliminary injunction. APP3028-APP3037.

**J. Developments in the District Court Since FHFA's Appearance.**

As a result of Fannie Mae's obstinate refusal to comply with the terms of the injunction and, in particular, its failure to disburse the insurance funds from the Restoration Reserve, Westland moved to compel Fannie Mae's compliance with the injunction in the district court. SA173-SA347. On the eve of the May 6, 2021 hearing, Fannie Mae finally disbursed $905,599.68 to Westland representing the amount of insurance proceeds associated with the repairs of the fire-damaged buildings at the Properties. SA281-SA297. Additionally, Fannie Mae remitted $550,748.78 to Westland as reimbursement for the amounts it paid in excess of its monthly loan obligations due to Fannie Mae's and Grandbridge's bad faith loan servicing. *Id*.

Westland submits that Fannie Mae's newfound willingness to comply with the injunction and disburse Westland's funds arose from the fact that Fannie Mae had just been compelled to produce two new PCA reports for the Properties that were conducted at Fannie Mae's behest on March 4-5, 2021. APP3067-APP3201, APP3202-3343. The new PCA reports established that the appropriate amount for

Westland's Replacement and Repair Reserve Accounts is, at best, a mere $436,005—which is more than $2.4 million less than the demand that led to Fannie Mae declaring default and commencing foreclosure proceedings against Westland. APP3082-APP3083, APP3219-APP3220. Indeed, even after recently releasing nearly $1.5 million, there is no question that Westland's Repair and Replacement Reserve Accounts are overfunded by hundreds of thousands of dollars given that the Repair and Replacement Reserve Accounts for the Properties contained $1,050,093.31 as of June 16, 2021 and that balance continues to accrue. APP3345-APP3346. In short, the new PCA reports commissioned by Fannie Mae confirm that it lacked any justifiable basis to declare default and commence foreclosure proceedings in the first place, which renders FHFA's belated intervention into this dispute even more inexplicable and improper.

On June 14, 2021, FHFA filed a motion to "dissolve" the preliminary injunction challenging every aspect of the November 20, 2020 order. On July 12, 2021, Westland opposed the motion on grounds it was an untimely motion for reconsideration, that the Anti-Injunction Clause does not apply because FHFA had not taken any action necessary to put Fannie Mae in a sound and solvent condition, and that FHFA had not even engaged in any act within the scope of its conservatorship powers. APP3041-3415. After a hearing, the district court denied FHFA's motion on September 17, 2021 because the preliminary injunction "was

issued after extensive development of the issues in this Court and is now the subject of extensive litigation on the pending appeal." APP3445-APP3454.

FHFA nonetheless filed yet another motion for "clarification" of the district court's order, which incorrectly argued that the Court had not considered 12 U.S.C. § 4617(f) and sought revision of certain findings. SA348-SA356; SA357-SA359. On November 3, 2021, the district court denied FHFA's motion for clarification as "unwarranted." SA360-SA367. This appeal followed.

## VII. SUMMARY OF THE ARGUMENT

Several threshold issues make this appeal an inappropriate vehicle to reach the merits of FHFA's Anti-Injunction Clause argument. Initially, this Court lacks appellate jurisdiction to hear the appeal because, in substance, FHFA's motion to "dissolve" was actually an untimely motion for reconsideration under NRCP 59. Moreover, because FHFA filed its motion attacking the preliminary injunction at a time when Fannie Mae had already appealed the preliminary injunction to this Court, the district court lacked jurisdiction to consider FHFA's motion. The district court also ruled that FHFA's motion was untimely—a ruling that was correct and that this Court reviews only for abuse of discretion.

If the Court reaches the merits of FHFA's Anti-Injunction Clause argument, it should rule that the federal statute does not bar equitable remedies against Fannie and FHFA in this case for multiple reasons. First, with limited exceptions that do not

apply here, the Anti-Injunction Clause permits equitable remedies in breach of contract cases. *Sharpe v. FDIC*, 126 F.3d 1147, 1155 (9th Cir. 1997); *CML-NV Grand Day, LLC v. Grand Day, LLC*, 134 Nev. 925, 430 P.3d 530, 2018 WL 6016683 (2018) (unpub. disp.). Second, the Supreme Court recently ruled that FHFA's actions are covered by the Anti-Injunction Clause only if they are "*necessary* to put the regulated entity in a sound and solvent condition," *Collins v. Yellen*, 141 S. Ct. 1761, 1776 (2021) (emphasis added), a showing that FHFA does not even attempt to make. Third, FHFA cannot invoke the Anti-Injunction Clause when it admits it had no substantive involvement in the events that gave rise to this case. *Suero v. Fed. Home Loan Mortg. Corp.*, 123 F. Supp. 3d 162, 171 (D. Mass. 2015). And fourth, the district court did not "restrain or affect" the exercise of FHFA's conservatorship powers by insisting that FHFA demonstrate a contractual basis for foreclosing on the Westland properties before actually seizing them. *Abbott Bldg. Corp., Inc. v. United States*, 951 F.2d 191, 194 (9th Cir. 1991).

## VIII. ARGUMENT

### A. This Appeal is the Wrong Vehicle To Rule on the Merits of FHFA's Anti-Injunction Clause Defense.

#### 1. The Court lacks appellate jurisdiction to review the district court's denial of FHFA's motion, which in substance was an untimely motion for reconsideration under NRCP 59.

Ordinarily, this Court has jurisdiction to review a preliminary injunction only if a notice of appeal is filed within 30 days of when the preliminary injunction is

entered. NRAP 4(a)(1). If a party files a "*timely*" motion to alter or amend a preliminary injunction under NRCP 59, the deadline to appeal is extended to 30 days after the district court rules on that motion. NRAP 4(a)(4) (emphasis added). But to be timely, a Rule 59 motion must be filed in the district court within 28 days of service of the preliminary injunction. NRCP 59(e). FHFA filed the motion that led to the order that is the subject of this appeal *four months* after the preliminary injunction issued. Thus, FHFA's motion was untimely if it was a motion under NRCP 59, and treating FHFA's motion as an untimely Rule 59 motion—which it is—would be fatal to this Court's appellate jurisdiction.

In an attempt to avoid this jurisdictional problem, FHFA styled its motion in the district court as a motion to dissolve the preliminary injunction rather than as a motion under Rule 59. As a result, FHFA seeks to invoke this Court's appellate jurisdiction to review an order "refusing to dissolve an injunction." NRAP 3A(b)(3). But if "[a] dissatisfied litigant who . . . allowed the time to appeal to run[] need only apply for dissolution or modification to produce a new opportunity," then appeals of preliminary injunction rulings would be "open without end." Wright & Miller, Federal Practice & Procedure § 3924.2 (3d ed. 2021). To avoid creating a loophole that would allow litigants to appeal from a preliminary injunction decision at any time by filing a motion to "dissolve," the Court must look to the substance of FHFA's motion rather than its form. *See Bally's Grand Hotel & Casino v. Reeves*,

112 Nev. 1487, 1488, 929 P.2d 936, 937 (1996) ("This court has consistently looked past labels in interpreting NRAP 3A(b)(1)[.]").

This Court does not appear to have ever had occasion to decide how to distinguish between an untimely Rule 59 motion and a proper motion to dissolve a preliminary injunction. But when this issue is addressed under federal law, circuit courts ask whether the motion "merely seeks to relitigate the issues underlying the original preliminary injunction order" or "in substance is based on new circumstances that have arisen after the district court granted the injunction." *Credit Suisse*, 400 F.3d at 1124. To avoid Rule 59's time limit and provide a basis for appellate jurisdiction, the motion must identify "a change of circumstances between entry of the injunction and the filing of the motion that would render the continuance of the injunction in its original form inequitable." *Favia v. Indiana Univ. of Pa.*, 7 F.3d 332, 337 (3d Cir. 1993). Put another way, a district court ruling is only properly characterized as "refusing to dissolve an injunction" under NRAP 3A(b)(3) if the underlying motion was based upon "significant changes in fact, law, or circumstance since the previous ruling." *Gooch v. Life Invs. Ins. Co.*, 672 F.3d 402, 414–15 (6th Cir. 2012); *see also Aevoe Corp. v. AE Tech Co.*, 2012 WL 760692, at *2 (D. Nev. March 7, 2012) ("AE Tech does not discuss any new circumstances that have arisen after the original order that would justify the Court's consideration to vacate the order. Accordingly, the Court will apply the motion for reconsideration standard

under Rule 59(e) to the instant motion to determine whether or not to vacate the preliminary injunction.").

FHFA does not deny that its Section 4617(f) argument could have been raised during the original preliminary injunction proceedings. Thus, because FHFA's motion did not identify any "new circumstances that have arisen after the district court granted the injunction," *Credit Suisse*, 400 F.3d at 1124, it was in substance an untimely Rule 59 motion.

FHFA makes several arguments to the contrary, but none are persuasive. First, FHFA contends that Section 4617(f) is jurisdictional and that the Court may hear this appeal because the district court exceeded its jurisdiction when it entered the preliminary injunction. But even before deciding whether the district court had jurisdiction over the proceedings below, this Court must first assure itself of its own appellate jurisdiction. The question whether this Court has appellate jurisdiction "is *antecedent* to all other questions, including the question of the subject matter [jurisdiction] of the District Court." *In re Lang*, 414 F.3d 1191, 1195–96 (10th Cir. 2005); *see also Petroleos Mexicanos Refinacion v. M/T KING A*, 377 F.3d 329, 333 n. 4 (3d Cir. 2004) (declining to reach appellant's challenge to district court's subject matter jurisdiction because appeals court lacked appellate jurisdiction); *RTC v. Sonny's Old Land Corp.*, 937 F.2d 128, 129 (5th Cir. 1991) ("Before addressing the district court's jurisdiction on removal, we must decide our own jurisdiction."). Even

if FHFA were correct that Section 4617(f) is jurisdictional (it is not), that would not provide a basis for this Court to hear an appeal triggered by the denial of an untimely Rule 59 motion.

Second, FHFA argues that Rule 59's time limits do not apply when a motion raises "new matter not considered when the injunction was first issued" and that its Section 4617(f) defense qualifies as a "new matter" because no one raised it during the original preliminary injunction proceedings. OB at 59 (quoting *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1419 n.4 (9th Cir. 1984)). Despite FHFA's suggestion to the contrary, an argument that could have been raised during the original preliminary injunction proceedings but that counsel overlooked is not a "new matter" within the meaning of the cases upon which FHFA relies. Indeed, as one of FHFA's own cases explains, "[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." *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000) (emphasis added).

Third, FHFA attempts to fit this case within a narrow exception to the rules described above that the Ninth Circuit has recognized in cases where an intervenor attacks a preliminary injunction that was entered before it became a party to the case. *See Alto v. Black*, 738 F.3d 1111, 1120 (9th Cir. 2013). As an initial matter, the Ninth Circuit's decision in *Alto* is wrong because it effectively allows a district court, by

granting a motion to intervene, to extend the deadline for filing a Rule 59(e) motion. *See* NRCP 6(b)(2) ("A court must not extend the time to act under . . . Rule 59(b), (d), and (e)."). The Ninth Circuit in *Alto* did not explain how its decision could be reconciled with Rule 6(b)(2), and it does not appear to have received adversarial briefing on this issue.

But even if this Court follows *Alto*, that case is distinguishable. It was critical to the outcome in *Alto* that the appealing intervenor had "no prior opportunity to challenge the grant of the injunction." 738 F.3d at 1120. The same cannot be said for FHFA, which controls Fannie Mae. Indeed, FHFA recently told this Court that "everything Fannie Mae does is an act of the conservator because the conservator is the legal successor to Fannie Mae." Oral Argument Audio in No. 82666, at 8:12–20 (Nov. 4, 2021). Taking it at its word, FHFA could have acted through Fannie Mae and raised its Section 4617(f) defense during the original preliminary injunction proceedings or by filing a timely Rule 59(e) motion within 28 days of when the preliminary injunction issued. FHFA's failure to do so takes this case outside the rule of *Alto* and deprives this Court of appellate jurisdiction.

*Alto* is also distinguishable for another reason. The intervenor in that case filed its motion to dissolve the preliminary injunction on the same day that it moved to intervene in the district court. Here, in contrast, FHFA moved to intervene on March 26, 2021, and the district court granted FHFA's motion on April 26, 2021. But

FHFA waited to file its motion to dissolve the preliminary injunction until June 14, 2021—well beyond the 28-day deadline that Rule 59(e) establishes, even under the generous assumption that time began to run from when FHFA's intervention motion was granted.[8]

Because the Court lacks jurisdiction to hear this appeal, the appeal should be dismissed.

**2. Fannie Mae's pending appeal of the preliminary injunction deprived the district court of jurisdiction to rule on FHFA's motion.**

Even if the Court concludes that it has appellate jurisdiction, there is a second jurisdictional reason why the Court should not reach the merits of FHFA's Section 4617(f) argument in this appeal: FHFA filed its motion to dissolve at a time when the district court did not have jurisdiction to consider it. It is a bedrock principle of Nevada law that "the perfection of an appeal divests the district court of jurisdiction

[8] After FHFA was allowed to intervene, the parties continued to dispute the scope of FHFA's intervention and, on May 6, 2021, a hearing was held specifically addressing whether FHFA's intervention motion was timely insofar as the agency sought to attack the preliminary injunction. The district court ruled at the hearing that it would not narrow the scope of FHFA's intervention at that time, but that the ruling was without prejudice to such objections being raised in future motions. The ruling was embodied in an order entered on June 11, 2021, specifying that FHFA was allowed to intervene "without prejudice to [Westland's] . . . procedural contention[ ]" that FHFA had waited too long to challenge the preliminary injunction. APP3028-APP3037. The district court ultimately determined that FHFA's challenge to the preliminary injunction was untimely, which is yet another basis to distinguish *Alto*.

to act except with regard to matters collateral to or independent from the appealed order." *Foster v. Dingwall*, 126 Nev. 49, 52, 228 P.3d 453, 455 (2010); *cf. Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (filing of notice of appeal in federal court "is an event of jurisdictional significance"). When FHFA filed its motion to dissolve, Fannie Mae had already appealed the preliminary injunction to this Court, and that appeal remains pending. FHFA's motion obviously was not "collateral to or independent from" the preliminary injunction that is the subject of Fannie Mae's appeal. *Id.* Thus, the district court lacked jurisdiction to rule on FHFA's motion.

In the proceedings below, FHFA responded to this jurisdictional argument by relying on a line of federal cases that says a trial court may modify a preliminary injunction despite a pending appeal when doing so is necessary "to maintain the status quo among the parties." *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 880 (9th Cir. 2000); *see also Coastal Corp. v. Tex. E. Corp.*, 869 F.2d 817, 820 (5th Cir. 1989); *Ideal Toy Corp. v. Sayco Doll Corp.*, 302 F.2d 623, 625 (2d Cir. 1962). But dissolving the preliminary injunction would do the opposite of maintain the status quo. The relief FHFA sought in the district court would have allowed Fannie Mae to immediately foreclose on the Westland properties, stripping the current owners of possession of the buildings, causing the nearly three dozen Westland employees who work in the buildings to lose their jobs, and placing a cloud

of uncertainty over the future of two residential communities that Westland has done much to rehabilitate after years of mismanagement by the previous owners. Setting in motion those real-world consequences would not preserve the status quo but dramatically alter it. *See McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 735 (9th Cir. 1982) ("[B]y ordering the publisher to reinstate employees who were not working when the appeal was filed, the amended judgment required a change from the status quo.").

Nevertheless, FHFA claimed that dissolving the preliminary injunction would preserve the status quo because Section 4617(f) renders the preliminary injunction "void ab initio." Putting aside for the moment the merits of FHFA's Section 4617(f) defense, this argument fundamentally misunderstands the scope of a district court's authority to modify an injunction that is the subject of a pending appeal. As the leading federal civil procedure treatise explains, district courts retain jurisdiction during a pending appeal to preserve the status quo "in aid of the appellate court's jurisdiction." Wright & Miller, Federal Practice & Procedure § 3949.1 (3d ed. 2021). In other words, to establish the district court's jurisdiction pending appeal, FHFA had the burden to demonstrate that its requested relief would "neither change[ ] the status quo . . . *nor materially alter the status of the appeal*." *Mayweathers v. Newland*, 258 F.3d 930, 935 (9th Cir. 2001) (emphasis added); *see also Coastal Corp.*, 869 F.2d at 820 ("[T]he powers of the district court over an injunction

pending appeal should be limited to maintaining the status quo and *ought not to extend to the point that the district court can divest the court of appeals from jurisdiction while the issue is before us on appeal*.") (emphasis added).

Far from seeking relief that would facilitate this Court's consideration of Fannie Mae's appeal, the relief FHFA sought through its motion would moot Fannie Mae's appeal. It necessarily follows that the district court lacked jurisdiction to entertain FHFA's motion.[9]

**3. The district court did not abuse its discretion in ruling that FHFA's motion was untimely.**

There is still another reason why the Court need not reach the merits of FHFA's Section 4617(f) defense in this appeal: the district court correctly ruled that FHFA's motion was untimely because the preliminary injunction "was issued after extensive development of the issues in this Court and is now the subject of extensive litigation in the pending appeal." APP3445-APP3454. As FHFA acknowledges, the district court's decision is subject to review by this Court only for abuse of

[9] This appeal does not squarely present the issue, but Westland notes that it is doubtful the district court had jurisdiction to permit FHFA to intervene to challenge the preliminary injunction in the first place. This is so because Fannie Mae had already appealed the preliminary injunction when FHFA's motion to intervene was granted. *See, e.g.*, *Doe v. Pub. Citizen*, 749 F.3d 246, 257–59 (4th Cir. 2014); *Taylor v. KeyCorp,* 680 F.3d 609, 617 (6th Cir. 2012); *Drywall Tapers & Pointers of Greater New York*, *Local Union 1974 v. Nastasi & Assocs. Inc.*, 488 F.3d 88, 94–95 (2d Cir. 2007).

discretion. Under that standard, FHFA's attacks on the district court's timeliness ruling fail.

FHFA's primary argument on timeliness is that Section 4617(f) restricts the district court's jurisdiction and is therefore an issue that may be raised at any time. FHFA is wrong. In *Perry Capital v. Mnuchin*, 864 F.3d 591, 604 (D.C. Cir. 2017), FHFA's Anti-Injunction Clause defense was treated as a "merits" issue. *See also, e.g.*, *Roberts v. FHFA*, 889 F.3d 397, 403 (7th Cir. 2018). That is the correct approach under controlling U.S. Supreme Court precedent because a federal statutory provision must be "clearly labeled jurisdictional" to be jurisdictional. *Reed v. Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166, 130 S. Ct. 1237, 1247 (2010); *accord Sebelius v. Auburn Regional Medical Ctr.*, 568 U.S. 145, 153–55, 133 S.Ct. 817, 824-25 (2013) (federal statutes are non-jurisdictional absent "a clear statement" to the contrary); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515–16 (2006).

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

have jurisdiction" over certain claims during receivership); *id.* § 4623(d) (providing "no court shall have jurisdiction" to affect FHFA's capital classifications). When Congress uses jurisdictional labels in some provisions of a statute but declines to do so in others, the variation in usage must be given meaning.

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

FHFA argues that the Supreme Court implicitly treated Section 4617(f) as jurisdictional when it said the statute "sharply circumscribed judicial review of any action that the FHFA takes as a conservator or receiver." *Collins*, 141 S. Ct. at 1775. But whether the Anti-Injunction Clause is jurisdictional was not briefed in *Collins*, and the Court had no reason to decide the question. In any event, FHFA is wrong to assume that every statutory limitation on judicial review is jurisdictional; to the contrary, "when Congress does not rank" a statutory limitation on judicial action "as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Arbaugh*, 546 U.S. at 515–16; *see, e.g.*, *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428 (2011) (statutory deadline for noticing appeal under Veterans' Judicial Review Act is non-jurisdictional); *Oryszak v. Sullivan*, 576 F.3d 522, 524–26 (D.C. Cir. 2009) (clarifying that important statutory limits on judicial review under the Administrative Procedure Act are "not . . . jurisdictional bar[s]"); *Hamdi ex rel. Hamdi v. Napolitano*, 620 F.3d 615, 628 & n.15 (6th Cir. 2010) (federal statute limiting judicial review required dismissal of claim but did not deprive courts of jurisdiction; "it is not the subject matter of Hamdi's complaint that the statute prohibits, but rather the relief that he seeks"). Absent a clear statement from Congress to the contrary, a federal statute that limits when judicial relief is available is non-jurisdictional.

Of course, the presumption that statutory limitations on judicial review are non-jurisdictional may be overcome, as when Congress expressly states that "no court shall have jurisdiction to review" certain categories of agency action. 8 U.S.C. § 1252(a)(2) (treated as jurisdictional in *Kucana v. Holder*, 558 U.S. 233 (2010)). Some courts also treat federal statutes as jurisdictional if they "implicate[ ] sovereign immunity," which is a jurisdictional doctrine. *Barbosa v. United States Dep't of Homeland Security*, 916 F.3d 1068, 1072 n. 6 (D.C. Cir. 2019). Simply put, as in 8 U.S.C. § 1252(a)(2), when a statute is jurisdictional a court does not have the power "to review." But here, under the Anti-Injunction Clause, judicial review is at most only limited—not removed altogether. That is a strong indication that the Anti-Injunction Clause is non-jurisdictional.[10]

[10] To the extent FHFA claims that its motion was timely because Westland somehow expanded the scope of the district court's findings in the written order, that argument likewise fails. Again, the district court is presumed to know what is contained in the written order that it reads and signs. *See Mortimer*, 62 Nev. at 142, 145 P.2d at 736 (1944). Moreover, even if Fannie Mae and FHFA were surprised by the scope of the preliminary injunction, neither party filed a timely motion for reconsideration based upon the Anti-Injunction Clause thereafter. Instead, FHFA waited four months to move for dissolution of the preliminary injunction in the district court, and Fannie Mae did not bother to raise the issue at all in the district court before taking an appeal to this Court. Under these circumstances, and in light of Fannie Mae's pending appeal, the district court did not abuse its discretion in deeming FHFA's motion untimely.

## B. The Preliminary Injunction Does Not Violate HERA's Anti-Injunction Clause.

### 1. The Anti-Injunction Clause allows equitable remedies in breach of contract cases like this one.

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

Although FHFA cites a litany of other cases in which it successfully invoked the Anti-Injunction Clause, the most applicable case and the appropriate starting place for the Court's analysis is *Sharpe*. In *Sharpe*, the Ninth Circuit held that the materially identical anti-injunction provision that applies to the FDIC allows equitable remedies in contract cases because the statute "does not authorize the breach of contracts." This Court favorably cited that portion of *Sharpe* in *CML-NV Grand Day, LLC*, 2018 WL 6016683, and *Sharpe*'s reasoning applies with full force

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

*Sharpe*'s interpretation of the statutory text is buttressed by several additional considerations. Courts apply a presumption against federal preemption of state law, *see Rolf Jensen & Assocs. v. Dist. Ct.*, 128 Nev. 441, 446, 282 P.3d 743, 746 (2012), and to hold that FHFA is authorized by statute to breach contracts would preempt out of existence a broad swath of state law concerning the availability of equitable remedies in breach of contract cases that involve real property. Nothing in the statute's text even hints that Congress intended to displace state contract law except when FHFA exercises its limited authority to repudiate contracts, and the Supreme Court has held that the materially identical statutory regime that applies to the FDIC leaves state law in place "except where some provision in the extensive [federal statutory] framework . . . provides otherwise." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994). *Sharpe* also finds strong support in the canon of constitutional

avoidance as it would raise a serious question under the Fifth Amendment's Takings Clause if the statute were interpreted to permit FHFA and Fannie Mae to seize properties through foreclosure even when there has been no default on the underlying loan agreement. *See Waterview Mgmt. Co. v. FDIC*, 105 F.3d 696, 700 (D.C. Cir. 1997) (narrowly construing FDIC's statutory powers to avoid Takings Clause problem).

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

FHFA attacks *Sharpe* by relying on out-of-context snippets from other cases to suggest that it "is not controlling outside of its limited context," *Meritage Homes of Nev., Inc. v. FDIC*, 753 F.3d 819, 825 (9th Cir. 2014), and "an unusual case," *McCarthy v. FDIC*, 348 F.3d 1075, 1078 (9th Cir. 2003). But those statements, along with most of FHFA's discussion of *Sharpe* in its brief, concern *Sharpe*'s separate treatment of the handling of administrative claims during receivership—an issue covered in Section IV.B of the *Sharpe* opinion that is not relevant in this conservatorship case. More recently, the Ninth Circuit reaffirmed "*Sharpe*'s

reasoning as to whether FIRREA authorizes the unrestrained breach of contract," *Bank of Manhattan, NA v. FDIC*, 778 F.3d 1133, 1136–37 (9th Cir. 2015)—the distinct issue decided in Section IV.A of the *Sharpe* opinion, which FHFA ignores. In 2018, this Court followed Section IV.A of the Ninth Circuit's decision in *Sharpe*, thus laying to rest any question about the continued vitality of that portion of the Ninth Circuit's opinion. *See CML-NV Grand Day, LLC*, 2018 WL 6016683, at *2.[11]

Unable to persuasively distinguish *Sharpe*, FHFA attempts to bury the Court in an avalanche of other cases that concern Section 4617(f) or the equivalent statutory provision that applies to the FDIC. FHFA's cases fall into four broad categories, which are all inapposite for the following reasons.

***First***, FHFA cites cases that implicate a conservator's or receiver's statutory authority to transfer the assets of a failed bank during receivership "without any approval, assignment, or consent with respect to such transfer." 12 U.S.C. § 1821(d)(2)(G); *see also id.* § 4617(b)(2)(G) (materially identical provision of HERA).[12] Because the statutory text empowers FHFA and the FDIC to make such

[11] Although FHFA has suggested otherwise, the Supreme Court's decision in *Collins* does nothing to call *Sharpe* into question. *Sharpe* does not require courts to decide "whether the FHFA made the best, or even a particularly good, business decision," *Collins*, 141 S. Ct. at 1778, but only to determine whether a breach of contract falls within FHFA's time-limited statutory authority to repudiate contracts.

[12] Cases cited by FHFA that fall into this category include *RPM Invs., Inc.*, 75 F.3d at 619 (transfer of property obtained through foreclosure), *Volges v. RTC*, 32 F.3d 50, 52 (2d Cir. 1994) (transfer of mortgages owned by failed bank), *National Trust*

transfers "without any approval," courts have held that the Anti-Injunction Clause precludes injunctions against such transfers even when they breach contracts. *See Mile High Banks v. FDIC*, 2011 WL 2174004, at *4 (D. Colo. June 2, 2011) (distinguishing *Sharpe* on the ground that it did not involve "enjoining the FDIC from selling an asset of the troubled institution"). Nothing in the preliminary injunction purports to enjoin FHFA from transferring the assets of Fannie Mae, so this case is controlled by *Sharpe* rather than any of the asset transfer cases FHFA cites.

***Second***, FHFA cites numerous cases that did not involve alleged breaches of contract.[13] *Sharpe* addresses when a conservator or receiver may be enjoined from breaching a contract, and FHFA's legal authority that does not involve contract claims has no bearing on the analysis.

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*for Historic Preservation v. FDIC*, 21 F.3d 469, 473 (D.C. Cir. 1994) (sale of building owned by failed bank), *Gross v. Bell Savings Bank PA SA*, 974 F.2d 403, 404 (3d Cir 1992) (transfer of pension funds held by failed bank), *Ward v. RTC*, 996 F.2d 99, 100 (5th Cir. 1993) (auction of property owned by failed bank), and *In re: Landmark Land. Co. of Carolina*, 110 F.3d 60, 1997 WL 159479, at *4–*5 (4th Cir. 1997) (per curiam) (transfer of trust assets lawfully controlled by receiver).

[13] These cases include *Roberts*, 889 F.3d at 402–03, *Robinson v. FHFA*, 876 F.3d 220 (6th Cir. 2017), *Cnty. of Sonoma*, 710 F.3d at; *Leon Cnty. v. FHFA*, 700 F.3d 1273 (11th Cir. 2012), *Hindes v. FDIC*, 137 F.3d 148 (3d Cir. 1998), *National Trust for Historic Preservation*, 21 F.3d at 473, *Gross*, 974 F.2d at 405, and *Telematics*, 967 F.2d at 705 (1st Cir. 1992).

***Third***, FHFA relies heavily on the D.C. Circuit's decision in *Perry Capital, LLC v. Mnuchin*, 864 F.3d 591 (D.C. Cir. 2017). Although the plaintiffs in that case did bring breach of contract claims, the availability of equitable remedies for breach of contract claims against FHFA was not the subject of the appeal. Indeed, in their briefing to the D.C. Circuit in *Perry Capital*, the parties did not even cite *Sharpe*. Moreover, while the D.C. Circuit extensively discussed Section 4617(f) as it applies to *statutory* claims, its analysis of those claims is in key respects inconsistent with the Supreme Court's subsequent decision in *Collins*. *Compare Perry Capital*, 864 F.3d at 607 (HERA "permits FHFA, but does not compel it in any judicially enforceable sense, to preserve and conserve Fannie's and Freddie's assets"), *with Collins*, 141 S. Ct. at 1776 (to be authorized under HERA, FHFA's actions "must be necessary to put the regulated entity in a sound and solvent condition and must be appropriate to carry on the business of the regulated entity and preserve and conserve its assets and property"). Under these circumstances, the D.C. Circuit's suggestion in a footnote that the plaintiffs were entitled to pursue their breach of contract claims "only insofar as [those claims] seek damages" is pure dicta and entitled to no weight. *See Perry Capital*, 864 F.3d at 633 n. 27.

***Fourth***, FHFA cites this Court's decisions in *Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 133 Nev. 247, 396 P.3d 754 (2017), and *Saticoy Bay LLC Series 9641 Christine View v. Fannie Mae*, 134 Nev. 270, 417 P.3d 363 (2018). But those

cases concerned the foreclosure bar that appears in 12 U.S.C. § 4617(j)(3). The Court did not cite Section 4617(f), much less purport to apply it in a breach of contract case.

Finally, FHFA makes a convoluted argument that the preliminary injunction violates Section 4617(f) because "virtually *every* contract operates, not as a guarantee of particular future conduct, but as an assumption of liability in the event of nonperformance." OB at 37 (cleaned up). This argument proves too much because it implies that equitable remedies should never be available to any party in a breach of contract case. *But see* OB at 38 (appearing to concede that Nevada law is to the contrary). Whatever Justices Scalia and Holmes thought about injunctions in breach of contract cases, Nevada law allows such injunctions in contract cases, like this one, that concern the possession of real property. *See, e.g.*, *Dixon v. Thatcher*, 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987); *Sundance Land Corp. v. Cmty. First Fed. Sav. & Loan Ass'n*, 840 F.2d 653, 661 (9th Cir. 1988). Accordingly, except in the limited scenarios in which FHFA exercises its statutory authority to repudiate contracts, FHFA and Fannie Mae are subject to the full suite of remedies available under state law in breach of contract cases. In Nevada, those remedies include injunctions to prevent the rightful owner of real property from being ousted through a contractually impermissible foreclosure.

### 2. The Anti-Injunction Clause does not apply because nothing in the preliminary injunction prevents FHFA from taking any action that is necessary to put Fannie in a sound and solvent condition.

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

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

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

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

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

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

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

**3. FHFA cannot invoke the Anti-Injunction Clause because it has never purported to exercise any of its conservatorship powers in this matter.**

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

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

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

FHFA's lack of involvement in this dispute makes sense given that, despite its string cite of irrelevant statutory conservatorship authority, FHFA broadly handed off responsibility for "normal business activities and day-to-day operations" to Fannie Mae shortly after placing it into conservatorship in 2008. APP3354. Notably, the responsibilities assigned to Fannie by FHFA include, among other things, "decisions about individual mortgages, property sales, or foreclosures." *Id*. FHFA likewise "lacks statutory authority to supervise activities by mortgage servicers" such as Grandbridge. APP3397, APP3404; SA001-SA024. Thus, FHFA cannot credibly claim that it was exercising its powers as conservator in connection with the punitive measures exacted on Westland by Fannie Mae when it delegated the very responsibilities at issue in this case back to Fannie Mae more than a decade ago.

### 4. The Anti-Injunction Clause does not bar preliminary injunctive relief that is needed to facilitate judicial review prior to a non-judicial foreclosure.

Normally when a debtor and a financial institution in conservatorship or receivership have a contract dispute, the conservator or receiver must take the debtor to court and establish the validity of its claim rather than resorting to self-help by simply seizing the debtor's property. *Tri-State Hotels, Inc. v. FDIC*, 79 F.3d 707 (8th Cir. 1996), upon which FHFA relies, is illustrative. In that case, as part of its effort to "collect all obligations and money due the institution," the FDIC sued a debtor for sums that it alleged the debtor owed. *Id.* at 711, 715. Although the Eighth Circuit held that the debtor could not sue the FDIC for recission of the loan because such relief would "restrain or affect" the FDIC's receivership powers, it also made clear that the debtor could raise its contract defenses in response to the FDIC's suit—thus enabling the debtor to obtain judicial review of the FDIC's interpretation of the contract. *Id.* at 715. The Eighth Circuit explained that once a conservator or receiver has settled on a position about the meaning of a contract and seeks to enforce its rights, a court does not "restrain or affect" the agency's powers by adjudicating the merits of the agency's claim. *Id.* at 714 & n.13.

An important question this case presents is how to translate this process into the unique context of Nevada's non-judicial foreclosure system. Assessing this same question under a nearly identical statute that prohibited courts from taking any action that would "restrain or affect" the powers of a federal receiver, the Ninth Circuit held that courts could rule on the validity of a receiver's non-judicial foreclosure in Nevada:

> [I]t can hardly be gainsaid that if a . . . receivership wishes to collect upon an alleged claim, it cannot simply seize assets of an alleged debtor, but must resort to an action at law. . . . It has never been thought that [a receiver's] inability to simply directly enforce its claims against recalcitrant debtors somehow restrained or affected it in the use of its receivership powers.

*Abbott*, 951 F.2d at 194. The same logic applies here. The district court did not restrain or affect the legitimate exercise of any powers or functions of FHFA by issuing a preliminary injunction that stopped Fannie Mae from seizing Westland's buildings without any contractual basis for doing so.

**5. Dissolving the preliminary injunction would do nothing to advance federal policy but would irreparably harm Westland.**

FHFA's brief includes a paean to the wisdom of Congress in enacting Section 4617(f) to ensure that conservators cannot be "hauled into court and forced to stop their activity every time an affected party questions a conservator's decision." OB at 49; *see id.* at 47–51. In assessing the merits of FHFA's arguments, the Court should be guided by the statutory text and its own decision in *CML-NV Grand Day—*

not broad characterizations of statutory purpose invented by a federal agency's lawyers. *Cf. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 726 (1995) (Scalia, J., dissenting) ("'The Act must do everything necessary to achieve its broad purpose' is the slogan of the enthusiast, not the analytical tool of the arbiter."). In any event, FHFA's policy arguments only underscore one of the reasons why Section 4617(f) does not apply in this case. In entering the preliminary injunction, the district court did not question anything FHFA has done. Indeed, FHFA had no substantive involvement in the events that gave rise to this case until it gratuitously injected itself into the litigation through a flurry of filings in this Court and the court below.

To the extent that policy considerations influence the Court's assessment of FHFA's arguments, it must not lose sight of the troubling implications of FHFA's position for non-judicial foreclosure states such as Nevada. If FHFA is correct that the Anti-Injunction Clause is an absolute bar to equitable remedies in breach of contract cases, then no court could stop Fannie Mae from immediately foreclosing on every one of the hundreds of thousands of residential mortgages that it owns across the State without regard to whether borrowers are current on their payments. Although FHFA describes Westland's arguments as "Orwellian," OB at 26, it does not deny that this is a necessary implication of its position. FHFA says that wrongfully foreclosed-upon property owners might be able to sue for damages,

although even that remedy is unavailable if "a monetary award would be the functional equivalent of injunctive relief." OB at 51 n. 10. But damages are hardly a fitting remedy for homeowners who, in FHFA's view of the law, are one arbitrary decision away from being thrown out on the street.

It is no answer to say that Westland is a commercial investor in real estate rather than the occupant of a single-family home with a mortgage owned by Fannie Mae. The sweeping interpretation of the Anti-Injunction Clause that FHFA asks this Court to adopt would apply with equal force to every mortgage Fannie Mae or Freddie Mac owns or has securitized in Nevada. Moreover, this Court "has viewed the loss of real property as irreparable harm even where the real property's putative owner is a corporate entity, and where the real property is to be used for a commercial purpose." *Inv'rs v. Bank of Am., NA*, 585 Fed. Appx. 742, 743 (9th Cir. 2014); *Sundance Land Corp.*, 8 F.2d at 661 (9th Cir. 1988) (income producing orchard where a motel was planned deemed unique justifying finding of irreparable harm); *Thirteen S. Ltd. v. Summit Vill., Inc.*, 109 Nev. 1218, 1220, 866 P.2d 257, 259 (1993) ("Thirteen South has shown that it would lose title to real property [a vacant lot to be developed] in an extra-judicial sale. Thus, it has met its burden of showing irreparable injury"); *Stoltz v. Grimm*, 100 Nev. 529, 533, 689 P.2d 927, 930 (1984) (finding "the subject matter of the contract was real property [a commercial mobile home park], and as such is unique"). The only case FHFA cites to support its

contrary position, *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211 (9th Cir. 1984), failed to cite a single Nevada precedent and involved the temporary shuttering of a pornographic bookstore—not the possession of real property.

The apartments that are the subject of this suit have been leased to a large number of tenants, they constitute a unique asset within Westland's Las Vegas centered real estate portfolio, and the properties are generating significant rental income for Westland. Westland, moreover, is not a traditional REIT with an investment strategy that largely treats properties as fungible—instead, it makes long-term investments in communities through unique parcels of real estate. If the properties are seized through foreclosure, Westland will no longer receive the rapidly improving significant monthly income gained through the leases it has negotiated, or recoup the investments it has made in terms of time by its 32 hard-working employees who work at the properties. Moreover, Westland has dramatically improved the properties—not only the buildings themselves but also the quality of life in the communities. Westland would sustain irreparable harm if it lost these properties after not missing a single periodic monthly payment, and many if not all of the employees who work at these locations would be at risk of losing their livelihoods.

## IX. CONCLUSION

For the foregoing reasons, this appeal should be dismissed for lack of appellate jurisdiction. Alternatively, the district court's order should be affirmed.

DATED this 27th day of December, 2021

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## CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Answering 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), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the Nevada Rules of Appellate Procedure.

I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) as this brief was prepared in a proportionally spaced typeface using Times New Roman 14 pt font. I also certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) as it contains 12,540 words.

DATED this 27th day of December, 2021

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## CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 27th day of December 2021, I caused true and correct copies of the foregoing Respondents' Answering Brief to be delivered to the following counsel and parties:

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