In the Supreme Court 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 District Court Case No. A-20-819412-C

APPELLANTS' REPLY BRIEF

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INTRODUCTION

This appeal is about whether the district court entered a preliminary injunction that violates federal law; it is not about the merits of the underlying case. The injunction is void under federal law.

FHFA's organic statute provides that "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator …." 12 U.S.C. § 4617(f).[1] The injunction constrains the Conservator's statutory powers to, among other things, "operate" Fannie Mae, "collect all obligations and money due" Fannie Mae, and "preserve and conserve" Fannie Mae's assets. *Id.* § 4617(b). It therefore contravenes Section 4617(f).

Defendants argue that the Court is powerless to apply the straightforward mandate Congress enacted. Having already argued that a writ petition was not the proper vehicle for FHFA to raise Section 4617(f), Defendants now argue that a direct appeal isn't either. Such a "heads I win, tails you lose" approach disregards this Court's interest in deciding cases on their merits and demeans the Supremacy Clause,

[1] This brief adopts the defined terms in the Opening Brief.

which makes Section 4617(f) "the supreme Law of the Land" and binds "the Judges in every State" to apply it. U.S. Const., art. VI.

Defendants' substantive arguments that Section 4617(f) does not bar the injunction fare no better; they distort precedent, disregard the statute's text, and offer no plausible response to arguments in the Opening Brief.

The Court has jurisdiction over this appeal, and the preliminary injunction violates federal law. The Court's absolute duty under the U.S. Constitution is to void the injunction.

ARGUMENT

I. The Court Is Not Disempowered from Reaching the Merits

Defendants contend that despite being Nevada's highest judicial authority, this Court is powerless to decide whether the injunction violates Section 4617(f). Ans. Br. at 21-34. They said a writ petition was the wrong vehicle. Appeal No. 82666, Ans. Br. to Writ Pet. at 16-19 (Doc. No. 21-15225). Then they said Fannie Mae's appeal was the wrong vehicle. Appeal No. 82174, Ans. Br. at 38-39 (Doc. 21-25243); Ans. Br. to Amicus Br. at 1-3 (Doc. No. 21-25317). And now they say this appeal is the wrong vehicle. Ans. Br. at 21-34. When pressed by the Court,

Defendants' counsel asserted that as things stand the Court cannot address Section 4617(f)'s application *at all*. *See* Appeal No. 82666, Oral Argument Audio, at 32:10-34:00.

Defendants are incorrect. This Court has jurisdiction over this appeal, and its "bedrock policy" is "to decide cases on their merits whenever feasible." *Willard v. Berry-Hinckley Indus.*, 136 Nev. 467, 470 (2020). Nothing prevents the Court from deciding this appeal on the merits, i.e., applying Section 4617(f).

A. Defendants Cannot Revise the Actual History of This Case

Defendants' primary contention is that the Court should view FHFA's motion to dissolve the injunction as a motion for reconsideration instead. Ans. Br. at 21-22. Defendants argue that such a motion would have been untimely, and a ruling on it unappealable.

Whether a motion for reconsideration would have been timely, and whether a ruling on such a motion would have been appealable in any event, are irrelevant. Under NRAP 3, "an appeal may be taken from … [a]n order … refusing to dissolve an injunction." Here, FHFA (with Fannie Mae) moved to dissolve the injunction, and the district court

refused. APP3439-41. This is an appeal of that refusal; it is therefore properly before the Court.

Defendants concede that this Court has *never* retroactively deemed a motion to dissolve a preliminary injunction to be some other kind of motion, Ans. Br. at 23, and they provide no persuasive reason for the Court to do so here. Indeed, because (as discussed below) Section 4617(f) is jurisdictional, adopting Defendants' position would leave the Court in the untenable position of having to endorse, and presumably to countenance the enforcement of, a void order that violates the U.S. Constitution.

But even if the Court were to break new ground and allow Defendants to transmogrify FHFA's motion to dissolve into a motion for reconsideration, appellate review of the order denying it would still be proper. Relying on Rule 59(e), Defendants contend that despite not being a party to the case at the time, FHFA had to file the motion within 28 days of the injunction's entry. But Rule 59(e) expressly applies to final judgments, not interlocutory orders. Because a district court may reconsider its own interlocutory order at any time, FHFA's motion was not untimely.

Even if Rule 59(e) could govern, Defendants correctly concede that the 28-day limit does not apply where "a change in circumstances" has occurred. Ans. Br. at 23. Here, circumstances changed dramatically following entry of the injunction: FHFA—the federal agency whose organic statute includes Section 4617(f)—intervened into the case. As explained in the Opening Brief, Op. Br. at 60-61, under *Alto v. Black*, 738 F.3d 1111 (9th Cir. 2013), it was proper for FHFA to intervene and thereafter move to dissolve the preliminary injunction on jurisdictional grounds, as it did.

Alto is on all fours with this case. There, the intervenor sought to intervene after a preliminary injunction was in place. *Id.* at 1119. The court granted the motion to intervene, and the intervenor then moved to dissolve the injunction on grounds that the original party could have asserted but did not—jurisdictional defects. *Id.* at 1119-20. The district court refused to dissolve the injunction and the intervenor appealed. *Id.* at 1119. The Ninth Circuit concluded that it had jurisdiction over the appeal because the intervenor "was permitted to intervene only after the issuance of the injunction," the intervenor sought to raise a "jurisdictional" issue, and the intervenor, "as a non-party, had no prior

opportunity to challenge the grant of the injunction." *Id.* at 1120.[2] Those elements are all present here as well.

Defendants' primary response is to assert that the Ninth Circuit in *Alto* was "wrong." Ans. Br. at 25. *Alto* is not wrong; it is sensible. Where, as here, a district court enters an injunction that directly constrains an entity that is not a party to the case, that entity must be entitled to intervene and assert jurisdictional objections; any other rule would present grave due process problems.

Defendants also note that Fannie Mae did not assert Section 4617(f) in its initial opposition to the injunction, and argue this prevents the Court from considering the issue. Defendants' argument rests on the premise that a jurisdictional bar can be waived indirectly, or (equivalently) that Fannie Mae's omission of a jurisdictional defense works an estoppel on FHFA. But waiver and estoppel do not apply to jurisdictional limitations *at all*, let alone indirectly. *Brady Dev. Co., Inc. v. RTC*, 14 F.3d 998, 1007 (4th Cir. 1994). Regardless, any omission of

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[2] Nor is *Fannie Mae* a dissatisfied litigant who allowed the time to appeal the injunction to run. To the contrary, Fannie Mae timely *appealed* it. Neither Fannie Mae nor FHFA seeks to regain a lost opportunity to appeal.

Section 4617(f) from early briefing cannot be imputed to FHFA, as that would preclude the *Conservator* from asserting its own statutory protections merely because the *conservatee* did not raise them earlier. Ans. Br. at 26. Defendants cite no authority for that proposition, and there is none.

Section 4617(f)—and other HERA provisions such as the Federal Foreclosure Bar of Section 4617(j)(3)—provide failsafe backstop protection that the Conservator can invoke even if Fannie Mae has forgone an opportunity to do so. *See Berezovsky v. Moniz*, 869 F.3d 923, 929 (9th Cir. 2017) (protection applies unless FHFA "affirmatively relinquishes it"). As such, whether Fannie Mae's actions represent exercises of the Conservator's powers and functions—they do, as FHFA's counsel noted during oral argument on the writ petition, Ans. Br. at 26—is of no moment.

To the contrary, recognizing FHFA's ability to raise Section 4617(f) upon intervention advances HERA's purpose of protecting conservatorship assets and facilitating efficiency in the Conservator's operations. *See Freeman v. FDIC*, 56 F.3d 1394, 1398 (D.C. Cir. 1995) (describing the purpose of Section 1821(j)). Fannie Mae and FHFA

remain separate entities, and Fannie Mae is constantly engaged in countless active litigation matters across the country. As Defendants concede, "[t]here is … no evidence to suggest that FHFA even knew about [this case] until long after this litigation commenced …." Ans. Br. at 17. It would not be efficient—or even possible, given FHFA's limited staff and resources—for FHFA to manage all litigation involving Fannie Mae, as most are routine cases that do not implicate the Conservator's statutory protections. When, however, FHFA becomes aware of a case that *does* implicate the protections Congress granted the Conservator, FHFA assesses whether and how to assert them, just as it did here.[3]

Finally, Defendants ignore that under Nevada law, void orders can be collaterally attacked at any time *either* through ordinary appeal (such as this one) *or* through an extraordinary writ (if no other vehicle is available). *Rawson v. Ninth Jud. Dist. Ct. in & for Cty. of Douglas*, 133 Nev. 309, 317 (2017) (citation omitted). Because (as discussed in the

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[3] Defendants' contention that FHFA sat on its hands after moving to intervene, Ans. Br. at 26-27, is incorrect. When the district court granted intervention, Defendants immediately sought to preclude FHFA from challenging the preliminary injunction. The Court denied that request on a Friday—June 11, 2021—and FHFA filed its motion to dissolve the injunction the following Monday. APP3008-25.

following section) the motion to dissolve was proper, this appeal is also proper. But if the Court determines—incorrectly, in FHFA and Fannie Mae's view—that this appeal is not the correct vehicle to evaluate the merits of Section 4617(f)'s application, it should do so in the still-pending writ proceeding.

B. The District Court Had Jurisdiction to Consider the Motion to Dissolve

Defendants' next ground for disputing the Court's jurisdiction over this appeal is that the district court supposedly did not have jurisdiction to consider the motion to dissolve the injunction because it was already the subject of a pending appeal. Ans. Br. at 27-30. That is incorrect.

First, an order's effect on a non-party is a matter "collateral to or independent from the appealed order," and, as Defendants concede, district courts retain jurisdiction to address such matters. Ans. Br. at 27-28 (quoting *Foster v. Dingwall*, 126 Nev. 49, 52 (2010) (en banc)). That is exactly the scenario here. FHFA was not a party when the injunction was entered, so FHFA (among other things) intervened into the district court case to collaterally challenge the injunction's effect on the Conservator, via a motion to dissolve. Under *Foster*, the district court had jurisdiction to rule on that motion.

Second, even if the motion to dissolve was not "collateral to or independent from" the order entering the injunction, the district court still had jurisdiction to consider it. In *Huneycutt v. Huneycutt*, this Court articulated a procedure by which parties can seek to have orders pending on appeal altered; that procedure is now codified in NRCP 62.1. 94 Nev. 79, 80-81 (1978) (per curiam). Under that rule, which FHFA asserted in the briefing below, APP2949-50, 3020, if the district court had been inclined to *grant* the motion to dissolve but determined it was unable to do so due to the pending appeal, it could have "certif[ied] this inclination" to this Court, which could then have determined whether to remand for a determination on the motion to dissolve. *Mack-Manley v. Manley*, 122 Nev. 849, 855-56 (2006) (per curiam); *see* NRCP 62.1; NRAP 12A. Here, however, because the district court was *not* inclined to dissolve the injunction, it had jurisdiction to "deny the motion," which it did. *See* NRCP 62.1(a)(2); *Foster*, 126 Nev. at 53 ("[T]he district court *does* have jurisdiction to *deny* such requests." (emphasis in original)); *In re Hillygus Family Tr.*, No. 77464, 2019 WL 245228 at *1 (Nev. Jan. 15, 2019) (unpublished disposition). APP3441. And, "if the order denying such

relief is independently appealable … any party aggrieved by that order may appeal that order to this court." *Foster*, 126 Nev. at 53 n.3.

Third, because the injunction was void *ab initio* under Section 4617(f), dissolving it would preserve the status quo, which Defendants concede the district court has jurisdiction to do. Ans. Br. at 28. Orders entered without jurisdiction "are not simply erroneous, but absolutely void." *Roman Catholic Archdiocese of San Juan v. Acevedo Feliciano*, 140 S. Ct. 696, 700 (2020) (citation omitted and cleaned up). For that reason, "a state court is without power to hold one in contempt for violating an injunction"—that is, without power to enforce an injunction—"that the state court had no power to enter by reason of federal pre-emption." *In re Green*, 369 U.S. 689, 692 (1962) (citation omitted). Thus, dissolving the injunction here would preserve the legal status quo and acknowledge the pre-existing legal reality that under federal law the injunction is void, rather than maintaining the appearance that an invalid and unenforceable order might nevertheless be effective.

C. Defendants' Timeliness Arguments Fail

Defendants next contend that "the Court need not reach the merits of … Section 4617(f)" because the district court supposedly ruled that

"FHFA's motion was untimely …." Ans. Br. at 30. That is wrong. Section 4617(f) is a jurisdictional provision and as such can be raised at any time. *See Landreth v. Malik*, 127 Nev. 175, 179 (2011) (en banc). Regardless, the district court did not rule that FHFA's motion was untimely. Defendants rely on an isolated snippet that misstates the record and, if construed as a timeliness holding, would constitute an abuse of discretion.

1. Section 4617(f) Is Jurisdictional

Courts applying Section 4617(f) and the substantively identical provision applicable to FDIC and RTC receivers, 12 U.S.C. § 1821(j), routinely describe them as "jurisdictional" limitations. *See, e.g.*, *Cty. of Sonoma v. FHFA*, 710 F.3d 987, 990 (9th Cir. 2013) (voiding preliminary injunction because under Section 4617(f), "courts have no jurisdiction" to grant such relief against FHFA as Conservator); *RPM Invs., Inc. v. RTC*, 75 F.3d 618, 622 (11th Cir. 1996) ("Section 1821(j) limits our jurisdiction" to order specific performance of a contract); *Telematics Int'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703, 704 (1st Cir. 1992) (similar). Defendants disparage these as "drive-by jurisdictional rulings" in which "[n]othing turned on Anti-Injunction Clause's jurisdictional status," Ans.

Br. at 32. But that is not true of *Hanson v. FDIC*, in which the Eighth Circuit held that "[b]ecause [Section] 1821(j) limits subject matter jurisdiction, we can consider [it] for the first time on appeal[.]" 113 F.3d 866, 870 n.5 (8th Cir. 1997) (holding Section 1821(j) barred claim).[4]

Defendants contend that all of these courts—and many more—got it wrong, but it is Defendants who are incorrect. As the U.S. Supreme Court has explained, "jurisdictional statutes speak about jurisdiction, or more generally phrased, about a court's powers." *United States v. Kwai Fun Wong*, 575 U.S. 402, 411 n.4 (2015). As a limitation on courts' powers, Section 4617(f) is jurisdictional.

In response, Defendants contend that, absent an express reference to jurisdiction, statutory limitations on courts' powers to grant relief, rather than on their power to hear entire claims, are "non-jurisdictional." Ans. Br. at 33. That is wrong. U.S. Supreme Court precedent confirms that statutory restrictions on courts' authority to award equitable relief are jurisdictional—whether or not they expressly refer to "jurisdiction."

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[4] Nor is it true of *OneBeacon Midwest Ins. Co. v. FDIC*, which deemed a dismissal under Section 1821(j) "without prejudice because it was based on lack of subject matter jurisdiction and not an adjudication on the merits." No. 12-cv-0106, 2014 WL 869286, at *4 (N.D. Ga. Mar. 4, 2014).

For example, the U.S. Supreme Court has described the Tax Injunction Act of 1937, 28 U.S.C. § 1341 ("TIA"), which provides that "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law"—but makes no express reference to jurisdiction—as a "jurisdictional bar." *Arkansas v. Farm Credit Servs.*, 520 U.S. 821, 823, 825 (1997). Likewise, in *California v. Grace Brethren Church*, the U.S. Supreme Court described the TIA as "divest[ing] the district court … of jurisdiction" to issue injunctive relief. 457 U.S. 393, 408 (1982). Indeed, a federal district court applying Section 1821(j) relied on that point in holding that "Congressional restriction of the remedies that a court may impose limit[s] the jurisdiction of a court." *Back to Bible Apostolic Faith Church, Inc. v. RTC*, No. 93-cv-1791, 1994 WL 146821 at *5 (D. Md. Jan. 24, 1994) (citing *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981) (TIA is jurisdictional)).

Nor are cases involving statutes limiting the relief available in taxation cases unique in that regard. To the contrary, the Ninth Circuit has explained that the federal Prison Litigation Reform Act, 18 U.S.C. § 3626, which mandates that "no longer may courts grant or approve [certain] relief" but does not mention jurisdiction, "operates … *to restrict*

the equity jurisdiction of federal courts." *Gilmore v. California*, 220 F.3d 987, 999 (9th Cir. 2000) (emphasis added). Cases applying the Johnson Act, 28 U.S.C. § 1342, which deprives courts of authority to grant certain relief relating to public-utility rates, make the same point. *E.g.*, *US West, Inc. v. Tristani*, 182 F.3d 1202, 1207 (10th Cir. 1999) (Act "precludes federal court jurisdiction in actions seeking both declaratory and injunctive relief[.]").

The primary authorities Defendants cite as requiring a "clear statement" in statutes limiting jurisdiction, Ans. Br. at 31, are irrelevant here. In both *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010), and *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145 (2013), the Court held that statutes enumerating *the parties'* substantive rights and duties, or their procedural obligations in asserting a claim, were not jurisdictional. In so doing, the Court expressly distinguished "[j]urisdictional statutes," which "speak to the power of the court rather than to the rights or obligations of the parties." *Reed Elsevier*, 559 U.S. at 161 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994)). Section 4617(f) speaks directly and expressly to courts' power. To whatever extent a clear statement about jurisdiction might be required,

therefore, the statement that "no court may take any action to restrain or affect [the Conservator's] powers or functions" qualifies. 12 U.S.C. § 4617(f).

Likewise, Defendants' claim that *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), ushered in an era of "far greater precision" regarding the use of the term "jurisdiction" that renders statutes limiting courts' power to grant certain relief non-jurisdictional, Ans. Br. at 32, is not correct. Among others, the *Gilmore* decision discussed above was issued well after *Steel Co.*, yet treats a provision that precludes certain relief—without referring expressly to jurisdiction—as "jurisdiction[al]." *Gilmore*, 220 F.3d at 998-99. Indeed, well after not only *Steel Co.* but also *Reed Elsevier* and *Auburn Regional*, the U.S. Supreme Court issued a decision confirming that the TIA—which, as noted above, makes no direct reference to jurisdiction but instead, like Section 4617(f), limits the relief courts may grant—is a "jurisdictional statute." *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 12, 14 (2015); *see also Big Sandy Rancheria Enters. v. Bonta*, 1 F.4th 710, 720 (9th Cir. 2021) (similar).

Thus, contrary to Defendants' argument, an "express jurisdictional label," Ans. Br. at 31, is not required for a statutory limitation on courts' power to grant relief to be jurisdictional. That is because Congress need not "incant magic words in order to speak clearly" about jurisdictional limitations. *Auburn Regional*, 568 U.S. at 153. As Defendants concede and as noted above, courts have ordinarily characterized Section 1821(j) "as a limitation on the federal courts' jurisdiction." Ans. Br. at 32 (citing cases). Although Defendants acknowledge only three such decisions, there are many—including several issued after *Reed Elsevier* and *Auburn Regional*.[5] Defendants' implausible position is, in substance, that only Defendants grasp the true meaning of the *Steel Co.*, *Auburn Regional* and *Reed Elsevier* decisions, while countless federal courts—including at

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[5] *See, e.g.*, Op. Br. at 57 n.12 (collecting cases); *see also, e.g.*, *Kelly v. FDIC*, No. 18-11738, 2019 WL 6910240, at *2 (E.D. La. Dec. 19, 2019) (Section 1821(j) removes "subject matter jurisdiction over [plaintiff's] claims"); *Suero v. Freddie Mac*, 123 F. Supp. 3d 162, 170 (D. Mass. 2015) (under Section 4617(f) "this Court lacks jurisdiction over Count I"); *Clark Cty. Bancoporation v. U.S. Dep't of Treas.*, No. 13-632, 2014 WL 5140004, at *14 (D.D.C. Sept. 19, 2014) (Section 1821(j) provides a "limitation on the Court's jurisdiction"); *OneBeacon*, 2014 WL 869286 at *1, *3-4 (Section 1821(j) is a "jurisdictional bar"); *RPM Invs*, 75 F.3d at 622 ("Section 1821(j) limits our jurisdiction"); *Telematics*, 967 F.2d at 704 ("[U]nder 12 U.S.C. § 1821(j), a federal court lacks jurisdiction to enjoin" FDIC as receiver); *Dittmer Properties, L.P. v. FDIC*, 708 F.3d 1011, 1020 (8th Cir. 2013) (similar).

least four circuits (in *Jacobs*, *Sonoma*, *Telematics*, *Big Sandy*, and *Dittmer*), and the U.S. Supreme Court (in *Brohl*)—do not.

In fact, the authorities cited by Defendants confirm that Section 4617(f) is jurisdictional. *See* Ans. Br. at 31. For example, in *Perry Capital v. Mnuchin*, the D.C. Circuit analyzed Section 4617(f)'s application after "turning to the merits," because the statute did not affect that court's authority to entertain the appeal, not because it is anything other than a jurisdictional limitation on lower courts' power to grant certain relief. 864 F.3d 591, 604 (D.C. Cir. 2017). The court expressly recognized that distinction in analyzing another HERA provision, 12 U.S.C. § 4623(d), explaining that while it "*deprives courts of jurisdiction* 'to affect, by injunction or otherwise, the issuance or effectiveness of any classification or action of the Director under this subchapter[,]' … [t]hat language *does not strip this court of jurisdiction to hear this case*." *Id.* at 603-04 (emphases added). The court then noted that Section 4617(f) is "nearly identical" to Section 1821(j), the "statutory limitation on judicial review" that, as noted above, is routinely acknowledged to be jurisdictional. *Id.* at 605.

Indeed, that analogy confirms that *Perry Capital* could not have held Section 4617(f) to be non-jurisdictional. An earlier D.C. Circuit decision holds that Section 1821(j) *is* jurisdictional, affirming a dismissal under it "for lack of jurisdiction." *Nat'l Trust for Historic Pres. v. FDIC*, 21 F.3d 469, 471 (D.C. Cir. 1994) (per curiam). And in that court, "[o]ne three-judge panel … does not have the authority to overrule another …." *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (citations omitted).

Section 4617(f) is jurisdictional, and therefore may be raised at any time.

2. The Motion to Dissolve Was Timely in Any Event

As discussed in the Opening Brief, Op. Br. at 57-61, the Court need not even reach the issue of whether Section 4617(f) is jurisdictional because the motion to dissolve was timely regardless. As an initial matter, Defendants' contention that the district court held that the motion to dissolve was untimely, Ans. Br. at 30, is not correct. The district court's statement that the preliminary injunction was "issued after extensive development of the issues in this Court" and is currently "the subject of extensive litigation on the pending appeal" is not a finding

of untimeliness; rather, it addresses judicial economy. *See* APP3441. Defendants, having drafted the order, are in no position to contend otherwise—if they believed the district court had made a timeliness ruling, they could have included one expressly. Nor could the motion to dissolve reasonably have been considered untimely, as district courts are permitted to consider motions to dissolve injunctions while an appeal of the injunction is pending. *See* NRCP 62.1.

But even if the order's conclusory reference to the purportedly "extensive" prior development of the issues before it were deemed a timeliness ruling, it would embody a clear abuse of discretion—the injunction *was not* "issued after extensive development of the issues." APP3441. The sole "issue" raised in the motion to dissolve, Section 4617(f), had *never* been considered by the district court before entering the injunction. As Defendants concede, Fannie Mae *did not* assert Section 4617(f) then. Ans. Br. at 26 (acknowledging that "Section 4617(f)" was not raised "during the original preliminary injunction proceedings"). Thus, the injunction was issued without *any* development—let alone "extensive development"—of "the issues" presented in the motion to dissolve. Basing a ruling on such a patent mistake of fact about the state

of the record and the history of the case necessarily constitutes an abuse of discretion. *See Shores v. Glob. Experience Specialists, Inc.*, 134 Nev. 503, 505 (2018).

II. The Preliminary Injunction Violates Section 4617(f)

The Opening Brief explains in detail how the preliminary injunction "restrain[s] or affect[s] the [Conservator's] exercise of [its] powers or functions," and thereby violates Section 4617(f). Op. Br. at 15-20. Defendants' responses are implausible and incorrect, and largely ignore the Opening Brief.

A. Section 4617(f) Has No Implied Exception for Contract Actions

Section 4617(f) has only one implied limitation: It does not bar judicial restraint where FHFA exceeds the scope of its statutory authority. *See Collins v. Yellen*, 141 S. Ct. 1761, 1776 (2021). Defendants contend that the implied limitation applies here. They argue that FHFA has no statutory authority to breach contracts and that the preliminary injunction merely "prohibit[ed] Fannie Mae and related entities from violating [Defendants'] contract rights." Ans. Br. at 35.

As an initial matter, Defendants' position would grant the privately agreed terms of Defendants' contracts a privilege that the legislatively

enacted terms of Nevada statutes (or federal statutes, or any other state's statutes) do not enjoy. Defendants concede that Section 4617(f) overrides generally applicable statutes, but nevertheless contend that their contracts are sacrosanct. *See* Ans. Br. at 38-39. Defendants offer no rationale for such an anomalous result, and there is none. The far more plausible reading—and one more consistent with Section 4617(f)'s express terms—is that the statute has no implied exception for contract claims.

Defendants nevertheless once again posit that *Sharpe v. FDIC*, 126 F.3d 1147 (9th Cir. 1997), precludes Section 4617(f)'s application in contract cases. Specifically, Defendants contend that under *Sharpe*, "FHFA exceeds its conservatorship authority when it breaches contracts" without following HERA's procedure for repudiating them. Ans. Br. at 36. But *Sharpe* holds only that a receiver cannot force a pre-receivership contract counterparty into an administrative claims process and thereby deprive the counterparty of a fully compensatory monetary award. As such, *Sharpe* has no application here, because Defendants are entitled to

pursue—and to receive if they establish all the elements of their claim—a fully compensatory damages award.[6]

Defendants' assertion that subsequent Ninth Circuit decisions read *Sharpe* more broadly is not correct. *See* Ans. Br. at 37-38. As a quote that Defendants themselves present confirms, the Ninth Circuit recognizes that *Sharpe* holds only that statutes like Section 4617(f) do not "authorize[] the *unrestrained* breach of contract"—i.e., breaches free of the consequence of paying (upon a showing of liability) fully compensatory damages. *Id*. (quoting *Bank of Manhattan, N.A. v. FDIC*, 778 F.3d 1133, 1136-37 (9th Cir. 2015) (emphasis added)). Other portions of *Bank of Manhattan*, which Defendants omit, make this clear. For example, the Ninth Circuit took care to note that *Sharpe* "does not permit the FDIC to breach pre-receivership contracts *without consequence*," 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* recognizes that *Sharpe* applies only where a receiver seeks to avoid liability for a full expectancy remedy on pre-receivership

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[6] In one respect, *Sharpe* is relevant and applicable: The Ninth Circuit acknowledges that Section 1821(j) imposes a "jurisdictional bar." 126 F.3d at 1155.

contracts, not in every contract action (regardless of whether the contract was pre-receivership or, as here, post-conservatorship).

Federal appellate decisions applying the substantively identical provision in Section 1821(j) confirm that Section 4617(f) applies to contract claims. For example, in *Volges v. RTC*, the court 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) ("The 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*, the court held that ordering specific performance of a contract would impermissibly "restrain or affect" the RTC in exercise of its statutory powers, explaining that "allegations that the RTC breached a contract do[] not affect our holding." 75 F.3d at 621.

Defendants unpersuasively quibble with the many decisions clearly stating that contract rights are not "Kryptonite" to Sections 4617(f) and 1821(j). Defendants' failure to muster a plausible response to the D.C. Circuit's clear statement in *Perry Capital* that Section 4617(f) allows

courts to entertain contract claims "only insofar as they seek damages because the pleas for equitable relief are barred by 12 U.S.C. § 4617(f)," 864 F.3d at 633 n.27, is emblematic. In the end, Defendants contend that the D.C. Circuit's conclusion is "pure dicta and entitled to no weight." Ans. Br. at 40. But the sentence embodies the D.C. Circuit's definitive statement on the scope of a remand—the district court could hear the contract claims, but "only insofar as they seek damages." *Perry Capital*, 864 F.3d at 633 n.27. That is a holding, not dicta, and it cannot be squared with Defendants' reading of *Sharpe*.

Nor has this Court ever endorsed Defendants' reading. Defendants observe that the Court "favorably cited" *Sharpe*, Ans. Br. at 35-36, but fail to note that the Court relied on *Sharpe* for a different proposition: that FDIC "steps into the shoes" of a failed financial institution unless it elects to repudiate the bank's contracts under FIRREA's special mechanism. *CML-NV Grand Day, LLC v. Grand Day, LLC*, 134 Nev. 925, 2018 WL 6016683, at *2 (Nov. 15, 2018) (unpublished disposition) (discussing 12 U.S.C. § 1821(e)). That ruling is inapplicable here since there is no claim of repudiation. Nor could there be: FHFA's authority as Conservator to repudiate contracts only applies to pre-conservatorship

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

Defendants' other *Sharpe*-related arguments exaggerate the conclusions this Court would have to reach in order to dissolve the injunction. A ruling in FHFA's favor will not require the Court to find that HERA preempts Nevada contract law, Ans. Br. at 36, as damages remain available. But to whatever extent the preclusion of injunctive relief might be deemed to preempt any state-law doctrine—contract or otherwise—that would allow for injunctive relief, that is the purpose and effect of Section 4617(f). And federal law cannot simply be ignored because it contradicts a state law or policy. *Howlett By & Through Howlett v. Rose*, 496 U.S. 356, 367 (1990) ("The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content[.]").

Nor is Defendants' argument that applying Section 4617(f) at face value would implicate the U.S. Constitution's Takings Clause at all plausible. *See* Ans. Br. at 36-37. Defendants retain the right to receive compensatory damages should they establish breach and the other elements of contract liability, and therefore will receive whatever just

compensation they are due through this action. The Takings Clause would afford them nothing more; it is therefore superfluous here.

Finally, Defendants purport to distinguish this Court's opinions regarding Section 4617(j)(3) because they "did not cite Section 4617(f)" or "apply [Section 4617(f)] in a breach of contract case." Ans. Br. at 40-41. Those decisions confirm that broad statutory provisions Congress enacted to protect FHFA conservatorships—provisions closely related to Section 4617(f)—must be construed and applied as written, not tailored and limited to suit Defendants' preferred outcome. The same principle applies here.

B. Section 4617(f)'s Protection Is Not Subject to an "Only if Necessary to Solvency" Qualifier

Defendants contend that, under *Collins*, Section 4617(f) applies only if the challenged action is strictly "necessary to put [Fannie Mae] in a sound and solvent condition"; they then argue that because the loans at issue here are small relative to Fannie Mae's overall balance sheet, the Conservator's power to collect on them is not "necessary" to preserve Fannie Mae's solvency. Ans. Br. at 42-45. The Opening Brief explains why this argument fails, Op. Br. at 41-46, yet Defendants ignore that discussion. Simply put, *Collins* does not establish a necessity

requirement, because the U.S. Supreme Court's actual disposition of the case would not comport with it: No court—not the Supreme Court, not the Fifth Circuit, and not the district court—ever analyzed whether the action at issue in *Collins* was "necessary" to solvency, yet the Supreme Court held that Section 4617(f) barred a claim anyway. Section 4617(f) is not contingent on a showing of "necessity."

Defendants' other arguments on the point confirm just how radical their position is.

First, Defendants argue that the Court should disregard Section 4617(f) because this case is "extremely important to Westland [but] it is not remotely material to the financial condition of Fannie Mae" as Fannie Mae had "four trillion dollars in assets" at the end of 2020. Ans. Br. at 43. Defendants' position would subvert the purpose of the statute. The fact that very few, if any, *specific* assets are material to Fannie Mae's financial condition does not mean that the Conservator's statutory power to collect obligations *generally* is unimportant or unworthy of the statutory protection Congress conferred.

Second, Defendants contend that application of Section 4617(f) would harm Fannie Mae's long-term financial condition because

counterparties might be reluctant to contract with it. *See* Ans. Br. at 43-44. This is makeweight. Section 4617(f) has been on the books since 2008; Section 1821(j), for decades. Federal conservators and receivers, and the institutions they protect, have had no difficulty finding willing transactional counterparties.

Third, Defendants contend that before applying Section 4617(f) a court must evaluate whether the Conservator's course of action actually benefits the conservatorship. *See* Ans. Br. at 44-45. As explained in the Opening Brief, this is the opposite of what Congress intended with Section 4617(f)—subject to potential liability for damages, Congress empowered the Conservator to exercise its judgment on how best to operate Fannie Mae and collect the obligations due it, free from judicial second-guessing. *See* Op. Br. at 47-51.

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

Repeating their previous arguments word-for-word, and ignoring the counterarguments in the Opening Brief, Defendants contend that Section 4617(f) precludes courts from restraining or affecting FHFA's powers or functions only if FHFA has acted affirmatively, and "nothing

in the record indicates that FHFA has taken any affirmative action in this matter." Ans. Br. at 45. Defendants' attempt to read an affirmative action requirement into the statute fails.

Defendants' argument conflicts with decisions holding that Section 4617(f) and the substantively identical Section 1821(j) bar declaratory relief addressing anticipated future acts of a conservator or receiver. *See, e.g.*, *Nat'l Tr. for Historic Pres.*, 21 F.3d at 473 (Wald, J., concurring) (Section 1821(j) bars declaration that anticipated transaction would violate statute). Furthermore, the statute's prohibitive language—"no court may take any action"—requires no affirmative act. It is unqualified and absolute, as *Collins* confirms. 141 S. Ct. at 1775-76. The Court should not usurp Congress's prerogative to define the statute's scope by inserting a non-existent, prior-affirmative-act requirement into it.

Defendants present decontextualized snippets from *Roberts v. FHFA*, 889 F.3d 397 (7th Cir. 2017), and *Suero*—both of which apply Section 4617(f) retroactively to past FHFA acts. *See* Ans. Br. at 45-46. These arguments were already addressed in the Opening Brief, Op. Br. at 40-41, which Defendants ignore. To summarize, the crux of the analysis in each case was not whether FHFA had already acted, but

instead whether FHFA's conservatorship powers were implicated; neither decision suggests Section 4617(f) does not apply prospectively.

D. Section 4617(f) Bars Injunctive Interference with Foreclosures

Defendants next contend that Section 4617(f) should not apply to preliminary injunctions against foreclosure. *See* Ans. Br. at 47-48. Defendants ignore many cases squarely holding that Sections 4617(f) and 1821(j) bar injunctions against foreclosure, including non-judicial foreclosures.

The D.C. Circuit's decision in *Freeman* is a prime example. There, the FDIC, acting as receiver, "initiated nonjudicial foreclosure proceedings on the Freemans' residence" and another property. 56 F.3d at 1397. The Freemans argued that the foreclosure was improper, contending that the deed of trust had been procured by fraud and was therefore void. *Id.* at 1397-98. The D.C. Circuit held that Section 1821(j) unequivocally barred injunctive relief against the foreclosure "regardless of [the Freemans'] likelihood of success on the merits of [their] underlying claims," because "the FDIC's broad powers as receiver include the power to foreclose on the property of a debtor held by the failed bank as collateral, and no court may enjoin the exercise of that power." *Id.* at

1399; *see also Lloyd v. FDIC*, 22 F.3d 335, 336 (1st Cir. 1994) (applying Section 1821(j) to bar injunctive relief to nonjudicial foreclosure); *281-300 Joint Venture v. Onion*, 938 F.2d 35, 39 (5th Cir. 1991) (same).

Lacking any on-point authority, Defendants proffer *Abbott Building Corp., Inc. v. United States* as suggesting that FHFA and Fannie Mae have somehow acted improperly. 951 F.2d 191 (9th Cir. 1991). *See* Ans. Br. at 48. But that case confirms that FHFA and Fannie Mae acted *properly* here—Fannie Mae did not "simply seize assets of an alleged debtor," it brought an action in the district court seeking the appointment of a receiver. And anything in *Abbott* that could conceivably be read as suggesting the court *could have* enjoined an improper foreclosure is dicta; the court held that the foreclosure was *proper*. 951 F.2d at 195-96. Regardless, courts have not adopted Defendants' interpretation of *Abbott*. District courts in the Ninth Circuit follow *Freeman*, *Lloyd*, and *Onion* in holding that Section 1821(j) *does* bar injunctive relief against foreclosures. *E.g.*, *Vegas Diamond Props., LLC v. La Jolla Bank, FSB*, No. 10-cv-1205, 2010 WL 4606461, at *5-6 (S.D. Cal. Oct. 29, 2010); *Furgatch v. RTC*, No. 93-20304, 1993 WL 149084, at *2 (N.D. Cal. Apr. 30, 1993). And other circuits have cited *Abbott* in

holding that courts *cannot* enjoin receivers from foreclosing. *E.g.*, *Sunshine Dev., Inc. v. FDIC*, 33 F.3d 106, 112 (1st Cir. 1994).

Defendants nevertheless dwell on the possibility that FHFA will direct or permit Fannie Mae to "immediately foreclos[e] 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" and complain that "damages are hardly a fitting remedy." Ans. Br. at 49, 50. This case involves large apartment complexes that had significant property-condition issues, not idyllic single-family homes. Regardless, Defendants' hypothetical Doomsday scenario is farfetched to the point of silliness. Fannie Mae is, by its federal charter, a mortgage investor, not a property manager. Its mission is to, among other things, (1) provide stability in the secondary mortgage market and (2) provide ongoing assistance to mortgages on housing for low- and moderate-income families, including in underserved areas. *See* 12 U.S.C. § 1716. There is no reason why it would foreclose on *any* non-defaulted loans, let alone "hundreds of thousands … across the state." Not only would that conflict with the mission set forth in Fannie Mae's charter, but given the

costs and losses associated with even the most straightforward foreclosures, it would be financially irrational.

Regardless, Defendants cannot square their unsupported Armageddon position with the many cases applying Section 1821(j) to prevent injunctive interference with a foreclosure. In *Freeman*, for example, the D.C. Circuit acknowledged that Section 1821(j)'s "limitation on courts' power to grant equitable relief may appear drastic," but concluded that it comported with due process because "aggrieved parties will have opportunities to seek money damages …." 56 F.3d at 1398, 1399. Defendants might prefer to put Fannie Mae and the Conservator under constant threat of injunctive interference with conservatorship operations, but Congress precluded it, and the wisdom of Congress's choice is not for this Court or any court to decide. *See Howlett*, 496 U.S. at 371-72.

Curiously, Defendants cite *Tri-State Hotels, Inc. v. FDIC*, 79 F.3d 707 (8th Cir. 1996), as if that decision authorized injunctions against foreclosure or other loan-collection activity. *See* Ans. Br. at 47. That interpretation is not correct. *Tri-State* holds only that a debtor who fails to timely assert a claim administratively against the receivership does

not waive the right to offer the same underlying theory as an affirmative defense in any litigation brought by the receiver. *Id.* at 715. *Tri-State* does not suggest that the debtor had somehow become entitled to injunctive relief; instead it holds that under Section 1821(j), "this Court … lacks jurisdiction to grant the requested equitable relief." *Id.* Defendants nevertheless describe *Tri-State* as "enabling the debtor to obtain judicial review of the FDIC's interpretation of the contract," Ans. Br. at 47, as if Section 4617(f) would somehow disempower the district court from evaluating Fannie Mae's and Defendants' competing interpretations here, but Defendants are incorrect. Assuming this case proceeds to judgment, the district court will decide which side's interpretation of the contract is correct; if it is Defendants' (and they establish all other elements of their claim) the district court can award compensatory damages.

Nor is it plausible that, as Defendants argue, Section 4617(f) would leave the Conservator unaccountable if it inexplicably chose to initiate a slew of improper foreclosures. FHFA is accountable to the President and Congress, neither of which would have any patience with such a scheme. Regardless, as noted above, the availability of fully compensatory

damages creates a powerful incentive for FHFA and Fannie Mae to act prudently, not cavalierly, in conducting foreclosures. Defendants' expressions of purported concern for themselves, their tenants, and their employees if the Court dissolves the preliminary injunction are hyperbole.

[*Continued on following page*]

CONCLUSION

The Court should reverse the order denying the motion to dissolve and should declare the preliminary injunction void *ab initio*.

Dated this 6th day of January, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the **APPELLANTS' REPLY 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 6,998 words.

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

Dated this 6th day of January 2022.

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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 January 6, 2022, I caused to be served a true and correct copy of the foregoing **APPELLANTS' REPLY BRIEF** upon the following by the method indicated:

☐ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.

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☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below:

/s/ Kelly H. Dove
An Employee of SNELL & WILMER L.L.P.