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

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT, Clark County, Nevada; and THE HONORABLE MARK R. DENTON, District Judge,

Respondents,

and

WESTLAND LIBERTY VILLAGE, LLC *et al.*,

Real Parties in Interest.

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Case No. 84573

ANSWER TO PETITION FOR WRIT OF MANDAMUS

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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, Westland Village Square, LLC, Amusement Industry, Inc., Westland Corona LLC, Westland Amber Ridge LLC, Westland Hacienda Hills LLC, 1097 North State, LLC, Westland Tropicana Royale LLC, Vellagio Apts of Westland LLC, Alevy Family Protection Trust, Westland AMT, LLC, AFT Industry NV, LLC, and A&D Dynasty Trust; that he knows the contents of this Answer to Petition for Writ of Prohibition; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and that as to such matters he believes them to be true. This verification is made pursuant to NRS 15.010 and NRAP 21(a)(5).

DATED this 13th day of July, 2022.

/s/ *Brian W. Barnes*
BRIAN W. BARNES

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.

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.

Amusement Industry, Inc. is a private California corporation that is majority-owned by family trusts. No shareholder other than the family trusts owns more than ten percent (10%) of Amusement Industry, Inc. Amusement Industry, Inc., in turn, is the sole owner of Westland Amber Ridge LLC.

Westland Corona LLC is a Nevada limited liability company that is wholly-owned by Corona Holdings LLC. Corona Holdings LLC is owned by Smart Real Estate, which is a private California corporation that is ninety-nine percent (99%) owned by family trusts.

Westland Hacienda Hills is a Nevada limited liability company that is wholly-owned by DNA Properties, Inc., which is a private California corporation owned by family trusts.

1097 North State, LLC is a Delaware limited liability company that is wholly-owned by Hemet MHP LLC, which is a Delaware limited liability company that is wholly-owned by Smart Real Estate.

Westland Tropicana Royale LLC is a Nevada limited liability company that is wholly-owned by a family trust.

Vellagio Apts of Westland LLC is a Nevada limited liability company that is wholly-owned by Westland Vellagio Ensenda LLC. That limited liability company, in turn, is wholly-owned by AF Properties 2015 LLC, which is majority-owned by family trusts. No shareholder other than the family trusts owns more than ten percent (10%) of AF Properties 2015 LLC.

Westland AMT, LLC and AFT Industry NV, LLC are Nevada limited liability companies that are wholly-owned by family trusts. The Alevy Family Protection Trust and A&D Dynasty Trust are Nevada irrevocable 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; J. Colby

Williams and Philip R. Erwin, Campbell & Williams; and John W. Hofsaess, Westland Real Estate Group.

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I. INTRODUCTION

This is one of *five* pending interlocutory appeals and petitions for extraordinary writs that FHFA and Fannie Mae have filed with the Court in this case. Petitioners nevertheless have the temerity to argue that the Court should entertain their latest petition for mandamus because doing so will serve the cause of "judicial economy." To the contrary, Petitioners' decision to clutter this Court's crowded docket with still another meritless writ petition perfectly illustrates the wisdom of generally waiting to review district court rulings until after final judgment.

Petitioners have not come close to demonstrating that the district court order they challenge satisfies the high standard for issuance of a writ of mandamus. All agree that after final judgment this Court can take up the federal statutory interpretation issue raised in the Petition if that issue ultimately makes a difference to the outcome. In the meantime, the district court's ruling that federal law does not categorically bar Respondents from seeking to recover punitive damages and attorneys' fees from Fannie adds little if anything to the remaining work that must be done to resolve the parties' disputes in the district court. Irrespective of the merits of the district court's interpretation of 12 U.S.C. § 4617(j)(4), there is simply no reason for this Court to wade into the issue now.

But to the extent the Court opts to address the merits of the district court's decision, it should rule that the district court was correct to allow Respondents'

prayer for punitive damages and attorneys' fees to proceed. The federal statute upon which Petitioners rely says that "[t]he Agency shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due." 12 U.S.C. § 4617(j)(4). Both the text and broader context of this provision make clear that it prohibits penalties imposed by state and local governments, not awards of attorneys' fees and punitive damages in private civil litigation. And whatever the scope of the protection this provision provides to "[t]he Agency"—*i.e.*, FHFA—that protection does not extend to Fannie Mae.

Petitioners' serial demands for appellate review of the district court's interlocutory orders are needlessly burdening this Court, diverting the parties' resources from litigating the issues that remain before the trial court, and interfering with the orderly resolution of this case. The Petition should be denied.

II. APPLICABLE LEGAL STANDARD

A writ of mandamus is "a purely discretionary" and "extraordinary remedy, reserved for extraordinary causes." *Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 819, 821 407 P.3d 702, 706, 707 (2017). Petitioners bear the burden of demonstrating that this "extraordinary relief is warranted." *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). This Court traditionally has only entertained petitions for mandamus when petitioners demonstrated (1) the

district court committed either "clear and indisputable legal error" or an "arbitrary or capricious abuse of discretion" and (2) the petitioners lacked a "plain, speedy and adequate remedy in the ordinary course of law." *Archon*, 133 Nev. at 820, 407 P.3d at 706; NRS 34.170.

This Court's case law has also "evolved" in a "separate branch" to entertain mandamus for interlocutory orders—even when the traditional requirements are not met—if petitioners demonstrate "(1) no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule, or (2) an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *Archon*, 133 Nev. at 820, 407 P.3d at 706; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197–98, 179 P.3d 556, 559 (2008). Yet in considering whether to exercise its "sound discretion" in this latter, narrow "branch" of mandamus, this Court has "require[d] special care . . . to avoid subverting the final judgment rule and inviting, rather than avoiding, undue delay and expense in dispute resolution." *Archon*, 133 Nev. at 821, 407 P.3d at 707.

III. RELEVANT FACTUAL BACKGROUND

This case concerns the mortgages on two working class apartment buildings in Las Vegas. Before Respondents had any connection to these buildings, they were badly mismanaged by their prior out-of-state owners. In addition to various deferred

maintenance issues, the buildings suffered from crime problems so serious that the Las Vegas Police Department declared them to be a chronic nuisance. APP168–69 (¶¶ 82–94).

Despite the buildings' serious shortcomings, the prior owners were able to withdraw equity from the buildings by obtaining mortgages from Fannie Mae in violation of Fannie Mae's own underwriting standards. APP170–71 (¶¶ 96–106). When Fannie Mae's agent realized its mistake, it hatched a plan to help the prior owners sell the buildings to someone more creditworthy and with the property management acumen to turn around these failing properties. *See* APP183 (¶¶ 175–80).

Respondents—collectively referred to in this filing and elsewhere in the record as "Westland"—are a group of related entities that trace their residential apartment investment experience back more than 50 years. APP164 (¶ 68). Unlike other residential real estate investors, Westland makes long-term investments in communities rather than attempting to flip the buildings it buys for a quick profit. All told, Westland owns over 10,000 residential units in the Las Vegas area. APP165 (¶ 69(b)). And in five decades of residential apartment investing, no Westland-affiliated entity has *ever* defaulted on a mortgage. APP165 (¶ 69(d)).

Westland was induced to purchase the buildings that are the subject of this lawsuit through a series of misrepresentations, the most notable of which concerned

the buildings' occupancy rates. The prior owners greatly overstated the buildings' occupancy rates, when in fact many of the buildings' claimed "tenants" had not paid rent for months. APP177 (¶ 141). Based on that and other false representations, Westland agreed to purchase the buildings, assuming responsibility for the existing Fannie Mae mortgages in addition to paying almost $22 million in cash. APP174 (¶ 120). To facilitate this transaction, which dramatically improved the mortgages' credit risk, Fannie Mae's agent required under the terms of the mortgages that only a modest sum be set aside in escrow for making repairs to the properties. APP174–76 (¶¶ 124–31).

Once Westland took ownership of the properties, it quickly became apparent that very substantial work would need to be done to address problems that the prior owners and Fannie Mae's agent had concealed. APP177 (¶¶ 137–39). One of the first steps in this process was evicting apartment occupants who were not paying rent or who were engaged in criminal activity. APP179 (¶¶ 147–48). But when the buildings' occupancy rates dropped as a result of these necessary evictions, Fannie Mae's agent used the decline as an excuse for demanding another inspection of the properties. APP185 (¶¶ 187–91). Although the mortgages did not entitle Fannie Mae to such an inspection, it then pointed to the results of the inspection as a basis for demanding that Westland add millions of dollars to escrow accounts for repairs—

even though the objective condition of the buildings had *improved* in the time since Westland purchased them. APP187–88 (¶¶ 204–05).

Westland balked at being asked to set aside escrow funds that it was told at the time of purchase were not needed, and Fannie Mae responded by declaring that Westland had defaulted on the mortgages even though Westland had never missed a debt payment. APP192–94 (¶¶ 235–47). This claimed default and other misconduct by Fannie Mae ultimately prevented Westland from accessing a line of credit it needed to cover margin calls on other investments, which precipitated tens of millions of dollars in losses for Westland. APP197–98 (¶¶ 267–280)

Fannie Mae filed this lawsuit seeking appointment of a receiver for the buildings pending a non-judicial foreclosure. The district court entered a preliminary injunction that prohibited Fannie Mae from foreclosing on the properties and taking possession of them during the pendency of this lawsuit—a ruling that is the subject of two appeals and another writ petition, all of which were filed in this Court by Petitioners.

Meanwhile in the district court, Westland asserted counterclaims against Fannie Mae, alleging, among other things, fraud and breach of contract. In addition to requesting compensatory damages for its counterclaims, Westland also sought to recover punitive damages and attorneys' fees in light of the egregious misconduct by Fannie and its agent. Petitioners moved to dismiss Westland's request for punitive

damages and attorneys' fees under 12 U.S.C. § 4617(j)(4) on the theory that any such award against Fannie Mae is categorically prohibited so long as it remains in conservatorship. The district court denied Petitioners' motion "without prejudice to further development" at the summary judgment stage, "having determined that the complexities and nuances involved in this case render disposition under NRCP 12(b)(5) to be inappropriate." App.509. Fannie Mae and FHFA then petitioned this Court for a writ of mandamus.

IV. ARGUMENT

A. Petitioners Fail To Satisfy The Demanding Standard For Mandamus.

"A writ of mandamus is not a substitute for an appeal." *Archon*, 133 Nev. at 819, 407 P.3d at 706 (2017). Instead, "mandamus is an extraordinary remedy, reserved for extraordinary causes." *Id.* To that end, mandamus is generally not available when a petitioner has "a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170; *Bertsch v. Eighth Judicial Dist. Court*, 133 Nev. 240, 243, 396 P.3d 769, 772 (2017). The prototypical adequate remedy is the right to appeal an adverse decision. Thus, when a petitioner can appeal an adverse decision, this Court generally holds that mandamus is precluded. *Archon*, 133 Nev. at 820, 407 P.3d at 706 (2017) ("[T]he right of eventual appeal from the final judgment 'is generally an adequate legal remedy that precludes writ relief.'" (quoting *Pan*, 120 Nev. at 223, 88 P.3d at 841)); *State Dep't of Transp. v. Eighth Judicial Dist. Court*,

133 Nev. 549, 552, 402 P.3d 677, 681 (2017); *Int'l Game Tech., Inc.*, 124 Nev. at 197, 179 P.3d at 558.

There is no dispute that Petitioners will be able to appeal the award, if any, of punitive damages and attorneys' fees in this case. *See, e.g.*, *TMX, Inc. v. Volk*, 448 P.3d 574 (table), 2019 WL 4619524 (Nev. 2019) (affirming award of punitive damages and attorneys' fees in ordinary appellate process). That all but defeats the need for mandamus here. *Watson Rounds v. Eighth Jud. Dist. Ct.*, 131 Nev. 783, 791, 358 P.3d 228, 234 (2015) (hearing mandamus petition of attorneys' fee award because sanctioned attorney "has no right to appeal").

In fact, Petitioners make no argument whatsoever that an appeal would prove inadequate. For instance, this Court has previously found an appeal to be inadequate when, absent immediate correction, a district court decision will "wreak irreparable harm." *AeroGrow Int'l, Inc. v. Eighth Judicial Dist. Court*, 137 Nev. Adv. Op. 76, 499 P.3d 1193, 1197 (2021) (quoting *Archon*, 133 Nev. at 820, 407 P.3d at 706). Yet Petitioners have not alleged any such circumstances here. Instead, Petitioners just disagree with the district court's interlocutory ruling and would simply find it more convenient for their operations if this Court prematurely settled the matter. *See* Pet. at 12 (arguing mandamus would assist Fannie Mae in "routine foreclosure actions").

Instead of arguing that an appeal would be inadequate, Petitioners rely on two rare exceptions to the general bar against mandamus when an ordinary appeal is

available. The first is when "no factual dispute exists and the district court is obligated to dismiss an action pursuant to *clear authority* under a statute or rule." *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 559 (2008) (emphasis added). This Court has explained that the "clear authority" to dismiss an action arises under requirements like NRCP 4(i), "regarding the failure to serve process," NRCP 41(e), regarding dismissal for want of prosecution, and NRCP 25(a)(1), regarding "the failure to timely substitute a party following a suggestion of death." *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 n.1 (1997). This Court has also countenanced mandamus when a Nevada statute overlays the civil rules with additional mandatory procedures. *See Klingensmith v. Eighth Judicial Dist. Court*, 494 P.3d 904 (table), 2021 WL 4261541 (Nev. 2021); NRS 41A.071 (providing that if a medical malpractice action is filed without an affidavit of merit, the district court shall dismiss the action). A federal statute that purportedly bars punitive damages and attorneys' fees (it does not, *see infra*), is far afield from mandatory procedural requirements set out in Nevada Revised Statutes or the Nevada Rules of Civil Procedure. Moreover, whether Respondents are entitled to punitive damages and attorneys' fees *will* turn on numerous contested questions of fact. There is no need for this Court to address a question of federal statutory interpretation when district court proceedings may find for Petitioners *anyway* based on currently disputed facts.

The second rare exception is "when an 'important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition.'" *Bertsch*, 133 Nev. at 243, 396 P.3d at 772 (quoting *Int'l Game Tech., Inc.*, 124 Nev. at 197, 179 P.3d at 558–59). Under this exception, this Court has found review through mandamus appropriate for issues such as the legal inviolability provided to certain officials through judicial and quasi-judicial immunity. Judicial immunity is "a broad grant of immunity not just from the imposition of civil damages, but also from the burdens of litigation, generally." *State v. Second Judicial Dist. Court*, 118 Nev. 609, 615, 55 P.3d 420, 423 (2002). Early intervention via mandamus was appropriate in these cases, not because the petitioners would prevail in litigation ultimately, but rather because the petitioners had an important entitlement to be free from litigating in court altogether. *Bertsch*, 133 Nev. at 246, 396 P.3d at 774; *State*, 118 Nev. at 615, 55 P.3d at 423.

Other important issues considered by this Court through mandamus are similar in that the resolution of these issues could obviate the need for any further litigation, *Int'l Game Tech., Inc.*, 124 Nev. at 198, 179 P.3d at 559 (evaluating whether employer could be liable under Nevada's False Claims Act, and thus whether action should proceed), or could *dramatically* alter the scale and substance of the proceedings, *Neville v. Eighth Judicial Dist. Court*, 133 Nev. 777, 779, 406 P.3d 499, 501 (2017) (reviewing dismissal of "majority of [plaintiff's] class-action

claims"); *Anse, Inc. v. Eighth Judicial Dist. Court of State*, 124 Nev. 862, 870, 192 P.3d 738, 744 (2008) (reviewing whether the owners of 700 homes were "claimants" eligible for "the remedies of Nevada's residential constructional defect statutes" in litigation involving "over 1,200" homes). Thus, addressing these issues through mandamus would serve interests of judicial economy as well because of the controlling nature of the issue to the underlying litigation.

The issue presented by Petitioners—whether a federal statute bars punitive damages and attorneys' fees—is not akin to those mandamus-worthy issues. First, the alleged prohibition on attorneys' fees is not a state law immunity "from the burdens of litigation, generally." *State*, 118 Nev. at 615, 55 P.3d at 423. It is a claimed bar on certain relief involving an interpretation of federal law. Petitioners have not asserted a right to be free from litigating Westland's counterclaims altogether. Second, Petitioners have not demonstrated any way in which resolution of this issue by this Court through mandamus will contribute to judicial economy at either the district court or in this Court. Petitioners neither explain how the substance of the underlying litigation will be altered in the district court nor do Petitioners describe any narrowing of discovery or other pre-trial matters that would flow from a ruling in their favor on this mandamus petition. And, in this Court, Petitioners have *multiple* proceedings currently pending, which arise from this litigation. Far from contributing to a reduction in judicial proceedings, this Petition continues

Petitioners' gambit of multiplying proceedings. *Cf. State ex rel. Dept. of Transp. v. Thompson*, 99 Nev. 358, 362, 662 P.2d 1338, 1340 (1983) (describing most mandamus petitions as generally "quite disruptive to the orderly processing of civil cases in the district courts, and . . . a constant source of unnecessary expense for litigants"). Third, Petitioners fail to explain how this court can resolve any conflicting interpretation of the federal statutory interpretation involved here. After all, any disagreement between state and federal courts cannot be finally resolved by a state supreme court, especially when it concerns the interpretation of a federal statute.

This Court "generally declines to consider writ petitions challenging district court orders denying motions to dismiss because such petitions rarely have merit, often disrupt district court case processing, and consume an enormous amount of this court's resources." *Bertsch*, 133 Nev. at 243, 396 P.3d at 772. Petitioners have provided no reason to depart from this general practice here.

B. Federal Law Permits Private Parties To Seek Punitive Damages And Attorney's Fees From Fannie Mae.

Nothing in the text of the Housing and Economic Recovery Act ("HERA") prevents a private party from seeking punitive damages or attorney's fees from Fannie Mae. Petitioners' argument to the contrary rests exclusively on the so-called "penalty bar" provision in 12 U.S.C. § 4617(j)(4), which states that "[t]he Agency shall not be liable for any amounts in the nature of penalties or fines, including those

arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due." Petitioners' argument fails for four independent reasons.

First, the text of Section 4617(j)(4) applies only to financial punishment by *government entities*. "When interpreting a statute," this Court "focus[es] on the words used in the statute." *Lofthouse v. State*, 136 Nev. 378, 380, 467 P.3d 609, 612 (2020). And here, the relevant word is "penalties." Although a "penalty" is generally defined as a "[p]unishment imposed on a wrongdoer," depending on the context it may be "a sum of money exacted as punishment for either a wrong to the state or a civil wrong" (or both). *Penalty*, Black's Law Dictionary (11th ed. 2019) (emphasis added). Simply staring at the word "penalties" in Section 4617(j)(4), however, does not clarify which meaning Congress adopted.

Instead, the Court must look to the surrounding context. "When a word has more than one plain and ordinary meaning, the context and structure inform which of those meanings applies." *Lofthouse*, 136 Nev. at 380, 467 P.3d at 611. One contextual tool for interpreting statutory language is the "doctrine of *noscitur a sociis*," which "teaches that words are known by—acquire meaning from—the company the keep." *Building Energetix Corp. v. EHE LP*, 129 Nev. 78, 85, 294 P.3d 1228, 1234 (2013); *see also Life Techs. Corp. v. Promega Corp.*, 137 S. Ct. 734, 740

(2017) ("A word is given more precise content by the neighboring words with which it is associated." (cleaned up)).

Here, Section 4617(j)(4) lists examples that are exclusively "penalties or fines" collected by a government entity. It states that "penalties or fines" barred by Section 4617(j)(4) shall "include[e] those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due." These penalties and fines—essentially property taxes and government filing fees—are collected only by *government entities*. Thus, the surrounding statutory language indicates that Section 4617(j)(4) does not bar punitive damages or attorney's fees sought by *private parties*.

That conclusion is supported by another contextual canon of statutory construction: When the Legislature uses similar words or phrases across numerous statutes, courts will generally assume the words or phrases are "used in the same sense." *Savage v. Pierson*, 123 Nev. 86, 94, 157 P.3d 697, 702 (2007). Here, Congress frequently uses the phrase "penalties or fines" (or a materially similar phrase) in the context of *government* penalties or fines. In the Administrative Procedure Act, for example, Congress listed the "imposition of a penalty or fine" as an illustration of a "sanction" by "*an agency*." 5 U.S.C. § 551(10)(C) (emphasis added). And in the housing context, Congress has discussed a "penalty" or "penalties" solely in terms of money "*collected by the public housing agency*." 42

U.S.C. § 1437f(o)(10)(e) (emphasis added). Other statutory provisions similarly use the phrase "penalty or fine" in terms of *government* punishment. *See, e.g.*, 46 U.S.C. § 3178(e)(1) (discussing any "penalty or fine" collected by "the United States Government").

Second, even if Section 4617(j)(4) did encompass "penalties" sought by private parties, the statutory phrase "penalties or fines" does not include punitive damages or attorneys' fees. Courts generally adhere to the "usual rule against 'ascribing to one word a meaning so broad' that it assumes the same meaning as another statutory term." *Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1939 (2022) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)). And here, in the precise statute at issue, Congress expressly discussed "punitive or exemplary damages" elsewhere. *See* 12 U.S.C. § 4617(d)(3)(B). Specifically, Section 4617(d)(3)(B) limits FHFA's liability for "punitive or exemplary damages" when FHFA repudiates contracts.[1] Petitioners' reading "ascribe[es] to" the word "penalty" "a meaning so broad' that it assumes the same meaning as" the phrase "punitive or exemplary damages"—despite Congress's express use of that phrase in a separate provision. *See Ysleta Del Sur Pueblo*, 142 S. Ct. at 1939. Simply put, "[h]ad Congress wished" to include "punitive or exemplary damages" in the penalty-bar

[1] Here, FHFA cannot avoid punitive damages under this provision because, per its own regulations, FHFA's authority to repudiate contracts had expired by the time of the events that gave rise to this lawsuit. *See* 12 C.F.R. § 1237.5(b).

provision, Section 4617(d)(3)(B) demonstrates that "it knew how to do so." *See Tanzin v. Tanvir*, 141 S. Ct. 486, 492 (2020).

In addition, "[s]tatutes must be construed together so as to avoid rendering any portion of a statute immaterial or superfluous." *Buckwalter v. Eighth Judicial Dist. Ct.*, 126 Nev. 200, 202, 234 P.3d 920, 922 (2010). Reading Section 4617(j)(4) to bar punitive damages *entirely* would render superfluous the limited prohibition on punitive damages when FHFA repudiates contracts. In this situation, the "general/specific canon" applies to avoid "the superfluity of a specific provision that" would be "swallowed by the general one." *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012).

Third, Section 4617(j)(4) immunizes only FHFA—not Fannie Mae—from liability for penalties and fines. By its terms, the provision applies only to "[t]he Agency." 12 U.S.C. § 4617(j)(4). And elsewhere, HERA defines "the Agency" to mean FHFA, not Fannie Mae. *See* 12 U.S.C. § 4502(2) ("The term 'Agency' means the Federal Housing Finance Agency established under section 4511 of this title."). The "statute's express definition of [the] term controls the construction of that term." *State v. Second Judicial Dist. Ct.*, 136 Nev. 191, 195, 462 P.3d 671, 674 (2020); *see also Van Buren v. United States*, 141 S. Ct. 1648, 1657 (2021) ("When a statute includes an explicit definition of a term, we must follow that definition, even if it varies from a terms' ordinary meaning." (cleaned up)).

This reading follows not only from Congress' definition of "Agency," but also its careful effort to distinguish between "the Agency" and a "regulated entity" (such as Fannie Mae) in conservatorship or receivership throughout Section 4617. The court to most thoroughly engage with the relevant statutory text observed that Section 4617 uses the term "Agency" 138 times and "regulated entity" 189 times while consistently differentiating between the two. *See Burke v. Fannie Mae*, 221 F. Supp. 3d 707, 710 (E.D. Va. Oct. 21, 2016), *vacated upon settlement*, 2016 WL 7451624 (E.D. Va. Dec. 6, 2016).[2] What is more, Section 4617(j) applies only to cases "in which the Agency *is acting* as a conservator or receiver." 12 U.S.C. § 4617(j)(1) (emphasis added). And here, it is undisputed that FHFA had no involvement in the events underlying this lawsuit until it belatedly parachuted into the case in an effort to shield Fannie Mae from liability.

Lastly, Section 4617(j)(4) does not apply to punitive damages or attorneys' fees sought to *offset* Westland's liability to Fannie Mae under the relevant loan agreements. While Section 4617(j)(4) states that FHFA "shall not be liable" for penalties and fines, a separate and more specific statutory provision expressly permits the exercise of contractual rights "to offset or net out" payment obligations

[2] Petitioners attempt to minimize *Burke* by saying it was "later vacated for lack of jurisdiction," Pet. 9 n.3, but they omit the reason the court later lost jurisdiction: Over a month after Fannie Mae lost on this issue, it agreed to settle the case, *see Burke*, 2016 WL 7451624 at *1.

to FHFA, 12 U.S.C. § 4617(d)(8)(E)(iii). To the extent that Westland's prayer for punitive damages and attorneys' fees is used as a basis for reducing Westland's contractual liability to Petitioners, these remedies would not make FHFA "liable" for anything.

Petitioners' contrary arguments fail. Their primary contention is that courts have described punitive damages or attorney's fees as "penalties" or, even less relevant, "punishment." *See* Pet. 6–8. But that anodyne proposition does nothing to demonstrate how *Congress* used the word "penalties" in Section 4617(j)(4) specifically. And the law frequently distinguishes between "punitive damages" on the one hand and "penalties" on the other. *See, e.g.*, NRS 228.1116(1)(b) (attorney's contingency fee contract "[m]ust not be based on any amount attributable to a fine or civil penalty, but may be based on an amount attributable to punitive damages"); *Nevada Power Co. v. Eighth Judicial Dist.*, 120 Nev. 948, 961, 102 P.3d 578, 587 (2004) (explaining in context of administrative enforcement action that "civil penalties" are "not equivalent" to "punitive damages").

Thus, the question is not whether punitive damages or attorneys' fees *could* be described as "penalties"; the question is whether Congress *did* include them as "penalties" that are barred by Section 4617(j)(4). And as explained above, although punitive damages or attorneys' fees for private parties could potentially fall within the meaning of the word "penalties," the express language of Section 4617(j)(4), the

surrounding statutory context, and the other examples of Congress using the phrase "penalties or fines" shows that Section 4617(j)(4) does *not* apply to a private party seeking punitive damages or attorneys' fees from Fannie Mae.

Moreover, with respect to attorneys' fees specifically, Petitioners misstate what Nevada law provides. They contend that "Nevada law permits attorneys' fees in a civil case *only* 'to punish for and deter frivolous or vexatious claims and defenses.'" Pet. 7 (quoting NRS 18.010) (emphasis added). But the statutory provision that Petitioners quote does *not* say that attorneys' fees are available "only" to punish and deter frivolous or vexatious litigation; the provisions that Petitioners omit provide that attorneys' fees may also be "authorized by specific statute" or awarded to the prevailing party "[w]hen the prevailing party has not recovered more than $20,000." *See* NRS 18.010(2)(a). Awarding attorneys' fees to a "prevailing party [who] has not recovered more than $20,000"—in effect *bonus* payments—may, in no sense of the word, be considered a "penalty." And in any event, that Nevada may permit attorneys' fees to prevent frivolous or vexatious litigation does not show that, when Congress used the word "penalties" in Section 4617(j)(4), it barred attorneys' fees under Nevada law. Indeed, the statutory text and context show otherwise.

Petitioners also cite a handful of cases in which courts have read Section 4617(j)(4) more broadly to extend to claims for punitive damages by a private party

against Fannie Mae. *See* Pet. 8–9. But none of the cases Petitioners identify grapple with the statutory text like *Burke* did. And in any event, the precedents do not uniformly favor FHFA's interpretation. In *Higgins v. BAC Home Loans Servicing, LP*, 2014 WL 1332825, at *5 (E.D. Ky. Mar. 31, 2014), a case upon which Petitioners rely, the court distinguished between an "ordinary action for damages where exemplary or punitive damages are awarded" and remedies that are "properly characterized as penal." The court explained that only "penal" remedies are "penalties" under Section 4617(j)(4) and held that a suit for treble damages under a Kentucky statute could go forward. *Id.* Likewise here, the punitive damages Westland seeks are not "penal," so Section 4617(j)(4) does not apply. Similarly, another case that Petitioners cite, *National Fair Housing Alliance v. Fannie Mae*, 2019 WL 3779531, at *6-7 (N.D. Cal. Aug. 12, 2019), held that attorneys' fees were not "penalties" under Section 4617(j)(4). And ultimately, no case is as persuasive as *Burke*'s thorough analysis of the statutory text.

In sum, the statutory text and context show that Congress did not prohibit private parties from seeking punitive damages or attorneys' fees from Fannie Mae when it enacted Section 4617(j)(4).

V. CONCLUSION

For the foregoing reasons, the petition for a writ of mandamus should be denied.

DATED this 13th day of July, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 28.2, I hereby certify that this answering brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 font, double spaced, Times New Roman.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 4,840 words.

I further 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)(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 reply does not conform with the requirements of the Nevada Rules

of Appellate Procedure.

DATED this 13th day of July, 2021.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 13th day of July 2022, I caused true and correct copies of the foregoing **Answer to Petition for Writ of Mandamus** to be delivered to the following counsel and parties:

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