No. 20-01673

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NERIS MONTILLA, on behalf of herself and all others so similarly situated;
MICHAEL KYRIAKAKIS, on behalf of himself and all others so similarly situated,
Plaintiffs-Appellants,

RUBEN VELASQUEZ, on behalf of himself and all others so similarly situated;
ROSELIA MONTUFAR, on behalf of herself and all others so similarly situated,
Plaintiffs.

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION;
FEDERAL HOUSING FINANCE AGENCY,
Defendants-Appellees,

SETERUS, INC., C.I.T. BANK, N.A.; MR. COOPER, f/k/a Nationstar Mortgage, LLC,
Defendants.

On Appeal from the United States District Court
for the District of Rhode Island, Case No. 1:18-cv-00632-WES
The Honorable William E. Smith

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CORPORATE DISCLOSURE STATEMENT

Per Rule 26.1 of the Federal Rules of Appellate Procedure, Appellees state the following:

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

The Federal Housing Finance Agency is not a publicly held corporation, has no parent corporation, and does not issue stock.

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INTRODUCTION

This action arises from a sad but sometimes necessary occurrence—foreclosure of mortgage loans. In this case, the loans were secured by the properties of Plaintiffs-Appellants Neris Montilla and Michael Kyriakakis. Defendant-Appellee Federal National Mortgage Association ("Fannie Mae") owns the loans. Defendant-Appellee Federal Housing Finance Agency ("FHFA") is Fannie Mae's Conservator; as such, it directs Fannie Mae's operations as legal successor to Fannie Mae's rights, titles, powers, and privileges.

After Plaintiffs defaulted on their loan payments, Fannie Mae exercised the right to foreclose that Plaintiffs had granted the original lender and its successors. As Rhode Island law permits—presumably to reduce costs that borrowers ultimately bear—the foreclosures did not involve a judicial proceeding.

Plaintiffs then brought this action alleging that non-judicial foreclosures conducted by Fannie Mae and FHFA as Conservator denied them due process. The district court held that the complaint failed as a matter of law because neither FHFA as Conservator nor Fannie Mae conducted the foreclosures as government actors—a necessary element to any due process claim.

Those entities' status has been litigated many times, and all but one federal district court has deemed them to be private actors. Indeed, to date, 16 federal courts (including four Courts of Appeals)—which together issued 46 decisions—

have held that FHFA as Conservator, Fannie Mae, and/or similarly situated Freddie Mac are *not* government actors. Affirmance would therefore align with the great weight of authority, while reversal would create a clear circuit split.

Plaintiffs' due process claim also fails on the merits; Plaintiffs received notice of the impending foreclosures and had the opportunity to be heard.

The district court properly entered judgment in Defendants' favor and this Court should affirm.

ISSUES PRESENTED

I. Whether FHFA's actions as Conservator—directing Fannie Mae's private, contractual right to foreclose—qualifies as government action for purposes of a constitutional claim.

II. Whether Fannie Mae qualifies as a government actor for that purpose while under FHFA's conservatorship.

III. Whether Plaintiffs' due process claim fails on the merits because they received notice and opportunities to be heard regarding their foreclosures.

STATEMENT OF THE CASE

A. Factual Background and Procedural History

Plaintiffs Montilla and Kyriakakis acquired real property in Providence, and Cranston, Rhode Island, respectively. Supplemental Appendix ("SA") 011 ¶52, SA015 ¶73. Both executed promissory notes and secured the loans with a

mortgage. SA012 ¶53, SA015 ¶74. The loans and corresponding mortgages were later sold to Fannie Mae. *See* SA012 ¶55, SA016 ¶76. After Plaintiffs defaulted on their payments, Fannie Mae's loan servicers conducted non-judicial foreclosure sales of the properties under Rhode Island law and recorded foreclosure deeds. SA012 ¶57, SA016 ¶78.

Plaintiffs acknowledge that they received advance notice of the foreclosure sales. SA012 ¶56, SA016 ¶77. The foreclosure deeds confirm that such notice was given, as well as several other notices. SA046-56 (Kyriakakis Foreclosure Deed); SA058-70 (Montilla Foreclosure Deed). For Kyriakakis, this included notice of the default, two notices of the opportunity for a mediation conference, and both publication and written notice of the foreclosure sale. And for Montilla, who had a reverse mortgage, this included notice of default and both publication and written notice of the foreclosure sale. Neither Plaintiff alleges that they contested the relevant foreclosure before it occurred.

Instead, after the foreclosures, Plaintiffs filed this putative class action, alleging that FHFA as Conservator and Fannie Mae deprived them, and similarly situated borrowers, of property without due process, in violation of their Fifth Amendment rights.[1]

[1] Several parties to the district court action were dismissed voluntarily or by stipulation, leaving only Montilla and Kyriakis as Appellants, and FHFA and

In February 2019, FHFA as Conservator moved to dismiss the case, arguing that it and Fannie Mae are not government actors for purposes of due process claims. ECF Nos. 20-21. Fannie Mae filed a separate motion to dismiss, incorporating FHFA's motion and alternatively arguing that Plaintiffs' due process claim fails on the merits. ECF No. 22. Plaintiffs opposed both motions. ECF Nos. 30-31.

In May 2020, the district court granted Defendants' motions to dismiss, holding that FHFA as Conservator and Fannie Mae are not government actors subject to Plaintiffs' due process claim. Addendum ("ADD") 1-11. Specifically, the district court held that "FHFA is not a government actor in its capacity as conservator to Fannie Mae" and, "because the government does not exercise permanent control over Fannie Mae, [Fannie Mae] is not a government actor for purposes of Plaintiffs' constitutional challenge." ADD9. In so doing, the court "side[d] with the majority of courts to have considered the issue" and rejected the analysis of another Rhode Island district court decision, currently under appeal in coordination with this case (Case Nos. 20-02025/02026), which held that FHFA as Conservator and Fannie Mae are effectively government actors. ADD6-10 (citing *Sisti v. FHFA*, 324 F. Supp. 3d 273 (D.R.I. 2018)). The district court did not reach the merits of Plaintiffs' due process claim. ADD4 n.2.

Fannie Mae as Appellees. ECF Nos. 33-34, 39 ("ECF" numbers refer to the district court's docket numbers); Order, *Montilla v. Fannie Mae* (Oct. 9, 2020).

This appeal ensued.

B. FHFA and Fannie Mae in Conservatorship

Congress chartered Fannie Mae to facilitate the nationwide secondary mortgage market, and thereby to enhance the equitable distribution of mortgage credit throughout the nation. *See Town of Johnston v. FHFA*, 765 F.3d 80, 82 (1st Cir. 2014).

In July 2008, Congress passed the Housing and Economic Recovery Act of 2008 ("HERA"), codified as 12 U.S.C. § 4511 et seq., which established FHFA. SA005 ¶23. FHFA is an independent federal agency with regulatory and oversight authority over Fannie Mae, Freddie Mac, and the Federal Home Loan Banks. *Id.* HERA authorizes FHFA to place any of those entities into conservatorship in certain circumstances. 12 U.S.C. § 4617(a)(3); SA005 ¶24. In September 2008, FHFA placed Fannie Mae and Freddie Mac (the "Enterprises") into conservatorships "for the purpose of reorganizing, rehabilitating, or winding up [their] affairs." *Id.* § 4617(a)(2); SA005 ¶25. As Conservator, FHFA succeeded to "all rights, titles, powers, and privileges" of the Enterprises and their respective stockholders, boards of directors, and officers, and is empowered to "operate" the entities. *See* 12 U.S.C. § 4617(b)(2)(A)(i), (B)(i); SA006 ¶28. Thus, FHFA as Conservator stepped into the shoes of Fannie Mae and assumed the power to direct Fannie Mae's operations. SA007 ¶33. The Conservator reconstituted Fannie

Mae's Board of Directors and provided for it to exercise the functions necessary to oversee Fannie Mae's day-to-day business. *See* SA005 ¶26.

HERA also amended Fannie Mae's statutory charter to grant Treasury authority to purchase securities issued by Fannie Mae, by "mutual agreement." *See* 12 U.S.C. § 1719(g)(1)(A). Under this authority, Treasury agreed to infuse hundreds of billions of taxpayer dollars into Fannie Mae as needed, and Treasury received warrants to purchase a majority of Fannie Mae's common stock. SA007-8 ¶¶35-36. Plaintiffs do not allege that Treasury has ever exercised that right, and it has not. *E.g.*, Fannie Mae, Quarterly Report at 4 (Form 10-Q) (Sept. 30, 2020) ("Treasury owns...a warrant to purchase 79.9% of our common stock."). Thus, Treasury owns no Fannie Mae common stock.

C. Nonjudicial Foreclosure in Rhode Island

Nonjudicial foreclosure has existed in Rhode Island for over a century. *Bucci v. Lehman Bros. Bank, FSB*, 68 A.3d 1069, 1085 (R.I. 2013). To foreclose nonjudicially, the mortgagee exercises a power of sale in the mortgage agreement. *See* R.I. Gen. Laws § 34-11-22. Through the power-of-sale clause, the mortgagor grants the mortgagee authority to sell the property securing the loan in the event of a default. *E.g.*, *Bucci*, 68 A.3d at 1084-85. The nonjudicial foreclosure process at issue here is embedded in both Rhode Island statutory law and the mortgage agreement, and both contain numerous protections for mortgagors like Plaintiffs.

As to notice, Rhode Island requires the mortgagee to provide a series of notices before the mortgagee can accelerate the debt and sell the property. *First*, the mortgagee must provide notice of default. *See, e.g.*, *Viera v. Bank of N.Y. Mellon as Tr. for Certificate Holders of Cwalt, Inc.*, No. 17-cv-0523, 2018 WL 4964545, at *2 (D.R.I. Oct. 12, 2018). Paragraph 22 of the standard Fannie Mae mortgage agreement requires the mortgagee to provide the mortgagor notice of the default, the action required to cure the default, a date not less than 30 days from the notice by which the default must be cured, and that failure to cure may result in acceleration of the debt and sale of the property. Paragraph 22 also requires notice to the mortgagor of their right to bring a court action to dispute the default or raise other defenses. *See*, *e.g.*, SA041 ¶22 (Kyriakakis Mortgage).

Second, Rhode Island requires a mortgagee to provide residential borrowers with notice of the opportunity for a mediation conference. R.I. Gen. Laws § 34-27-3.2(d). If the mortgagor chooses to participate, the conference occurs within 60 days. *Id.* § 34-27-3.2(f). If the mortgagor fails to respond, or no resolution is reached at the conference, then the mortgagee may proceed to foreclosure.

Third, the mortgagee must provide notice of the foreclosure sale, by publication and mail. *Id.* §§ 34-11-22, 34-27-4(a)-(b). The notice must state the time and location of the sale and must be sent to the property at issue and any other

address that the mortgagor has designated for notice, or listed with the tax assessor's office. *Id.* § 34-27-4(b).

Having been afforded these notices, a Rhode Island mortgagor has several opportunities to be heard. *First*, in addition to the mediation described above, a mortgagor may seek a judicial hearing before the foreclosure sale takes place. As noted in Paragraph 22 of the standard Fannie Mae mortgage agreement, and as explained in notices of default sent pursuant to that provision, the mortgagor has a "right to bring a court action to assert the non-existence of a default or any other defense … to acceleration or sale." SA041 ¶22; *see also, e.g.*, *Bucci*, 68 A.3d at 1072, 1084–85.

Second, the mortgagor also has a post-foreclosure opportunity to be heard. This is because, following a foreclosure, a mortgagor who remains in possession of the property can be ordered to leave only following notice to quit and initiation of an eviction action, in which the mortgagor may assert defenses to the foreclosure. *See* R.I. Gen. Laws §§ 34-18-38, 34-18.1-2; *see also Stamatakos v. Wells Fargo Bank*, No. 17-cv-00062, 2017 WL 2635291, at *1 (D.R.I. Apr. 20, 2017), *report and recommendation adopted sub nom. Stamatakos v. U.S. Bank Ass'n*, 2017 WL 2633497 (D.R.I. June 19, 2017). In that action, the mortgagor may dispute the debt or raise other defenses to the foreclosure. *See* R.I. Gen. Laws § 34-28-56(h);

Parra v. MERS, Inc., No. PC 2011-1828, 2013 WL 1387030, at *3 (R.I. Super. Apr. 1, 2013).

SUMMARY OF ARGUMENT

This Court should affirm.

Plaintiffs' argument that FHFA as Conservator and Fannie Mae denied them due process by conducting non-judicial foreclosures fails as a matter of law because neither entity is a government actor for such purposes.

Cases involving other federal conservators or receivers, such as *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), establish that FHFA as Conservator does not qualify as a government actor for purposes of Plaintiffs' constitutional claim. Like other federal agencies acting in similar roles, FHFA as Conservator stepped into Fannie Mae's private shoes, assuming Fannie Mae's private status and, in this case, directing the exercise of Fannie Mae's preexisting private power to foreclose non-judicially.

Nor is Fannie Mae a government actor. Even if FHFA as Conservator were incorrectly assumed to be a government actor, Fannie Mae would not be one, because the Conservator's control over Fannie Mae is neither permanent nor structural, as the governing Supreme Court precedent requires. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995).

Plaintiffs rely primarily on *Sisti* for the proposition that FHFA as Conservator and Fannie Mae are government actors. *See* Appellants' Opening Brief ("AOB") 10-23. The district court considered *Sisti*'s reasoning and rejected it, aligning itself with the overwhelming majority of cases adopting Defendants' position. ADD8. Indeed, reversing the district court decision would create a circuit split: every Court of Appeals that has addressed the issue whether FHFA as Conservator or either Enterprise is a government actor in this context has held that they are not.

Alternatively, Plaintiffs fail to state a claim on the merits of their due process claim. Plaintiffs received proper notice and an opportunity to be heard as prescribed under Rhode Island law.

ARGUMENT

I. FHFA AS CONSERVATOR IS NOT A GOVERNMENT ACTOR FOR CONSTITUTIONAL PURPOSES

Plaintiffs contend that "FHFA is a government agency and did not lose its governmental status by becoming the so-called 'conservator' of Fannie Mae." AOB 22. Plaintiffs' contention is incorrect. FHFA is a single agency that acts in two distinct capacities. In one capacity—as a financial regulator—FHFA's actions *are* deemed governmental for constitutional purposes. In its second capacity—as Conservator for a *private* corporation (Fannie Mae), overseeing Fannie Mae's exercise of a *private* right to foreclose non-judicially—FHFA's actions *are not*

deemed governmental for constitutional purposes. Here, FHFA is alleged to have acted solely in its second capacity as Conservator. SA005-9 ¶¶23-40. FHFA as Conservator stepped into Fannie Mae's *private* shoes and assumed its status as a *private* actor. Plaintiffs primarily rely on *Sisti* to support their contrary position, AOB 14-15, 18-23, but that decision misreads and misapplies Supreme Court precedents, relying on flawed logic untethered to statutory or decisional authority.

A. FHFA as Conservator Assumes Fannie Mae's Private Status

In its capacity as Conservator, FHFA succeeded to Fannie Mae's rights and powers, as well as those of its shareholders, boards of directors, and management. 12 U.S.C. § 4617(b)(2)(A)(i); *see also* SA006 ¶28. Fannie Mae's officers and employees conduct its day-to-day business activities under the oversight of the Board of Directors. Upon the inception of conservatorship, FHFA as Conservator reconstituted the Board and provided for it to exercise the functions necessary to oversee the day-to-day business of the company. *See* SA005 ¶26. Consequently, any exercise during conservatorship of Fannie Mae's pre-existing private powers, such as the power to conduct non-judicial foreclosures like the ones at issue here, does not involve any governmental function and does not make the Conservator a government actor.

O'Melveny & Myers makes this clear. In *O'Melveny*, the Supreme Court construed the similar statute governing FDIC receiverships[2] as "indicat[ing] that the FDIC as receiver 'steps into the shoes' of the [pre-existing institution], obtaining the rights 'of the [] institution' that existed prior to receivership." 512 U.S. at 86.[3] As a district court in this circuit later explained, this is because "when the FDIC is acting as a receiver it is performing a function normally accomplished by a private entity rather than a federal agency. As a receiver, the FDIC does not act on behalf of the United States government, and it does not perform any function unique to the federal government. Instead, it acts on behalf of the failed bank ...." *Schock v. FDIC*, 118 F. Supp. 2d 165, 169-70 (D.R.I. 2000); *see also Ameristar Fin. Servicing Co., LLC v. United States*, 75 Fed. Cl. 807, 812 (2007) (holding that, "as [a bank's] conservator, the FDIC 'stepped into the shoes' of [the bank] ... and was not acting as the United States"). Indeed, this Court has recognized that "'Corporate' FDIC"—i.e., FDIC as regulator—"and 'Receiver' FDIC are *separate and distinct legal entities*." *FDIC v. Roldan Fonseca*, 795 F.2d 1102, 1109 (1st Cir. 1986) (emphasis added). Accordingly, the appointment of a

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[2] 12 U.S.C. § 1821(d)(2)(A) ("The Corporation shall, as conservator or receiver, and by operation of law, succeed to ... all rights, titles, powers, and privileges of the insured depository institution ....).

[3] Because their statutory schemes are similar, courts routinely look to FDIC precedent when deciding FHFA cases. *See, e.g.*, *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 605 (D.C. Cir. 2017).

federal agency as conservator or receiver of a financial institution means that the agency, when overseeing the business affairs of the entity in conservatorship or receivership, assumes that entity's private status.

Shortly before *O'Melveny* was issued, the Fifth Circuit articulated substantially the same reasoning, holding that another federal agency acting as receiver for a failed bank—the Resolution Trust Corporation ("RTC")—was not a government actor for constitutional purposes. *United States v. Beszborn*, 21 F.3d 62, 68 (5th Cir. 1994).[4] In *Beszborn*, the RTC receiver successfully pursued an award of punitive damages against former officers and directors of the bank. *Id.* at 67. Later, when the Department of Justice brought criminal charges against the same individuals concerning the same conduct, they argued that the Double Jeopardy Clause barred the prosecution because the RTC was part of the government, making DOJ's prosecution a constitutionally barred second sovereign attempt to punish the same wrong.

The Fifth Circuit rejected that argument, explaining that "[t]he RTC as receiver of an insolvent financial institution *stands in the shoes of the bank*" and concluding that "the *RTC stands as a private, non-governmental entity, and is not the Government* for purpose of the Double Jeopardy Clause." *Id.* at 68 (emphases added). Other circuits have adopted *Beszborn*'s analysis. *United States v. Heffner*,

[4] The Fifth Circuit issued *Beszborn* on April 18, 1994; the Supreme Court handed *O'Melveny* down on June 13 of that year.

85 F.3d 435, 439 (9th Cir. 1996) (relying on *Beszborn* in holding that "RTC … as receiver is not the federal sovereign"); *United States ex rel. Petras v. Simparel, Inc.*, 857 F.3d 497, 503-04 (3d Cir. 2017) (applying *Beszborn* in holding that the Small Business Administration, acting as receiver, "did not qualify as the Government").

Likewise, HERA provides that FHFA as Conservator—by operation of law, upon the inception of conservatorship—succeeds to "all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director." 12 U.S.C. § 4617(b)(2)(A)(i). Thus, as the D.C. Circuit explained in holding that FHFA as Conservator was not a government actor for purposes of a constitutional claim, HERA "evinces Congress's intention to have the FHFA step into Fannie Mae's private shoes" and "shed[] its government character." *Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017) (alteration in original) (citation omitted) (dismissing a *Bivens* claim). That court held that after the inception of conservatorship, both FHFA as Conservator and Fannie Mae were private actors for constitutional purposes: "[W]hile the FHFA's status changed" from governmental to private, the private "status of Fannie Mae, as the 'shoes' into which the FHFA stepped, did not." *Id.*

Other circuits agree, applying *O'Melveny* to hold that FHFA as Conservator is not a government actor for a variety of purposes. For example, the Fourth

Circuit held that because the Conservator assumes the Enterprises' private status, it is not a government actor for statute-of-limitation purposes. *Meridian Invs., Inc. v. Freddie Mac*, 855 F.3d 573, 579 (4th Cir. 2017). That decision affirms a district court's holding—relying expressly on *O'Melveny*—that "when a federal [entity] acts as a conservator, in the interests of the party in conservatorship, that [entity] *does not act as the government*." *Meridian Invs. Inc. v. Freddie Mac*, No. 1:15-cv-1463, 2016 WL 795454, at *2 (E.D. Va. Mar. 1, 2016) (emphasis added). In affirming, the Fourth Circuit relied on *O'Melveny*'s reasoning, though it did not directly cite the case, holding that "as conservator[, FHFA] *steps into Freddie Mac's shoes, shedding its government character and also becoming a private party*." 855 F.3d at 579 (emphasis added).

Similarly, the Ninth Circuit adopted *O'Melveny*'s reasoning (albeit without expressly citing the case) in holding that, for purposes of the False Claims Act, conservatorship "places FHFA in the shoes of Fannie Mae and Freddie Mac, and gives the FHFA *their* rights and duties, not the other way around." *United States ex rel. Adams v. Aurora Loan Servs., Inc.*, 813 F.3d 1259, 1261 (9th Cir. 2016) (emphasis in original).

Under *O'Melveny* and its progeny, therefore, the fact that FHFA is a federal agency is irrelevant here. Plaintiffs' allegations as to FHFA concern only acts taken in its capacity as Conservator of a private corporation—Fannie Mae—not as

a federal regulatory agency. *See* SA005-9 ¶¶23-40. Plaintiffs neither allege nor could allege that FHFA, in connection with the foreclosure at issue, exercised any power or authority beyond the private contractual rights it inherited as Fannie Mae's statutory successor. *See* 12 U.S.C. § 4617(b)(2)(A)(i).

Indeed, the vast majority of federal courts to have reached the issue have held that FHFA as Conservator is *not* a government actor for constitutional purposes, relying on *O'Melveny*'s reasoning. The district court decision in *Herron* (which the D.C. Circuit affirmed) was one of the first; many others have since adopted its analysis. There, the court extensively analyzed *O'Melveny*, *Beszborn*, and other similar cases before concluding that a "federal agency [acting] in its guise as a conservator or receiver of a private corporation is not a government actor," and that because "FHFA stepped into the shoes of Fannie Mae[,] FHFA as conservator for Fannie Mae is not a government actor." *Herron v. Fannie Mae*, 857 F. Supp. 2d 87, 94-95 (D.D.C. 2012), *aff'd*, 861 F.3d 160 (D.C. Cir. 2017); *see also Parra v. Fannie Mae*, No. 13-cv-04031, 2013 WL 5638824, at *3 (C.D. Cal. Oct. 16, 2013) ("When FHFA 'serves as conservator,' it 'step[s] into the shoes of the private corporation, Fannie Mae,'" and therefore "does not qualify as a government actor [for Fifth Amendment purposes]." (citation omitted)); *Fannie Mae v. Mandry*, No. 12-cv-13236, 2013 WL 687056, at *5 (E.D. Mich. Feb. 26, 2013) ("FHFA [is] not [a] government actor[] that can be held liable for [a] Fifth

Amendment due process violation."); *Freddie Mac v. Shamoon*, 922 F. Supp. 2d 641, 645 (E.D. Mich. 2013) ("FHFA, as conservator, merely 'steps into the shoes' of Freddie Mac, a private corporation.").

Plaintiffs' attempt to distinguish *O'Melveny* because it involved "a tort claim," and a "failed savings and loan unlike a GSE such as Fannie Mae," is unpersuasive. AOB 14, 18; *see also* Amici Br. 13 (limiting *O'Melveny* as relevant "for purposes of determining the choice of law"). *O'Melveny* articulates its "stepping in the shoes" analysis as a general principle not limited to tort. And HERA is substantively identical to FIRREA, the federal statute governing the receivership at issue in *O'Melveny*.[5] As noted above, other circuits have relied on *O'Melveny* in determining whether federal conservators or receivers were governmental or private actors in cases involving non-tort claims (including constitutional claims) and various federal receivership/conservatorship statutes (including HERA). *See, e.g.*, *Herron*, 861 F.3d at 169 (constitutional case: HERA "evinces Congress's intention to have the FHFA step into Fannie Mae's private shoes."); *Adams*, 813 F.3d at 1260-61 (False Claims Act case: the conservatorship "places FHFA in the shoes of Fannie Mae and Freddie Mac."); *Resolution Tr. Corp. v. Diamond*, 45 F.3d 665, 670 (2d Cir. 1995) (contract case: "the RTC, like

[5] 12 U.S.C. § 1821(d)(2)(A)(i).

the FDIC in *O'Melveny*, steps into the shoes of another entity" when "the RTC does [not] exercise its federally-granted power.").

B. Plaintiffs' Reliance on *Sisti* Fails

Plaintiffs reject all of the on-point authority described above and instead argue that "U.S. Supreme Court precedent as outlined in the *Sisti* decision require this Court to find" that FHFA as Conservator is a government actor. AOB 11; *id.* 14-15, 18-22. Not so. *Sisti* is an extreme outlier that incorrectly disregards *O'Melveny*'s application—and, necessarily, the application of other receivership cases such as *Beszborn*—to FHFA as Conservator.[6] The *Sisti* decision also misinterprets an irrelevant holding in *FDIC v. Meyer*, 510 U.S. 471 (1994), as indicating that FHFA as Conservator is a government actor. Moreover, *Sisti* cites three court decisions holding that FHFA was a government actor for non-constitutional purposes for support, but those cases are inapposite here.

[6] One other tribunal—a single judge of the Court of Federal Claims—has adopted the *Sisti* court's erroneous analysis, holding that FHFA as Conservator qualifies as the United States for Tucker Act jurisdictional purposes. *Fairholme Funds, Inc. v. United States*, 147 Fed. Cl. 1 (2019), *appeal docketed*, No. 20-01912 (Fed. Cir. June 18, 2020). That decision is currently on interlocutory appeal in the Federal Circuit; on the question of the Conservator's status, it suffers from all the infirmities identified in this brief. In several substantively identical cases, the same judge issued decisions articulating the same analysis—always relying on *Sisti* as support. But even that court rejected *Sisti*'s holding that the Enterprises are government actors. *Fairholme Funds, Inc.*, 147 Fed. Cl. at 33.

1. *Sisti* Erroneously Disregards *O'Melveny*'s Application to FHFA as Conservator

The *Sisti* court incorrectly held that the *O'Melveny* analysis does not apply to FHFA as Conservator. 324 F. Supp. 3d at 284; *see also* AOB 14-15. The court reasoned that *O'Melveny* applies only to receivers—not conservators—supposedly because statutes such as HERA and the closely analogous statute governing FDIC/RTC receiverships and conservatorships distinguish conservators from receivers by mandating that conservators owe certain fiduciary duties that receivers do not. *Id.* at 282-84; *see also* AOB 18-23. That is not correct.

The *Sisti* court's reasoning on this score was that FHFA as Conservator could not step *into* Fannie Mae's shoes because, according to the court, FHFA owes fiduciary duties *to* Fannie Mae. 324 F. Supp. 3d at 282-83. The statute directly refutes that reasoning. HERA specifies that FHFA as Conservator succeeds to "all rights, titles, powers, and privileges of" Fannie Mae under 12 U.S.C. § 4617(b)(2)(A). That is, by the statutory text itself, FHFA as Conservator steps into Fannie Mae's shoes. Moreover, the text of that same provision refutes *Sisti*'s distinction of conservatorship from receivership. FHFA's succession to Fannie Mae's rights and powers occurs regardless of whether FHFA is designated to act as "conservator or receiver." *Id.* Indeed, the *Sisti* court acknowledged this point, 324 F. Supp. 3d at 283 n.10, and it should have been dispositive.

The *Sisti* court nevertheless erroneously distinguished FHFA as Conservator from FHFA as receiver, concluding that "just because both conservatorship and receivership are, at times, addressed in the same section does not mean that the language must be construed the same in both contexts." *Id.* Neither of the substantive reasons the court offers supports this conclusion.

First, the *Sisti* court asserts that "other provisions give different powers depending on whether the federal entity is exercising conservatorship or receivership powers." *Id.* But this undermines rather than supports the court's analysis. This case concerns nonjudicial foreclosures, a Fannie Mae power that FHFA as Conservator can exercise only by virtue of having succeeded to it under section 4617(b)(2)(A). And, as noted, that provision's language leaves no doubt that Congress bestowed the very same powers on FHFA regardless whether it acts as conservator or receiver. If Congress had intended section 4617(b)(2)(A) to give FHFA "different powers" as a conservator versus as a receiver, it would have done so expressly *in section 4617(b)(2)(A)*. *See United Seniors Ass'n, Inc. v. Philip Morris USA*, 500 F.3d 19, 24 (1st Cir. 2007) ("Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another."). But Congress drew no such distinctions between conservatorship and receivership in the relevant provision here.

Second, according to the *Sisti* court, "the fact that the statutes use the disjunctive 'or' and not the conjunctive 'and' when addressing the different powers in the same provision" proves its point. 324 F. Supp. 3d at 283 n.10. This conclusion is also incorrect. The statute's unambiguous language conveys that *regardless* of whether FHFA acts as conservator "or" receiver, it succeeds to *the same* rights and duties—those "of the regulated entity" and "any stockholder, officer, or director." 12 U.S.C. § 4617(b)(2)(A).

It is true, as Plaintiffs note (AOB 20-21), that HERA grants FHFA certain "[p]owers as conservator," including the power to take "such action as may be necessary … to put the regulated entity in a sound and solvent condition." 12 U.S.C. § 4617(b)(2)(D)(i). But powers are not duties, and the "sound and solvent" power is permissive, not mandatory—the Conservator "may," not must, take such actions. *Id*. Congress understood the distinction when drafting HERA. The very next subpart—section 4617(b)(2)(E), sets forth certain mandatory powers FHFA must exercise as receiver, specifying that "the Agency *shall* place the regulated entity in liquidation …." 12 U.S.C. § 4617(b)(2)(E) (emphasis added). Thus, section 4617(b)(2)(D)—the provision Plaintiffs cite—cannot reasonably be construed as creating a fiduciary duty.

Separately, the *Sisti* court's analysis depends upon flawed logic. The key proposition underlying the court's erroneous conclusion—drawn from a law

journal note, Goldman, *The Indefinite Conservatorship of Fannie Mae and Freddie Mac Is State Action*, 17 J. Bus. & Sec. L. 11, 26 (2016)[7]—is that "[c]onservators, unlike receivers, have a fiduciary duty running to the corporation itself," whereas receivers purportedly succeed to only the fiduciary duties of the entity in receivership. *Sisti*, 324 F. Supp. 3d at 283. The note's rationale—which *Sisti* adopts in a footnote—is that the U.S. Treasury's ownership of warrants to purchase Fannie Mae shares at a predetermined price makes it a "dominant shareholder," and "[d]ominant shareholders are widely recognized to have fiduciary duties running to the *corporation*, unlike to creditors, as is the case for [a] receiver." Goldman, *The Indefinite Conservatorship* at 26; *Sisti*, 324 F. Supp. 3d at 283 n.9 (citing *id*.).

Treasury owns warrants, not common shares; it is not a voting shareholder at all. Regardless, whether Treasury might, as a purportedly dominant shareholder, owe fiduciary duties to the Enterprises is not relevant to whether FHFA as Conservator (which does not own warrants or shares, and therefore is not a dominant shareholder) owes such duties. Both the note and *Sisti* assume their

[7] Plaintiffs argue that "[t]he contention that [the note] is the only thing Judge McConnell cited to support [his] reasoning in *Sisti*, ... is plainly and clearly false." AOB 19. But Plaintiffs do not direct this Court to the other authority supposedly cited. There is none. The note is the only support for the court's contention that conservators have fiduciary duties to the entity in conservatorship.

desired conclusion, reasoning in substance that because (1) one government agency (Treasury) purportedly owes fiduciary duties to the Enterprises, and (2) FHFA is also a government agency, (3) FHFA must also owe fiduciary duties to the Enterprises when it acts as Conservator, which (4) supposedly makes it a government actor. This chain of reasoning could be potentially valid only if FHFA as Conservator retained the Agency's governmental status—that is the only plausible way that whatever fiduciary duties Treasury may have assumed could be imputed to FHFA as Conservator. But whether the Conservator is a governmental or private actor is the *question* the *Sisti* court and the note are trying to answer; it cannot also be an *assumed premise*.[8]

Plaintiffs contend that the *Sisti* analysis is correct because courts have held "as a receiver, the FDIC owes a fiduciary duty to the Bank's creditors." AOB 19-20 (quoting *Golden Pacific Bancorp v. FDIC*, 375 F.3d 196 (2d Cir. 2004)). That may be,[9] but it is not the premise upon which *Sisti* rests, which is that FHFA as Conservator purportedly owes a fiduciary duty to the *corporation*, while receivers

[8] Other statements in the note also reflect mistaken reasoning. For example, the note asserts both that "[c]onservators owe fiduciary duties to the corporation," and that this relationship means the Enterprises are "effectively agents of the FHFA." Goldman at 27. The two assertions are inconsistent: as a matter of black-letter law, it is the *agent* that owes fiduciary duties to the *principal*, not vice-versa. *See, e.g.*, Restatement (Third) of Agency § 8.01 (2020).

[9] Plaintiffs claim FHFA contends "that there is no case law supporting the fact that a receiver owes a duty to creditors," but point to nothing FHFA has ever posited on the point. AOB 19. Whether a receiver owes a duty to creditors is not relevant here, and FHFA therefore takes no position on the question.

supposedly do not. *Sisti*, 324 F. Supp. 3d at 283. Plaintiffs identify no case but *Sisti* adopting that analysis, which (as discussed above) lacks any basis in the underlying statute and is incorrect.

Amici's separate argument that "*O'Melveny*'s application of the 'steps into the shoes' rule" "cannot apply to FHFA's actions taken after it seized control of the [Enterprises] because the succession clause can only apply to actions that occurred before FHFA's seizure of the [Enterprises]" is also incorrect. Amici Br. 14. The action challenged here—nonjudicial foreclosure on Plaintiffs' properties pursuant to the power-of-sale clause in their mortgages—is a Fannie Mae power (not some freestanding government power) to which FHFA as Conservator succeeded under section 4617(b)(2)(A). That section states that FHFA succeeds to "all" of Fannie Mae's "rights, titles, powers, and privileges," terms that encompass, as of the inception of conservatorship, FHFA's future exercise of those "rights, titles, powers, and privileges." 12 U.S.C. § 4617(b)(2)(A)(i). Amici do not cite any case adopting their reasoning, and Defendants are not aware of any. Indeed, *Herron* and its progeny discredit the argument.

2. *Sisti* Misinterprets *Meyer*

Sisti also purports to rely on the Supreme Court's *FDIC v. Meyer* decision, which involved an attempt to assert a *Bivens* claim against the Federal Savings and

Loan Insurance Corporation ("FSLIC"),[10] as receiver of a failed bank, to support the proposition that FHFA as Conservator is a government actor. *Sisti*, 324 F. Supp. 3d at 281-82 (citing *Meyer*, 510 U.S. 471). That reliance is misplaced. As an initial and dispositive matter, *Meyer* is not "on point," AOB 14, because it did not address any "government actor" question—i.e., whether FSLIC, as receiver, constituted a government actor for purposes of a constitutional claim. FSLIC asserted no such defense before the Supreme Court, so, naturally, the Supreme Court neither considered nor issued any holding on the point.

Meyer holds that a *Bivens* claim cannot be validly pled against a government agency, but must instead be pled against individual government officers. 510 U.S. at 485-86. Because a *Bivens* claim necessarily requires a defendant who is subject to constitutional constraints (but has acted outside the scope of its authority), the Supreme Court first considered whether sovereign immunity would preclude jurisdiction over FSLIC. *Id.* The court determined that FSLIC's sue-and-be-sued clause waived the sovereign immunity a governmental defendant would ordinarily enjoy. *Id.* From that, the *Sisti* court reasoned that "*Meyer* means that the [FSLIC] is a government actor when acting as a receiver for constitutional claims, as only government entities can have (and thus waive) sovereign immunity." *Sisti*, 324 F. Supp. 3d at 282.

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[10] FDIC was the statutory successor to FSLIC. *Meyer*, 510 U.S. at 474 & n.1.

The *Sisti* court's reasoning was incorrect; the Supreme Court's discussion of the sovereign-immunity waiver in FSLIC's organic statute does not imply that FSLIC as receiver (or, by extension, FHFA as Conservator) qualifies as a government actor. To the contrary, the Supreme Court's analysis implies only that if it were possible to plead a *Bivens* claim against FSLIC *at all*, jurisdiction would be present *regardless* of whether FSLIC acted in a private or governmental capacity—if FSLIC acted in a private capacity, no waiver of sovereign immunity would be necessary, while if FSLIC acted in a governmental capacity, the statutory waiver would apply.

As the Supreme Court explains, "determin[ing] that Meyer's claim falls within the sue-and-be-sued waiver ... does not end" the inquiry. *Meyer*, 510 U.S. at 483. The Supreme Court specifically rejects the proposition "that Meyer had a [viable] cause of action for damages against FSLIC *because* there had been a waiver of sovereign immunity." *Id.* (emphasis in original). Ultimately, the Supreme Court disclaims any need to determine whether the FSLIC receiver qualified as a government actor, expressly declining to "reach the merits of [plaintiff's] due process claim," because as a federal agency rather than an individual federal agent, FSLIC could not be liable on the *Bivens* claim in any event. *Id.* at 485-86 & n.12. Whether the FSLIC receiver qualified as a

government actor is an issue going to "the merits of [the] due process claim"; it is therefore an issue the Supreme Court "d[id] not reach." *Id.* at 486 n.12.

Later cases confirm that *Sisti*'s interpretation of *Meyer* is not correct. By the *Sisti* court's reasoning, any decision issued after *Meyer* that addresses whether an FDIC/RTC receiver was a government actor would have to hold that it was, based on the waiver of sovereign immunity in the sue-and-be-sued clause. The *Sisti* court itself states that "[t]here is merit" in the argument that "*Meyer* means that the FDIC is a government actor when acting as a receiver." *Sisti*, 324 F. Supp. 3d at 282. But post-*Meyer* appellate decisions are flatly inconsistent with *Sisti*'s analysis. *Beszborn*, 21 F.3d at 68 (holding that an RTC receiver "stands as a private, non-governmental entity, and *is not the government*" for purposes of the Double-Jeopardy clause (emphasis added)); *Heffner*, 85 F.3d at 439 (same). In sum, *Meyer* is beside the point—the decision "did not purport to determine the [governmental or private] status of the FDIC when ... taking over a failed bank as receiver ...." *United States v. Ely*, 142 F.3d 1113, 1121 (9th Cir. 1998).

But even if this Court were to assume *Meyer* somehow suggests that because FDIC's receivership statute has a sue-and-be-sued clause, FDIC as receiver must be a government actor, that would not mean that *FHFA as Conservator* is a government actor. *See Sisti*, 324 F. Supp. 3d at 282 (asserting that "[b]ecause only federal entities can waive sovereign immunity, it logically follows that FHFA-as-

conservator is a government actor"). Unlike the FDIC statute, HERA *does not* contain a sue-and-be-sued clause. The only sue-and-be-sued clause applicable here appears in the private Enterprises' charters, not in HERA; it applies to the Conservator only by way of succession. The *Sisti* court never explains how the Conservator's succession to a *private* entity's sue-and-be-sued clause could waive a *sovereign* right or make the Conservator a *governmental* actor. Rather, the Conservator's succession to the rights and duties of a private actor (Fannie Mae) confirms that the Conservator is also a private actor.

Plaintiffs' and Amici's contention that *Meyer* is the controlling law on the issue is wrong. AOB 14; Amici Br. 9-14. This Court should follow the reasoning in *O'Melveny*, *Beszborn*, *Herron*, *Meridian*, *Adams*, and the multiple district court cases holding that federal financial-agency conservators and receivers are not government actors for various purposes, including purposes of constitutional claims.

3. Decisions Deeming the Conservator Governmental for Other Purposes and in Other Contexts Are Not Relevant Here

Plaintiffs tout the fact that *Sisti* cites three decisions in which courts held that FHFA was a governmental entity for other purposes, arguing that this Court should hold the same here, AOB 17-18. *Sisti*, 324 F. Supp. 3d at 282 n.8 (citing *FHFA v. Countrywide Fin. Corp.*, 900 F. Supp. 2d 1055 (C.D. Cal. 2012); *FHFA v. Royal*

Bank of Scotland Grp. PLC, No. 3:11-cv-01383, 2012 WL 3580522 (D. Conn. Aug. 17, 2012); and *Nevada ex rel. Hagar v. Countrywide Home Loans Serv., LP*, No. 3:10-cv-419, 2011 WL 484298, at *3 (D. Nev. Feb. 4, 2011)). Not so. Those cases all involved non-constitutional, statutory-based analysis, with the courts often expressly distinguishing the constitutional analysis that applies here.

In *Countrywide*, the court concluded that an ambiguous statute of limitations provision governing litigation brought by the Conservator should be interpreted in FHFA's favor. 900 F. Supp. 2d at 1066. The court decided the issue as a matter of statutory interpretation, discerning Congress's intent from the interplay among various provisions of HERA. *Id.* The *Countrywide* court plainly considered the question it faced to be different from that presented in this case, noting that it would reach the same conclusion "regardless of whether the FHFA is a government [actor] for purpose of [constitutional] claims." *Id*. at 1066 n.9 (citing *Herron*, 857 F. Supp. 2d at 87).

In *Royal Bank*, the court held that FHFA Conservator was not subject to a mandatory discovery stay under the Private Securities Litigation Reform Act ("PSLRA"). The court again based its decision on statutory-interpretation principles, considering the purpose of the statute, reasoning that "the concerns motivating Congress in enacting the PSLRA are not present here," and concluding that FHFA's case was not a "private action" as that term is used in the PSLRA.

2012 WL 3580522, at *2. Confirming that it was not applying the constitutional principles at issue here, the *Royal Bank* court denied a motion to reconsider its ruling after the *Herron* decision was issued, emphasizing the differing legal context of the two holdings: "*Herron* does not address the meaning or scope of the term 'private action' as used by Congress in the PSLRA. Thus, *Herron* does not alter the court's conclusion that where FHFA is 'bringing this action pursuant to its Congressional authorization under HERA,' the action 'is not a private action under the PSLRA.'" Order re Defendants' Motion for Reconsideration at 3, *Royal Bank*, No. 11-CV-01383 (D. Conn. Sept. 30, 2013), ECF No. 201.

Finally, in *Hagar*, the court held that it had subject-matter jurisdiction in part because FHFA as Conservator intervened in the case and was "a federal agency with the right to remove." 2011 WL 484298, at *3. For support, the court cited a HERA provision that gave the Conservator "removal" authority "[i]n the event of any appealable judgment." *Id.* (citing 12 U.S.C. § 4617(b)(11)(B)(i)). Although the *Hagar* court also cited the general federal-agency removal provision, 28 U.S.C. § 1442(a)(1), that does not make the Conservator a government actor for constitutional purposes. First, the discussion is dicta; the Conservator-specific removal provision was sufficient. Second, even if § 1442(a)(1) had been the sole ground for removal, that would not make FHFA as Conservator a government actor. The FDIC as receiver removes cases based on § 1442(a)(1), *e.g.*, *Dernis v.*

Amos Financial, 701 F. App'x 449 (6th Cir. 2017), but, as described above, FDIC receivers are not government actors.

Thus, *Countrywide*, *Royal Bank*, and *Hagar* are inapposite here. FHFA as Conservator is not a government actor, and the Court should therefore affirm the judgment as to FHFA.

II. FANNIE MAE IS NOT A GOVERNMENT ACTOR FOR CONSTITUTIONAL PURPOSES

Plaintiffs argue that Fannie Mae is a government actor by virtue of the control FHFA exercises as its Conservator. *E.g.*, AOB 9. Plaintiffs' premise is not correct, as described above: The Conservator is not a government actor. But even if the Court were to assume that FHFA as Conservator could somehow be deemed a government actor, that would not make Fannie Mae one under the controlling precedent, as virtually every court to have considered the issue has held.

As Plaintiffs agree, AOB 11, the Supreme Court's *Lebron* decision provides the test for when an otherwise private, governmentally created corporation can be deemed a government actor for purposes of constitutional claims. That decision holds that where "[1] the Government creates a corporation by special law, [2] for the furtherance of governmental objectives, and [3] retains for itself *permanent authority* to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." 513 U.S. at 399 (emphasis added).

The parties do not contest the first two elements of the *Lebron* analysis. The sole issue here is whether the government has permanent control over Fannie Mae during conservatorship. It does not. Before conservatorship, Fannie Mae was a private actor;[11] and during conservatorship, Fannie Mae maintains its private status for constitutional purposes because the government does not have permanent, structural control over Fannie Mae. Plaintiffs' contrary arguments fail.

A. Conservatorship Does Not Convert Fannie Mae into a Government Actor

1. Under *Lebron*, the Conservator Does Not Exert Permanent, Structural Control over Fannie Mae

In *Lebron*, the Supreme Court held that Amtrak is a governmental entity because "Amtrak is not merely in the *temporary control* of the Government (as a private corporation whose stock comes into federal ownership might be)," but rather is under permanent government control because "the Government retain[ed] for itself *permanent authority* to appoint a majority of the directors." 513 U.S. at 398-99 (emphases added). The government retained permanent authority to

[11] The Ninth Circuit unequivocally held that similarly situated, pre-conservatorship Freddie Mac was not a government actor for purposes of a constitutional claim. *Am. Bankers Mortg. Corp. v. Freddie Mac*, 75 F.3d 1401, 1406-09 (9th Cir. 1996) (noting that the majority of Freddie Mac's board of directors is elected by voting common shareholders). There is no material distinction between pre-conservatorship Freddie Mac and Fannie Mae. 12 U.S.C. §1723(b) ("The Federal National Mortgage Association shall have a board of directors, which shall consist of 13 persons ... who shall be elected annually by the common stockholders.").

appoint a majority of Amtrak's directors because under Amtrak's statutory charter, "six of the corporation's eight externally named directors (the ninth is named by a majority of the board itself) are appointed directly by the President of the United States." *Id.* at 397. Thus, *Lebron* equates permanent government control with the presence of structural elements that not only give the government ongoing, practical control over the corporation's affairs, but that also cannot be altered except by a further act of Congress.

Plaintiffs contend that if control is "indefinite," it is "thus permanent." AOB 22. That is wrong, as *Lebron*'s endorsement of the earlier *Regional Rail Reorganization Act Cases* makes clear. In *Regional Rail*, the Supreme Court held that another federally supported railway subject to extensive government control, Conrail, was not a federal actor—because the government's control was not structurally permanent:

> [Amtrak] also invokes ... the *Regional Rail Reorganization Act Cases* [], which found ... Conrail[] not to be a federal instrumentality, despite the President's power to appoint, directly or indirectly, 8 of its 15 directors ... . But we specifically observed in that case that ... "*[f]ull voting control ... will shift to the shareholders if federal obligations fall below 50% of Conrail's indebtedness*."

Lebron, 513 U.S. at 399 (citing *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 152 (1974) (emphasis added)). Notably, voting control would shift to the Conrail shareholders only if federal financial support fell below a certain level—

meaning that even though the government's control over Conrail had no obvious or fixed end date, control could shift back to the shareholders without further legislation. Thus, the government's control, though functionally complete, was indefinite and temporary—i.e., not permanent.

In *Lebron*, the Supreme Court distinguished the *Regional Rail* holding that Conrail was not a government actor from the holding that Amtrak was a government actor on the ground that the government's authority to appoint the majority of Conrail's board of directors was contingent on the continuation of federal financial support—and therefore could end without further legislation—rather than *permanently established* in Conrail's organic statute. *Lebron*, 513 U.S. at 399. Even though there was no certainty as to when the federal financial support would end, and therefore no certainty whether (and, if so, when) voting control would ever shift back to the Conrail shareholders, the Supreme Court reaffirmed its holding that Conrail was not a government actor in the context of a constitutional claim. *Id.*

Here, like the financial-assistance arrangement in *Regional Rail* but unlike the charter provisions in *Lebron*, conservatorship does not grant FHFA permanent, structural control over Fannie Mae. As an initial matter, Fannie Mae's charter does not give any government body the right to appoint Fannie Mae's directors. Instead, but for conservatorship, "[Fannie Mae's] board of directors ... shall be

elected annually by the common stockholders." 12 U.S.C. § 1723(b). Although HERA gives FHFA the right to appoint Fannie Mae's directors during conservatorship, FHFA's authority to do so will end automatically when the conservatorship terminates. And HERA's statutory framework makes clear that bringing the conservatorship to its end requires no further legislation. In HERA, Congress empowered FHFA's Director to appoint the Agency to act as Fannie Mae's conservator for purposes of "reorganizing, rehabilitating, or winding up [its] affairs." 12 U.S.C. § 4617(a)(2).

These statutory provisions naturally limit the conservatorship to a certain resolution—"reorganizing, rehabilitating, or winding up [Fannie Mae's] affairs"; they do not grant FHFA permanent authority. As the Sixth Circuit explained, "Congress, by statute, empowered the FHFA to become conservator for Fannie Mae for the limited purpose of 'reorganizing, rehabilitating, or winding up [its] affairs.' *This is an inherently temporary purpose*." *Rubin v. Fannie Mae*, 587 F. App'x 273, 275 (6th Cir. 2014) (emphasis added). This contrasts starkly with *Lebron*, where the Supreme Court focused solely on the permanent, structural control the government retained under Amtrak's charter. 513 U.S. at 399.

Notably, the Fourth Circuit recently identified conservatorship as a quintessential example of temporary control that does not convert a private corporation into a government actor: "In *Lebron*, the Supreme Court explained

that entities that are both created and controlled by the federal government may be considered federal entities that are subject to the limitations of the Constitution .... *Temporary control—as when the federal government steps in as a conservator—is not sufficient*." *Kerpen v. Metro. Washington Airports Auth.*, 907 F.3d 152, 158-59 (4th Cir. 2018) (citing *Lebron*, 513 U.S. at 398) (emphasis added). The Third Circuit held similarly, ruling that under *Lebron* "the requisite control of a corporation does not exist ... where the Government is acting as a conservator." *Sprauve v. W. Indian Co. Ltd.*, 799 F.3d 226, 233 n.8 (3d Cir. 2015). Thus, the conservatorship is temporary under *Lebron* and does not convert Fannie Mae into a government actor.

2. The Weight of Authority Holds that the Enterprises Are Not Government Actors

Since the inception of conservatorship, more than 40 decisions have denied constitutional claims against the Enterprises; the majority of these cases involve foreclosure disputes, similar to this case. ADD12-16 (listing cases).

Two Courts of Appeals—the Sixth and D.C. Circuits—have ruled specifically that Fannie Mae and Freddie Mac are not government actors for purposes of constitutional claims while in conservatorship. The D.C. Circuit squarely held that conservatorship "does not transform Fannie Mae into a government actor" and dismissed a First Amendment *Bivens* claim. *Herron*, 861 F.3d at 169. Likewise, the Sixth Circuit held that the similarly situated "Freddie

Mac is not a government actor who can be held liable for violations of the Fifth Amendment's Due Process Clause." *Mik v. Freddie Mac*, 743 F.3d 149, 168 (6th Cir. 2014); *see also Rubin*, 587 F. App'x at 275. This issue has been litigated repeatedly in the Sixth Circuit, and multiple panels have rejected—without dissent—the argument that the Enterprises are government actors while in conservatorship.[12]

Two additional Courts of Appeals—the Fourth and Ninth Circuits—have applied *Lebron* to hold that the Enterprises are not government actors for other, statutory purposes. *See Meridian*, 855 F.3d at 579; *Adams*, 813 F.3d at 1261.

Moreover, dozens of district court decisions have reached the same conclusion in cases involving constitutional claims. ADD12-16 (listing cases). Indeed, two opinions, in addition to the underlying district court decision, acknowledged the contrary *Sisti* decision but declined to follow it. *Seals v. Carrington Mortg. Servs., LLC*, No. 5:20-cv-00044, 2020 WL 5067885, at *4 (N.D.W. Va. July 29, 2020); *Timm v. Freddie Mac*, No. 19-cv-17304, 2020 WL 3871208, at *3-4 (D.N.J. July 9, 2020).

Fannie Mae is not a government actor under *Lebron*, because it is not under the permanent, structural control of any government body.

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[12] *Bernard v. Fannie Mae*, 587 F. App'x 266, 271 (6th Cir. 2014); *Heibel v. Fannie Mae*, 581 F. App'x 543, 544 (6th Cir. 2014); *Freddie Mac v. Gaines*, 589 F. App'x 314, 316 (6th Cir. 2014).

B. Plaintiffs' and Amici's Contrary Arguments Fail

1. *American Railroads* Does Not Prove that the Conservatorship Constitutes Permanent Control

While Plaintiffs agree that *Lebron* requires permanent control, Plaintiffs contend that *Department of Transportation v. Association of American Railroads*, 575 U.S. 43 (2015), "qualified the third prong of the *Lebron* analysis" and requires the Court to analyze "the practical reality of federal control and supervision." AOB 11-12. *American Railroads* in no way undermines *Lebron*'s permanency requirement.

As an initial matter, the Supreme Court "does not normally overturn, or so dramatically limit, earlier authority *sub silentio*." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000). Indeed, the Supreme Court certainly did not do so here. Rather, in *American Railroads*, the Supreme Court reaffirms *Lebron* in response to the parties' dispute over the significance of Amtrak's "statutory directives that Amtrak 'shall be operated and managed as a for profit corporation' and 'is not a department, agency, or instrumentality of the United States Government.'" 575 U.S. at 43 (quoting § 24301(a)(2)-(3)). On that point, the Supreme Court held that "*Lebron* teaches that, for purposes of Amtrak's status as a federal actor or instrumentality under the Constitution, the practical reality of federal control and supervision prevails over Congress' disclaimer of Amtrak's governmental status." *Id.* at 55. *Lebron* and *American Railroads* together

demonstrate that permanent control means the government's control must be structural (embedded in the entity's charter) and permanent (legislative action would be necessary to eliminate the control), and that statutory provisions disclaiming governmental status are not determinative.

Plaintiffs and the *Sisti* court, citing *American Railroads*, mischaracterize HERA's provision confirming that the conservatorship is temporary as a mere "disclaim[er]" of permanence and, therefore, of government control. *Sisti*, 324 F. Supp. 3d at 280 & n.6; AOB 12-13, 15 (referring to the inherently temporary nature of the conservatorship as a "label"). Specifically, the *Sisti* court treated section 4617(a)(2)—which specifies that FHFA can be appointed Conservator only "for the purpose of reorganizing, rehabilitating, or winding up the affairs" of the entity in conservatorship—as "a congressional declaration that serves to disclaim the constitutional obligations of a government-created entity" by "disclaiming permanent control." 324 F. Supp. 3d at 280. That is not correct.

Section 4617(a)(2) is not a disclaimer. In fact, the *Sisti* court seems to acknowledge that point by admitting that section 4617(a)(2) "does not explicitly disclaim the [Enterprises]' status as federal entities as Amtrak's charter does," and noting that by enacting HERA, "Congress authorized a facially temporary conservatorship." *Id.* at 280-81 (citing *Lebron*, 513 U.S. at 400). That should have disposed of any "disclaimer" argument. But the *Sisti* court asserted that even

though section 4617(a)(2) is not formally a "disclaimer" of governmental status, its "language still has the same effect—under *Lebron*, 'permanent' government control is required, and here Congress is disclaiming permanent control." *Id.* That reasoning is erroneous because it conflates "disclaimers" of governmental status (i.e., statutorily applied labels) with substantive provisions that statutorily define the scope and extent of the Conservator's control. The former is irrelevant, while the latter is precisely what must be analyzed under *Lebron* to determine the answer to the government-actor question.

As *Lebron* shows, a congressional statement that a government-created corporation "will not be an agency or establishment of the United States," *Lebron*, 513 U.S. at 391 (citation omitted), is irrelevant if Congress has also enacted substantive provisions establishing that the government maintains permanent structural control over the corporation. But by the same token, statutory terms that make clear an entity is not subject to permanent, structural control are not, and do not function as, mere disclaimers; rather, they are dispositive, substantive provisions a court cannot discard under *Lebron*. And in this case, nothing in HERA grants FHFA as Conservator permanent, structural control over Fannie Mae, as the comparison with Amtrak's structure in *Lebron*, presented above, confirms.

Because there is no "disclaimer" in play here, the analysis of such statutory provisions in *American Railroads* is simply beside the point.

2. As a Matter of Law, the Conservatorship Is Temporary Under *Lebron*

Plaintiffs contend that the Court should focus "on the 'degree of control,'" and infer permanence from allegations that FHFA as Conservator maintains pervasive practical control over Fannie Mae. AOB 11-12, 18.

But such an analysis is irrelevant. As discussed, *Lebron* equates permanent government control with the presence of structural elements that cannot be altered except by act of Congress, such as statutory charter provisions entitling the President to appoint a majority of the entity's governing body. *Lebron*, 513 U.S. at 397-99. Unless accompanied by such structural permanence, even pervasive practical control over the corporation's affairs is insufficient.

As support for the assertion that pervasive practical control can substitute for permanent, structural control under *Lebron*, the *Sisti* court quotes this Court's statement in *Barrios-Velazquez v. Asociacion de Empleados del Estado Libre Asociado de P.R.*, 84 F.3d 487 (1st Cir. 1996), that "*Lebron* focused on the degree of control that the federal government had over Amtrak." 324 F. Supp. 3d at 279. However, this Court did not suggest that permanent, structural control need not be shown under *Lebron*. To the contrary, the Court specifically examined whether

"the Government of Puerto Rico ... retained *permanent* authority over the directors" of the entity at issue. 84 F.3d at 492 (emphasis added).

Indeed, the *Sisti* court erred because it treated the analysis of whether the government permanently controls Fannie Mae as a factual issue, as Plaintiffs do here. AOB 11-12, 22. The *Sisti* court concluded that the FHFA conservatorship must be deemed permanent because "[t]he government appoints all of the members of the [Enterprises'] boards of directors and controls every operational aspect of the entities. It owns all of the [Enterprises'] senior preferred stock and owns warrants to purchase 79.9% of their common stock. The government does not allow the [Enterprises] to pay dividends to shareholders; rather, they must be paid directly into the U.S. Treasury." 324 F. Supp. 3d at 280.

But that control is irrelevant because it is temporary. As the D.C. Circuit explained:

> While the conservatorship authorized the government to exercise substantial control over Fannie Mae, "that control is temporary, 'as a private corporation whose stock comes into federal ownership might be.'" *See Meridian Invs.*, 855 F.3d at 579 (quoting *Lebron*, 513 U.S. at 398, 115 S. Ct. 961). Thus, the government's indefinite but temporary control does not transform Fannie Mae into a government actor. *See Lebron*, 513 U.S. at 399, 115 S. Ct. 961 (citing *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 152 (1974)).

Herron, 861 F.3d at 169.

By the *Sisti* court's logic, every federal financial-institution conservatorship and receivership is necessarily "permanent" from its inception, because the conservator's or receiver's "practical control" is complete and indefinite. That conclusion is not tenable under *Lebron*, and no other federal court has ever adopted it.

The *duration* of the conservatorship is also inconsequential as a matter of law. The *Sisti* court held that Fannie Mae is a government actor because "the government can control Fannie Mae and Freddie Mac in perpetuity" because "the conservatorship will only end in one of two ways: the director of FHFA can decide to end the conservatorship, or it can appoint FHFA receiver." 324 F. Supp. 3d at 280; *see also* AOB 15. According to the court, "[t]his renders the government's control *effectively* permanent, and requires Fannie Mae and Freddie Mac to be held to 'the most solemn obligations imposed in the Constitution.'" 324 F. Supp. 3d at 280-81 (quoting *Lebron*, 513 U.S. at 397) (emphasis added). This holding is also incorrect. Such reasoning confirms that the conservatorship is *not* permanent. Whatever might be argued (or speculated) about the possible duration of the conservatorship, Fannie Mae is not subject to permanent control by the government, as HERA did not grant FHFA permanent authority to appoint a majority of Fannie Mae's directors, nor is any further legislation necessary in order for the conservatorship to end. In *Lebron*'s terms, Fannie Mae in conservatorship

is more similar to Conrail than to Amtrak.[13] "Thus, the government's indefinite but temporary control does not transform Fannie Mae into a government actor." *Herron*, 861 F.3d at 169.

Plaintiffs' similar arguments criticizing the duration of the conservatorship because it "continue[s] to exist well past its intended purpose[, rendering] Fannie Mae a state actor," fail. AOB 9; *see also id.* 8, 13. Plaintiffs are not in any position to accurately determine at what point the conservatorship has fulfilled its purpose such that the Enterprises are stable enough to leave conservatorship and can maintain their stability after conservatorship.

Sisti is the only decision to hold that Fannie Mae is a government actor for constitutional purposes due to the conservatorship. Plaintiffs cite a Michigan state court case, *Freddie Mac v. Kelley*, as another contrary decision that "reached a similar conclusion as *Sisti*." AOB 17 (citing *Freddie Mac v. Kelley*, No. 12000885AV, 2013 WL 3812051, at *5 (Mich. Cir. Ct. Feb. 21, 2013)). But the

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[13] Though the Supreme Court could not have known when it decided *Regional Rail*, the government's control over Conrail lasted 13 years. *Regional Rail*, 419 U.S. at 111; James Sterngold, *85% U.S. Stake in Conrail Sold for $1.6 Billion*, N.Y. Times (Mar. 27, 1987), http://www.nytimes.com/1987/03/27/business/85-us-stake-in-conrail-sold-for-1.6-billion.html?scp=1&sq=conrail&st=nyt (last visited Jan. 15, 2021). That is roughly one year longer than the Enterprises have been in conservatorship, yet no court ever deemed that period sufficiently permanent to convert Conrail into a government actor. *See Morin v. Consol. Rail Corp.*, 810 F.2d 720, 723 (7th Cir. 1987) (agreeing "with the Second Circuit that Conrail ... is not an entity of the federal government for purposes of the due process clause" even after 13 years of government funding).

decision was reversed on appeal. *Freddie Mac v. Kelley*, 858 N.W.2d 69 (Mich. App. 2014). The Michigan Court of Appeals corrected the decision and applied *Lebron* consistently with the federal decisions Defendants cite here (ADD12-16).

Plaintiffs also cite *Faiella v. Fannie Mae*, where this Court affirmed that Fannie Mae was a federal instrumentality for purposes of the *Merrill* doctrine, as being relevant. AOB 9-10 (citing 928 F.3d 141, 148 (1st Cir. 2019)). It is not. As this Court held, an entity can be a federal instrumentality for some purposes and not for others. *Faiella*, 928 F.3d at 148. Indeed, the tests "differ depending on the context." *Faiella v. Fannie Mae*, No. 16-CV-088-JD, 2017 WL 6375600, at *7 (D.N.H. Dec. 13, 2017). Here, *Lebron* provides the appropriate test to determine if Fannie Mae is a government actor for purposes of constitutional claims.

With little supporting authority, Plaintiffs criticize the weight of authority against their position as "non-controlling precedent" with "analytical flaws," sharing similar logic with and relying on *Herron*. AOB 17 (quoting *Sisti*, 324 F. Supp. 3d at 279 & n.5). The *Herron* district court and D.C. Circuit opinions considered the opposing party's arguments and analyzed and applied the governing precedents. The fact that some of the many other decisions are brief and adopt the *Herron* district court's analysis only confirms that the *Herron* analysis was straightforward and that the law is clear. The Court should follow *Herron*, not *Sisti*, as the legally and logically sound authority.

3. Treasury's Financial Support of the Fannie Mae Conservatorship Does Not Establish Permanent Government Control Under *Lebron*

Plaintiffs assert that "the U.S. Treasury[] owns Fannie Mae permanently," "Fannie Mae is operated entirely for the benefit of the United States Treasury," and the Treasury has "unchecked ... power" over Fannie Mae, presumably converting Fannie Mae into a government actor. AOB 7-8, 22. Plaintiffs are wrong.

Treasury's financial investment in Fannie Mae is irrelevant to Fannie Mae's governmental status for constitutional purposes because the financial support does not give Treasury permanent control over Fannie Mae. *See Herron*, 857 F. Supp. 2d at 96 ("Treasury's warrant to purchase common stock and its ownership of non-voting Senior Preferred Stock do not give the United States permanent control over Fannie Mae and do not make Fannie Mae a government entity under *Lebron*."). Indeed, in *Lebron* the Supreme Court identified "a private corporation whose stock comes into federal ownership" as an example to illustrate the *absence* of permanent government control over the corporation. 513 U.S. at 398.[14] As noted above, *Lebron*'s discussion of *Regional Rail* also confirms that where government financial support results in the government retaining a controlling interest in a

[14] The *Sisti* court characterizes this example of temporary government control—"a private corporation whose stock comes into federal ownership"—as dicta. *Sisti*, 324 F. Supp. 3d at 281 n.7. But that example is directly on point, and it confirms that control through financial aid is insufficient to support a government-actor finding.

corporation indefinitely, that does not convert the corporation into a government actor. *See supra* at 33-35. This is so because "when the government acquires an ownership interest in a corporation, it acts—and is treated—as any other shareholder." *Meridian*, 855 F.3d at 579 (citing *Lebron*, 513 U.S. at 398; *Bank of U.S. v. Planters' Bank of Ga.*, 22 U.S. 904, 907 (1824)).

Indeed, it is common for the government (through Treasury and FDIC) to invest in troubled financial institutions to support the broader financial system. In prior financial crises, the government purchased equity of, and provided substantial financial support to, troubled banks. *See, e.g.*, *Holland v. United States*, 75 Fed. Cl. 483 (2007); *Caroline Hunt Trust Estate v. United States*, 470 F.3d 1044 (Fed. Cir. 2006); *FDIC v. Morley*, 867 F.2d 1381 (11th Cir. 1989). This financial support does not convert the subject institutions into government actors. *See, e.g.*, *Wiggins v. JP Morgan Chase Bank*, No. 2:14-cv-11103, 2015 WL 868933 (S.D. W. Va. Feb. 27, 2015) (recipient of TARP funds not a government actor).[15] Plaintiffs identify no case—because there is none—in which a private financial

[15] "Treasury used the TARP authority to make investments, loans and asset guarantees and purchases in or from a range of financial institutions. In exchange for this assistance, Treasury, on behalf of the taxpayer, received financial instruments including equity securities (preferred stock, common stock and warrants)." U.S. Dep't of the Treasury, *Where Did The Money Go?*, https://www.treasury.gov/initiatives/financial-stability/about-tarp/Pages/where-did-the-money-go.aspx (last visited Jan. 15, 2021).

institution has been deemed a government actor by virtue of accepting federal assistance while in conservatorship or receivership.

4. The Alternative Doctrines Amici Cite Do Not Supplant *Lebron*

Amici present an additional argument to this Court: that Fannie Mae can be held liable for a due process violation under four "broader test[s]" drawn from other Supreme Court decisions—"Coercion or Encouragement theory," "Joint Participation theory," "Government Control theory," and "Entwinement theory." Amici Br. 19-27. But Plaintiffs never asserted that argument, and "Amici cannot insert new arguments, not made by a party, into a case." *Weaver's Cove Energy, LLC v. Rhode Island Coastal Res. Mgmt. Council*, 589 F.3d 458, 467 (1st Cir. 2009).

Even if the Court were inclined to consider their substance, Amici's theories fail because they depend on a faulty premise—that FHFA as Conservator is a government actor. As explained above, FHFA as Conservator is a private actor for constitutional purposes. *Supra* Section I.

In any event, *Lebron* is the more specific—and therefore controlling—precedent; in substance, it articulates how the principles animating the cases Amici identify apply in the context of corporations the federal government creates to advance public missions. *See Mik*, 743 F.3d at 168 ("*Lebron* … established a framework for determining whether a government-sponsored corporation is a

government actor for constitutional purposes." (footnote omitted)). And as explained above, under *Lebron*, Fannie Mae cannot be deemed a governmental actor regardless of FHFA's status.

III. PLAINTIFFS' DUE PROCESS CLAIM FAILS ON THE MERITS

The judgment can and should be affirmed for an additional reason presented to the district court: Plaintiffs fail to state a claim on the merits for a violation of the Due Process Clause. *Furtado v. Oberg*, 949 F.3d 56, 57 (1st Cir. 2020) (court of appeals is "free to affirm on any grounds made manifest by the record"). Over the past two decades, federal courts have repeatedly rejected due process challenges to nonjudicial foreclosure. Plaintiffs agreed to statutorily authorized power-of-sale clauses granting their mortgagees the right to sell their properties in the event of default, Plaintiffs admit having received the statutorily prescribed advance notice of those foreclosure sales, and they had opportunities under Rhode Island law to seek to avoid their foreclosures, including in a judicial hearing to challenge their foreclosures. As such, Plaintiffs have no constitutional due process claim.

Due process requires that before the government deprives one of property, the "State must provide notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mennonite Bd. of Missions v. Adams*, 462

U.S. 791, 795 (1983). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

Applying these principles, in cases spanning two decades, courts repeatedly have rejected procedural due process challenges to nonjudicial foreclosure by state actors. In *Garcia*, the Sixth Circuit rejected the plaintiffs' assertion that Fannie Mae's foreclosure sale, utilizing Michigan's nonjudicial foreclosure processes, violated the Due Process Clause. *Garcia v. Fannie Mae*, 782 F.3d 736, 737 (6th Cir. 2015). As is true here, the plaintiffs there "signed a mortgage and a note that allowed for the use of summary foreclosure proceedings in the event of default." *Id.* at 743. And, as is true of the governing law here, under Michigan law, the mortgagee (Fannie Mae) was required to provide notice of both the plaintiffs' default and the impending foreclosure sale. *Id.* at 741-42. Finally, as is also true here, the plaintiffs in *Garcia* admitted they had received actual notice of the foreclosure sale. *Id.* at 743. The Sixth Circuit therefore rejected the plaintiffs' due process challenge to the nonjudicial foreclosure sale of their property, holding that they received appropriate notice and that due process principles "do not require a preforeclosure judicial hearing." *Id.*[16]

[16] Plaintiffs note (AOB 32-33) that the *Garcia* court also noted the availability of a redemption period following the foreclosure, but the court made clear that it found the Michigan nonjudicial foreclosure process to satisfy the Due Process

Before *Garcia*, two federal district courts similarly rejected due process challenges to nonjudicial foreclosures. In *Syriani v. Freddie Mac Multiclass Certificates, Series 3365*, No. 12-cv-3035, 2012 WL 6200251 (C.D. Cal. July 10, 2012), the court considered a challenge to nonjudicial foreclosure by Freddie Mac under California's procedures. As is true here, under California law the mortgagee was required to notify the mortgagor of the default and foreclosure sale. *Id.* at *5. As is also true here, the court noted that the plaintiff admitted she had received notice of the foreclosure. *Id.* Citing the Eighth Circuit's decision in *Vail v. Brown*, 39 F.3d 208, 209 (8th Cir. 1994), the *Syriani* court held that "[a] foreclosure does not require a due process hearing if sufficient notice has been given." *Id.* The court therefore rejected the due process challenge, holding that "the non judicial statutory scheme in California provides sufficient notice for a borrower to participate in the foreclosure process and exercise his or her options[.]" *Id.* "Therefore, even if Freddie Mac was a governmental actor, Plaintiff could not state

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Clause "*both*" as to the pre-foreclosure period (i.e., "the period following notice of the default but prior to any sale of the property") "*and*" the post-foreclosure period (*i.e.*, the six months following the foreclosure). *Garcia*, 782 F.3d at 743 (emphasis added). Regardless, in Rhode Island, mortgagors also have a means of presenting defenses to a foreclosure after the nonjudicial foreclosure sale and before being dispossessed of the property—namely, in an eviction hearing. *See supra* at 8.

a Fifth Amendment Due Process claim based upon the foreclosure of her Property." *Id.*[17]

Almost two decades earlier, the court in *Carada, Ltd. v. McAuliffe*, No. 92-cv-0465E(F), 1993 WL 117525 (W.D.N.Y. Apr. 6, 1993), rejected a plaintiff's challenge to a nonjudicial foreclosure on similar grounds. There, the foreclosure was carried out by the United States Department of Housing and Urban Development, after provision of notice to the mortgagor of both the default and the foreclosure sale. *Id.* at *3. As a result of those notices, the court found, the plaintiff received the "opportunity to present its reasons why it should be taken out of default and not be subjected to foreclosure." *Id.* at *5. "[W]hile the [Multifamily Mortgage Foreclosure] Act does not itself provide for a hearing after the service of the Notice of Default and Foreclosure and Sale and prior to foreclosure, any mortgagor who feels that HUD has wrongly foreclosed upon its mortgage can commence an action in court[.]" *Id.* at *6.

Other courts too have rejected due process challenges to nonjudicial foreclosure on similar grounds. *See Vail*, 39 F.3d at 209 (no hearing required where "notice given … is fully sufficient to permit the veteran to participate in the foreclosure sale and to exercise his or her pre-foreclosure options" (internal quotation marks omitted)); *Showell v. BAC Home Loans Servicing, LP*, No. 4:11-

[17] *Syriani* also rejected the argument that Freddie Mac should be treated as a government actor. *See Syriani*, 2012 WL 6200251, at *3-4.

cv-00489, 2012 WL 4105472, at *3 (D. Idaho Sept. 17, 2012) (due process rights not violated where notice of foreclosure sale given pursuant to Idaho's nonjudicial foreclosure statute); *Sain v. Geske*, No. 07-cv-4203, 2008 WL 2811166, at *14 (D. Minn. July 17, 2008) (due process rights not violated where notice of foreclosure sale given pursuant to Minnesota's nonjudicial foreclosure statute). The case law outlined here makes this principle clear: Nonjudicial foreclosure, accomplished by means of notice to the mortgagor of the foreclosure sale, satisfies the Due Process Clause.[18]

Applying the developed law on due process and nonjudicial foreclosure, the Rhode Island processes followed by Defendants here amply satisfy the Due Process Clause. In Rhode Island, notice is provided at multiple points before foreclosure, and Plaintiffs admit they received that notice. SA012 ¶56, SA015 ¶77. Having received notice, Plaintiffs had an opportunity to seek a hearing on any

[18] Plaintiffs cite a handful of decisions from the 1970s (AOB 27-29), but none should be credited here as they take a now-outmoded view of due process. For example, after *Ricker v. United States*, 417 F. Supp. 133 (D. Me. 1976), the District of Maine rejected a due process challenge to nonjudicial foreclosure even though the mortgagors "were not informed that they were entitled to a hearing at which they could challenge the foreclosure decision"—and thus the mortgagors "were not given the exact opportunity for a hearing that the *Ricker* court envisioned." *Fitzgerald v. Cleland*, 498 F. Supp. 341, 350-51 (D. Me. 1980), *aff'd in part, vacated in part on other grounds*, 650 F.2d 360 (1st Cir. 1981). The district court's decision in *Gardner v. Tri-State Development Co.*, 382 F. Supp. 377 (E.D. Mich. 1974), likewise has been rendered irrelevant by time. *Gardner* concerned Michigan's nonjudicial foreclosure procedures, a subject matter that the Sixth Circuit, the relevant court of appeals, has more recently addressed in *Garcia*.

defenses they may have had to their foreclosures. Yet Plaintiffs do not allege that they ever availed themselves of that opportunity. The notice they admit they received, and the opportunity it allowed them to seek a judicial hearing before their foreclosures, is what the Due Process Clause requires.

Finally, while these procedures are already fully adequate, the availability of relief through post-foreclosure eviction actions dispels any doubt on the due process score. Plaintiffs assert that for jurisdictional reasons, foreclosure defenses cannot be raised in eviction actions, AOB 30-31, but they are wrong. As *Parra*, holds, an individual can "raise[] the invalidity of the foreclosure sale, and thus the invalidity of the foreclosure deed, to lawfully pass title to the foreclosing bank in the District Court, or in any appeal following entry of judgment of possession, as it would affect the Plaintiff's standing to commence an eviction action." 2013 WL 1387030, at *3. An individual can also appeal an adverse decision from the district court to the superior court, where a trial *de novo* may be conducted. *See* R.I.G.L. § 9-12-10; *L.T.F. Fin. Servs., Inc. v. Silva*, No. PD 95-1305, 1995 WL 941454, at *3 (R.I. Super. July 20, 1995) (former mortgagor appealed district court's judgment of possession for plaintiff and raised notice issues on appeal). A mortgagor can also move to enjoin a foreclosure in the superior court, and thus challenge the foreclosure there. *See Foley v. Osborne Court Condo.*, No. 96-360,

1999 WL 615736, at *1 (R.I. Super. July 26, 1999). The availability of these processes further confirms that Plaintiffs' due process challenge has no merit.

* * *

Finally, as to the distinct estoppel defense presented by Fannie Mae in the district court, Kyriakakis argues that his surrender of property in exchange for a discharge of debts through a prior bankruptcy (SA073-149) cannot judicially estop his challenge to foreclosure in reliance upon a court decision that is not relevant to this appeal. AOB 34-37 (citing *In re: Gregory*, 572 B.R. 220 (W.D. Mo. June 14, 2017)). In *Gregory*, a mortgage holder petitioned to reopen a bankruptcy to compel dismissal of a state court trespass action the debtor had filed after the mortgagee asserted possession of the property without foreclosure. The Missouri Bankruptcy Court concluded that a debtor's statement of intent to surrender property through a bankruptcy petition did not relinquish possession of property to the mortgage holder. 572 B.R. at 232-33. Here, Defendants have not argued for outright possession of Kyriakakis's property arising solely from his notice of intent to surrender in a prior-filed bankruptcy. Instead, Kyriakakis's intent to surrender the property, which resulted in a bankruptcy discharge, contradicts Kyriakakis's legal position in challenging foreclosure of that same property.

Judicial estoppel is an equitable doctrine that prevents a litigant from pursuing a claim that is inconsistent with a prior litigated position. *New*

Hampshire v. Maine, 532 U.S. 742, 749 (2001). Multiple courts in this circuit have found that judicial estoppel bars a contested foreclosure action when the borrower has surrendered that property through bankruptcy. *See, e.g.*, *Ibanez v. U.S. Bank National Ass'n*, 856 F. Supp. 2d 273, 274-75 (D. Mass. 2021); *Colon v. Bayview Loan Servicing, LLC*, No. 19-517, 2020 WL 3051242, at *4-6 (D.R.I. June 8, 2020).

CONCLUSION

Defendants respectfully request that the Court affirm the judgment.

DATED: January 15, 2021

By: /s/ Michael A.F. Johnson

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), I certify Appellees' Answering Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) as it contains 12,987 words. I further certify Appellees' brief complies with the typeface and type styles of Rules 32(a)(5) and (6) as it has been prepared with a proportionally spaced typeface using Microsoft Word, Times New Roman font, and 14-point font size.

DATED: January 15, 2021 /s/ Michael A.F. Johnson

CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2021, I electronically filed the foregoing APPELLEES' ANSWERING BRIEF with the Clerk of the United States Court of Appeals for the First Circuit by using the appellate Electronic Filing system.

I certify that all parties of record to this appeal either are registered appellate Electronic Filing system users, or have registered for electronic notice, or have consented in writing to electronic service, and that service will be accomplished through the appellate Electronic Filing system.

DATED: January 15, 2021 /s/ Michael A.F. Johnson

ADDENDUM

(Pursuant to Local Rule 28)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

NERIS MONTILLA, et al.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 18-632 WES
FEDERAL NATIONAL MORTGAGE ASSOCIATION, et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

WILLIAM E. SMITH, District Judge.

Before the Court is Defendant Federal Housing Finance Agency's ("FHFA") and Federal National Mortgage Association's ("Fannie Mae") Motions to Dismiss, ECF Nos. 20, 22. For the reasons set forth below, both Motions are GRANTED.

I. Background

This dispute involves a putative class action against Defendants FHFA, Fannie Mae, and C.I.T. Bank, N.A. ("C.I.T.")(collectively, "Defendants") for alleged wrongful foreclosure of Plaintiffs Neris Montilla's and Michael Kyriakakis's properties.[1] Am. Compl. ¶ 1, ECF No. 4. The relevant facts, as detailed in the Amended Complaint, are as follows.

[1] The Amended Complaint initially named two other plaintiffs — Ruben Velasquez and Roselia Montufar — and two other defendants — Seterus, Inc. and Mr. Cooper (formerly known as "Nationstar

On July 24, 2008, Montilla executed a mortgage in favor of Financial Freedom Senior Funding Corporation on a property in Providence to secure a promissory note in the amount of $427,500. Id. ¶ 53. That mortgage was later assigned to Mortgage Electronic Registration Systems, Inc. ("MERS") in 2009, and then ultimately assigned to its current holder, Fannie Mae, on April 20, 2015. Id. ¶ 54-55. On September 10, 2016, following Plaintiff's alleged default, C.I.T., in its capacity as servicer of the loan for Fannie Mae, sent Montilla a "Notice of Intent to Foreclose and Mortgagee's Foreclosure Sale" ("Montilla Foreclosure Notice") noting a scheduled sale date of October 14, 2016. Id. ¶ 56. C.I.T. conducted a foreclosure sale on that date, at which time the property was sold to Fannie Mae for $160,000. Id. ¶ 57.

Separately, in April of 2013, Kyriakakis executed a mortgage on his Cranston, Rhode Island property in favor of One West Bank, FSB as Lender and MERS as mortgagee to secure a promissory note in the amount of $239,750. Id. ¶ 73-74. The mortgage was assigned to Nationstar Mortgage, LLC (now known as "Mr. Cooper"), and later

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Mortgage, LLC"). See Am. Compl. ¶¶ 15, 19, 21. Plaintiffs Velasquez and Montufar voluntarily dismissed all of their claims in the action. See Notice of Voluntary Dismissal as to Seterus, Inc., ECF No. 33; Notice of Voluntary Dismissal, ECF No. 34. Seterus, Inc.'s alleged wrongdoings relate only to those two Plaintiffs, so it was dismissed from the action entirely. See Am. Compl. ¶¶ 66-67. Defendant Mr. Cooper was also voluntarily dismissed from the case. See Notice of Voluntary Dismissal as to Nationstar Mortgage, LLC, ECF No. 39.

to Fannie Mae. Id. ¶ 75-76. Following assignment to Fannie Mae, Mr. Cooper remained the servicer of the mortgage. Id. ¶ 76. In that capacity, Mr. Cooper sent a Notice of Intent to Foreclose and Mortgagee's Foreclosure Sale ("Kyriakakis Foreclosure Notice") to Kyriakakis on November 21, 2017. Id. ¶ 77. The property was sold to mortgagee Fannie Mae at a foreclosure sale on December 26, 2017 for $216,885.13. Id. ¶ 78.

Plaintiffs filed a complaint in this Court on November 19, 2018 and subsequently amended their complaint on December 7, 2018. See Compl., ECF No. 1; see also Am. Compl. Both Plaintiffs, individually and on behalf of others similarly situated, allege that Defendants violated the Due Process Clause of the Fifth Amendment insofar as they conducted the foreclosure proceedings "without first providing adequate notice, a meaningful hearing prior to the deprivation of property, and an opportunity to recover adequate damages." Am. Compl. ¶¶ 58, 79. Defendants Fannie Mae and FHFA filed the instant Motions to Dismiss on February 19, 2019. See FHFA's Mot. to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6), ECF No. 20; see also Fannie Mae's Mot. to Dismiss, ECF No. 22. Defendant C.I.T. joins both Motions. See Notice by C.I.T. Bank, N.A. 1, ECF No. 23.

II. Legal Standard

When reviewing a motion to dismiss, the Court must "accept the well-pleaded facts as true, viewing factual allegations in the

light most favorable to the plaintiff." Rederford v. U.S. Airways, Inc., 589 F.3d 30, 35 (1st Cir. 2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

III. Discussion

Defendants argue that Fannie Mae and FHFA (and C.I.T., as an agent of those entities) are not government actors for purposes of Plaintiffs' Fifth Amendment due process claims.[2] Mem. of Law in Supp. of Def. FHFA's Mot. to Dismiss Under Fed. R. Civ. P. 12(b)(6) ("FHFA's Mot. to Dismiss") 5, ECF No. 21; see Mem. in Supp. of Mot. to Dismiss of Def. Fannie Mae 10, ECF No. 22-1 (joining FHFA's government actor argument). Plaintiffs, primarily relying on Chief Judge McConnell's decision in Sisti v. Federal Housing Finance Agency, 324 F. Supp. 3d 273 (D.R.I. 2018), contend that both entities are government actors and therefore subject to these constitutional claims. Mem. of Law in Supp. of Pls.' Opp'n to

[2] Defendants further aver that even if Fannie Mae and FHFA could be considered government actors, Plaintiffs' due process claims fail on the merits. Mem. in Supp. of Mot. to Dismiss of Def. Fannie Mae 1, ECF No. 22-1. The Court need not reach this alternative argument because, as discussed infra, it agrees that Fannie Mae, FHFA, and C.I.T as Fannie Mae's agent are not government actors for purposes of Plaintiffs' constitutional claims.

Def. FHFA's Mot. to Dismiss for Failure to State a Claim ("Pls.' Opp'n to FHFA's Mot. to Dismiss") 3-4, ECF No. 30.

Fannie Mae is a government-sponsored enterprise created by Congress in the wake of the Great Depression to provide support for the residential mortgage market. See Jacobs v. Fed. Hous. Fin. Agency, 908 F.3d 884, 887 (3d Cir. 2018). Despite its birth by federal charter, Fannie Mae is a private, publicly traded corporation. See Town of Johnston v. Fed. Hous. Fin. Agency, 765 F.3d 80, 82 (1st Cir. 2014). In 2008, Congress passed the Housing and Economic Recovery Act, creating the FHFA and empowering it to act as conservator of Fannie Mae "for the purpose of reorganizing, rehabilitating, or winding up [] affairs", which right it exercised in September 2008. Id.; see 12 U.S.C. § 4617(a)(2); 12 U.S.C. § 4511; see also Am. Compl. ¶ 23-25. As conservator, FHFA succeeded to "all rights, titles, powers, and privileges" of Fannie Mae and its stockholders, board of directors, and officers. See 12 U.S.C. § 4617(b)(2)(A).

Because a defendant cannot be held liable under the Fifth Amendment unless it is deemed a federal actor, Martinez-Rivera v. Sanchez Ramos, 498 F.3d 3, 8-9 (1st Cir. 2007), the Court must determine whether Fannie Mae and FHFA are government actors for purposes of Plaintiffs' constitutional claims.

A. Fannie Mae's Status as a Government Actor

To determine whether Fannie Mae is a government actor, the Court looks to the tripartite test in Lebron v. National Railroad Passenger Corp., 513 U.S. 374 (1995). Lebron instructs that a corporation "is part of the Government" for purposes of constitutional claims where "[(1)] the Government creates a corporation by special law, [(2)] for the furtherance of governmental objectives, and [(3)] retains for itself permanent authority to appoint a majority of the directors of that corporation." Lebron, 513 U.S. at 399. In Department of Transportation v. Association of American Railroads, 575 U.S. 43, 55 (2015), the Supreme Court reaffirmed Lebron, adding that the "practical reality of federal control and supervision prevails over Congress' disclaimer of . . . governmental status." Because there is no dispute that the first two factors have been met, the Court need only resolve the third question of the Lebron test here, and answer whether the federal government exercises permanent control over Fannie Mae.

Plaintiffs argue that FHFA's indefinite conservatorship amounts to permanent control over Fannie Mae. See Pls.' Opp'n to FHFA's Mot. to Dismiss 5-6. In support of this argument, Plaintiffs rely on Chief Judge McConnell's reasoning in Sisti, where he concluded that "[t]he practical reality . . . is that the government effectively controls Fannie Mae and Freddie Mac

permanently" because the government appoints the members of Fannie Mae's boards of directors, exercises total operational control, owns all of Fannie Mae's senior preferred stock, and warrants to purchase a majority of the common stock. Sisti, 324 F. Supp. 3d at 280; see Pls.' Opp'n to FHFA's Mot. to Dismiss 8-10. The court also found it to be critical that "the decision to end the conservatorship is left entirely to the discretion of the government". Sisti, 324 F. Supp. 3d at 280.

The majority of courts to consider this question have taken the opposite position - that Fannie Mae is not a government actor for purposes of constitutional claims. See, e.g., Rubin v. Fannie Mae, 587 F. App'x 273, 275 (6th Cir. 2014) (holding that "following FHFA's conservatorship, Fannie Mae is not a state actor" and recognizing that every district court up to that point had reached the same conclusion); see also Dean v. Crosscountry Mortg., Inc., No. 4:18-CV-705, 2019 WL 6271042, at *3 (E.D. Tex. Nov. 25, 2019)("[O]ther courts carefully have considered, and rejected [the] argument that the conservatorship of Fannie Mae and Freddie Mac in 2008 transformed those entities into government actors.") (internal citation omitted); FHFA's Mot. to Dismiss Ex. A (listing cases), ECF No. 21-1. In Herron v. Fannie Mae, 861 F.3d 160, 169 (D.C. Cir. 2017), the D.C. Circuit Court of Appeals, affirming the district court's ruling, examined the statute empowering FHFA to become Fannie Mae's conservator, finding that "the purpose of the

conservatorship is to restore Fannie Mae to a stable condition", which is "an inherently temporary purpose".[3] Herron, 861 F.3d at 169 (quoting Rubin, 587 Fed. Appx. at 275); see 12 U.S.C. § 4617(a) & (b)(2)(D). The court concluded, "[t]hus, the government's indefinite but temporary control does not transform Fannie Mae into a government actor." Herron, 861 F.3d at 169.

While the Court finds Judge McConnell's analysis in Sisti to be well-reasoned and sensible, it ultimately sides with the majority of courts to have considered the issue. Although the "conservatorship authorized the government to exercise substantial control over Fannie Mae, 'that control is temporary . . . .'"[4] Herron, 861 F.3d at 169 (quoting Meridian Invs. v. Fed. Home Loan Mortg. Corp., 855 F.3d 573, 579 (4th Cir. 2017)); see also Herron v. Fannie Mae, 857 F. Supp. 2d 87, 96 (D.D.C. 2012) ("Because

[3] Chief Judge McConnell rejected this line of reasoning in Sisti v. Fannie Mae, finding that the enabling statute acts as a Congressional disclaimer of the government's permanent control of Fannie Mae, and as such it could not be relied upon to determine that the government exercised temporary control. 324 F. Supp. 3d 274, 280 (D.R.I. 2018). Rather, he concluded that, despite not being an explicit statutory disclaimer of government control, the statute's "language still has the same effect — under Lebron, 'permanent' government control is required, and here Congress is disclaiming permanent control." Id. (quoting Lebron, 513 U.S. at 400).

[4] Indeed, there are signs that FHFA's conservatorship may soon end. See Fairholme Funds, Inc v. United States, 147 Fed. Cl. 1, 19-21, 33 (Fed. Cl. 2019) (taking judicial notice of statements by the Secretary of the U.S. Treasury and FHFA Director suggesting they are "committed to ending the conservatorships").

conservatorship is by nature temporary, the government has not acceded to permanent control over the entity and Fannie Mae remains a private corporation."). Accordingly, because the government does not exercise permanent control over Fannie Mae, it is not a government actor for purposes of Plaintiffs' constitutional challenge.

B. FHFA's Status as a Government Actor

As for the FHFA, there is no question that it is a government agency. See 12 U.S.C. § 4511. Defendants contend, however, that the FHFA is not subject to Plaintiffs' Fifth Amendment claims because it assumes Fannie Mae's private status while acting as its conservator. See FHFA's Mot. to Dismiss 15-21. This is so, Defendants argue, because "as Conservator, FHFA does not perform any function unique to the federal government when it exercises powers inherited from [Fannie Mae]." Id. at 16. Plaintiffs respond against to say that the "practical reality" is that the FHFA is a government actor. See Pls.' Opp'n to FHFA's Mot. to Dismiss 7-8 (citing Ass'n of Am. R.R., 575 U.S. at 55). Furthermore, relying on Sisti, Plaintiffs challenge Defendant's contention that the FHFA, as conservator, takes on Fannie Mae's private status. Id. at 12-15.

On this question, too, the Court sides with the majority of courts to have found that the FHFA is not a government actor in its capacity as conservator to Fannie Mae. See, e.g., Herron, 861

F.3d at 169; see also Parra v. Fed. Nat'l Mortg. Ass'n, No. CV 13-4031 FMO (SHx), 2013 WL 5638824, at *3 (C.D. Cal. Oct. 16, 2013) ("[T]he FHFA, which took over as Fannie Mae's conservator, also does not qualify as a government actor."). Here, the FHFA's power to foreclose is a contractual right inherited from Fannie Mae by virtue of its conservatorship. See 12 U.S.C. § 4617(b)(2)(A)("The Agency shall, as conservator or receiver, and by operation of law, immediately succeed to – all rights, titles, powers, and privileges of the regulated entity."). When acting as conservator, the FHFA "steps into [Fannie Mae's] shoes, shedding its government character and also becoming a private party." Meridian Invs., Inc., 855 F.3d at 579; see Herron, 861 F.3d at 169 ("[W]hile the FHFA's status changed, the status of Fannie Mae, as the 'shoes' into which FHFA stepped, did not."); see also O'Melveny & Meyers v. F.D.I.C, 512 U.S. 79, 86 (1994) (finding that similar statutory language "appears to indicate that the FDIC as receiver 'steps into the shoes' of the failed [entity]" for purposes of state tort claims)(internal citations omitted). Accordingly, because the FHFA is similarly not subject to Plaintiffs' Fifth Amendment claims, those claims cannot proceed.

IV. Conclusion

For the foregoing reasons, Defendants' Motions to Dismiss, ECF Nos. 20 and 22, are GRANTED.

IT IS SO ORDERED.

William E. Smith
District Judge
Date: May 26, 2020

SUPPORTING DECISIONS

I. Decisions holding that Fannie Mae and Freddie Mac are not Government Actors Subject to Constitutional Claims

Appellate Court decisions:

1. *Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017) ("[T]he government's indefinite but temporary control does not transform Fannie Mae into a government actor.")

2. *Mik v. Freddie Mac*, 743 F.3d 149, 168 (6th Cir. 2014) ("Under the *Lebron* framework, Freddie Mac is not a government actor who can be held liable for violations of the Fifth Amendment's Due Process Clause.")

3. *Rubin v. Fannie Mae*, 587 F. App'x 273, 275 (6th Cir. 2014) ("Under Supreme Court precedent, a necessary condition precedent for a conclusion that a once-private entity is a state actor is that the government's control over the entity is permanent.")

4. *Bernard v. Fannie Mae*, 587 F. App'x 266, 271 (6th Cir. 2014) (citing *Lebron* and holding that "following FHFA's conservatorship, Fannie Mae is not a state actor")

5. *Heibel v. Fannie Mae*, 581 F. App'x 543, 544 (6th Cir. 2014) (following Sixth Circuit precedent)

6. *Freddie Mac v. Gaines*, 589 F. App'x 314, 316 (6th Cir. 2014) (following Sixth Circuit precedent)

District Court decisions:

7. *Herron v. Fannie Mae*, 857 F. Supp. 2d 87, 92 (D.D.C. 2012) (Fannie Mae is not subject to *Bivens* claims because "the imposition of conservatorship . . . did not transform Fannie Mae into a government actor.")

8. *Haney v. Fannie Mae*, No. 16-cv-01296, 2017 WL 1404103, at *5 (D. Colo. Mar. 9, 2017) ("It is well-settled that Fannie Mae is not a state actor for purposes of establishing the necessary state action" under § 1983. (citing *Herron*, 857 F. Supp. 2d at 92))

9. *Beliz v. Loan Simple, Inc.*, No. 15-cv-01284, 2016 WL 424807, at *8 (D. Colo. Jan. 14, 2016), *report and recommendation adopted*, 2016 WL 409408 (D. Colo. Feb. 3, 2016) ("[T]the court agrees with those courts that have considered and rejected the argument that Freddie Mac and its companion, Fannie Mae, are government actors by virtue of the FHFA conservatorship. . . . [T]he court concludes that the FHFA conservatorship does not create the type of permanent control required under *Lebron*.")

10. *Caldwell v. Citimortgage, Inc.*, No. 15-cv-1784, 2015 WL 6445467, at *4 (N.D. Ill. Oct. 23, 2015) (agreeing with "[a]ll of the federal courts to address the issue [and that] have held that

Freddie Mac is not a government actor and, therefore, cannot be held liable for violating a plaintiff's constitutional rights")

11. *Fisher v. JP Morgan Chase Bank, NA*, No. 14-cv-12734, 2015 WL 871066, at *4 (E.D. Mich. Feb. 27, 2015) ("The Courts have already determined that Fannie Mae is not a government actor" for constitutional purposes.)

12. *Hurst v. Fannie Mae*, No. 14-cv-10942, 2015 WL 300275, at *4 n.4 (E.D. Mich. Jan. 22, 2015), *aff'd*, 642 F. App'x 533 (6th Cir. 2016) (concluding even if plaintiff had standing, her claims would fail because "[f]ederal courts . . . across the country [have] found that neither Fannie Mae nor Freddie Mac are governmental actors post-conservatorship pursuant to the Supreme Court's decision in *Lebron*")

13. *Freddie Mac. v. Kama*, No. 14-cv-00137, 2014 WL 4980967, at *16 (D. Haw. Oct. 3, 2014) (citing *Lebron* and agreeing with the "numerous district courts [that] have held that Freddie Mac, and similar entity [Fannie Mae] did not become federal governmental actors post-conservatorship")

14. *Wright v. Fannie Mae*, No. 1:13-cv-04294, 2014 WL 12042555, at *3 (N.D. Ga. Sept. 22, 2014) ("Since government control of Defendant Fannie Mae is temporary, courts have consistently held that Defendant Fannie Mae is not a government actor, even though it is in a conservatorship.")

15. *Rush v. Freddie Mac*, No. 13-cv-11302, 2014 WL 1030842, at *4 (E.D. Mich. Mar. 17, 2014) ("Thus, under the *Lebron* test, Freddie Mac is not a governmental entity.")

16. *Narra v. Fannie Mae*, No. 2:13-cv-12282, 2014 WL 505571, at *4 (E.D. Mich. Feb. 7, 2014) ("[N]either Fannie Mae nor Freddie Mac are governmental actors post-conservatorship pursuant to the Supreme Court's decision in *Lebron*.")

17. *In re Kapla*, No. ADV 12-4000, 2014 WL 346019, at *3 (E.D. Mich. Jan. 30, 2014) (citing *Lebro*n and agreeing "a conservatorship is by nature temporary and therefore the third prong required to find that [Fannie Mae] is a federal actor for the purpose of a constitutional claim is not satisfied")

18. *Dias v. Fannie Mae*, 990 F. Supp. 2d 1042, 1062 (D. Haw. 2013) ("FHFA's conservatorship does not create the type of permanent control required under *Lebron.*")

19. *Parra v. Fannie Mae*, No. 13-cv-4031, 2013 WL 5638824, at *3 (C.D. Cal. Oct. 16, 2013) (agreeing that "Fannie Mae and its conservator, [FHFA], are not government actors for purposes of the Fifth Amendment's Due Process Clause")

20. *Williams v. Fannie Mae*, No. 1:13-cv-1899, 2013 WL 5361211, at *2 n.3 (N.D. Ga. Sept. 25, 2013) ("[C]ourts have consistently found that Fannie Mae is not a government actor for purposes of a constitutional claim.")

21. *Johnson v. Fannie Mae*, No. 2:12-cv-00452, 2013 WL 3819365, at *2 (W.D. Mich. July 23, 2013) ("Fannie Mae is not a governmental entity capable of violating [plaintiff's] federal constitutional rights.")

22. *In re Hermiz*, No. BR 12-52399, 2013 WL 3353928, at *2 (E.D. Mich. July 3, 2013) (citing *Lebron* and holding that "Freddie Mac is not a federal instrumentality for constitutional purposes")

23. *May v. Wells Fargo Bank, N.A.*, No. 4:11-cv-3516, 2013 WL 3207511, at *5 (S.D. Tex. June 24, 2013) ("This Court agrees and holds that, despite FHFA's conservatorship, Freddie Mac is not a government actor under *Lebron.*")

24. *Colbert v. Fannie Mae*, No. 12-cv-13844, 2013 WL 1629305, at *13 (E.D. Mich. Apr. 16, 2013) ("This Court agrees with the reasoning of other courts in this District concluding that Fannie Mae is not a state actor.")

25. *Bernard v. Fannie Mae*, No. 12-cv-14680, 2013 WL 1282016, at *5 (E.D. Mich. Mar. 27, 2013), *aff'd*, 587 F. App'x 266 (6th Cir. 2014) ("FHFA's conservatorship does not create the type of permanent control required under *Lebron.* Accordingly, the Court holds that Fannie Mae is not a government actor that can be held liable for an alleged Fifth Amendment due process violation.")

26. *Fannie Mae v. Mandry*, No. 12-cv-13236, 2013 WL 687056, at *5 (E.D. Mich. Feb. 26, 2013) ("FHFA's conservatorship does not create the type of permanent control required under *Lebron.* Accordingly, this Court holds that Fannie Mae and FHFA are not government actors that can be held liable for the Fifth Amendment due process violation.")

27. *Freddie Mac v. Matthews-Gaines*, No. 12-cv-12131, 2013 WL 423777, at *3 (E.D. Mich. Feb. 4, 2013), *aff'd*, 589 F. App'x 314 (6th Cir. 2014) (Freddie Mac is not a government actor because "*Lebron* requires that the government maintain permanent control over the entity.")

28. *Lopez v. Bank of Am., N.A.*, 920 F. Supp. 2d 798, 801 (W.D. Mich. 2013) ("Because Fannie Mae is not under permanent governmental control, it is not a governmental actor for purposes of constitutional challenges.")

29. *Fannie Mae v. Lemaire*, No. 12-cv-11479, 2012 WL 12930829, at *2 (E.D. Mich. Dec. 20, 2012) (citing *Lebron* and holding "Defendants' due process argument must fail because Fannie Mae is a private corporation and not a government actor for constitutional purposes").

30. *In re Kapla*, 485 B.R. 136, 152 (Bankr. E.D. Mich. 2012), *aff'd*, 2014 WL 346019 (E.D. Mich. Jan. 30, 2014) ("Fannie Mae is not a government actor under *Lebron* for purposes of constitutional claims.")

31. *Rubin v. Fannie Mae*, No. 12-cv-12832, 2012 WL 6000572, at *3 (E.D. Mich. Nov. 30, 2012) (citing *Lebron* and holding "that Fannie Mae is not a federal actor [for the purpose of] constitutional claims")

32. *Ljekocevic v. CitiMortgage*, No. 11-cv-14403, 2012 WL 5379571, at *4 (E.D. Mich. Sept. 25, 2012), *report and recommendation adopted*, 2012 WL 5379370 (E.D. Mich. Oct. 31, 2012) ("Freddie Mac is a private corporation—not a government actor—for constitutional purposes.")

33. *Syriani v. Freddie Mac Multiclass Certificates, Series 3365*, No. 12-cv-3035, 2012 WL 6200251, at *4 (C.D. Cal. July 10, 2012) (applying *Lebron* and holding "Freddie Mac does not become a governmental actor for Fifth Amendment purposes merely because it is placed into conservatorship. [FHFA]'s 'control' is merely the same control that Freddie Mac had before the conservatorship.")

34. *Garcia v. Fannie Mae*, No. 1:13-cv-1259, 2014 WL 2210784, at *3 (W.D. Mich. Apr. 30, 2014), *aff'd*, 782 F.3d 736 (6th Cir. 2015) (citing *Herron* and holding that "Fannie Mae is not a governmental actor" for the plaintiff's § 1983 claim)

35. *Freddie Mac v. Shamoon*, 922 F. Supp. 2d 641, 644 (E.D. Mich. 2013) (applying *Lebron* and holding that "Freddie Mac, and similar entity Fannie Mae, [are] not governmental actors post-conservatorship, and dismissing claims alleging a constitutional violation as a matter of law")

36. *Oliver v. Bank of Am., N.A.*, No. 1:14-cv-00012, 2014 WL 11532239, at *6 (E.D. Tenn. Sept. 10, 2014) (agreeing with the "[n]umerous federal courts [that] have specifically considered the issue of whether post-conservatorship [Fannie Mae] qualifies as a state actor under the test set forth in *Lebron* and have consistently found that [Fannie Mae] is not a state actor")

37. *Colyer v. Freddie Mac*, No. 13-cv-10425, 2014 WL 1048009, at *6 (E.D. Mich. Mar. 18, 2014) (dismissing plaintiff's § 1983 claim because "Freddie Mac is not a governmental actor")

38. *Smalls v. Riviera Towers Corp.*, No.16-cv-847, 2017 WL 4180115, at *4 n.4 (D.N.J. Sept. 21, 2017) (Fannie Mae is "not considered to be a state actor for purposes of Section 1983 or constitutional claims.")

39. *Narra v. Fannie Mae*, No. 2:13-cv-12282, 2014 WL 505571, at *4 (E.D. Mich. Feb. 7, 2014) ("Federal courts . . . have comprehensively examined the issue and found that neither Fannie Mae nor Freddie Mac are governmental actors post-conservatorship pursuant to the Supreme Court's decision in *Lebron*.")

40. *Williams v. Fannie Mae*, No. 13-cv-12776, 2013 WL 5445883, at *2 (E.D. Mich. Sept. 30, 2013) ("Fannie Mae is not a state actor [for 'constitutional due process . . . violations.']")

41. *Yousif v. Fannie Mae*, No. 12-cv-12427, 2013 WL 980159, at *2 n.2 (E.D. Mich. Mar. 13, 2013) ("Fannie Mae is neither a governmental entity nor a state actor" subject to plaintiff's due process claim.)

42. *Freddie Mac v. Montague*, No. 1:13-cv-1162, 2014 WL 4313633, at *5 (W.D. Mich. Sept. 2, 2014) (Freddie Mac "is not a state actor who can be held liable for violations of the Due Process Clause.")

43. *Timm v. Freddie Mac*, No. 19-cv-17304, 2020 WL 3871208 (D.N.J. July 9, 2020) ("Although the conservatorship continues indefinitely, the federal government's control over Freddie Mac nevertheless is temporary—not permanent. Plaintiff, therefore, fails to state a Fifth Amendment claim against Freddie Mac.")

44. *Seals v. Fannie Mae*, No. 5:20-cv-00044, 2020 WL 5067885 (N.D.W. Va. July 29, 2020) (Plaintiffs Fifth Amendment due process claim "fails as a matter of law because Fannie Mae is not a government actor.")

II. Decisions holding that FHFA as Conservator is not a Government Actor Subject to Constitutional Claims

1. *Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017) (As Conservator, "FHFA shed its government character and became a private party." (international quotation marks and alterations omitted))

2. *Parra v. Fannie Mae*, No. 13-cv-4031 FMO SHX, 2013 WL 5638824, at *3 (C.D. Cal. Oct. 16, 2013) ("FHFA, which took over as Fannie Mae's conservator, also does not qualify as a government actor.")

3. *Dias v. Fannie Mae*, 990 F. Supp. 2d 1042, 1061 (D. Haw. 2013) ("Similarly, the FHFA, which took over as Fannie Mae's conservator, also does not qualify as a government actor.")

4. *Fannie Mae v. Mandry*, No. 12-cv-13236, 2013 WL 687056, at *5 (E.D. Mich. Feb. 26, 2013) ("Fannie Mae and FHFA are not government actors that can be held liable for [a] Fifth Amendment due process violation.")

5. *Herron v. Fannie Mae*, 857 F. Supp. 2d 87, 95 (D.D.C. 2012) ("FHFA as conservator for Fannie Mae is not a government actor.")