No. 20-2026

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JUDITH A. SISTI

Plaintiff - Appellee

v.

FEDERAL HOUSING FINANCE AGENCY;
FEDERAL HOME LOAN MORTGAGE CORPORATION;
NATIONSTAR MORTGAGE, LLC

Defendants - Appellants

On Appeal from the United States District Court for the District of Rhode Island,
Case No. 1:17-cv-00005
The Honorable John J. McConnell, Jr.

APPELLEE'S BRIEF FOR JUDITH A. SISTI

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INTRODUCTION

Judith Sisti ("Plaintiff") agrees with Defendants: foreclosures are sad and sometimes necessary. *But that is not what this case is about*. Rather, this case is about providing homeowners with basic due process before the government deprives them of their property interests in that most important asset: their home. While all foreclosures are sad, they become truly tragic when the government exceeds the bounds of its constitutional powers and strips homeowners of their homes improperly – precisely what Plaintiff alleges to have happened here.

Mistakes in the foreclosure process happen frequently. Plaintiff asserts mistakes happened here. And if it weren't for Plaintiff's litigation in this case, those mistakes would have gone entirely unnoticed.

In this case, Plaintiff alleged that the Federal Housing Finance Agency ("FHFA") (acting both as the government regulator and conservator of Federal Home Loan Mortgage Corporation ("Freddie Mac" or "GSE")) and the GSE are government actors and that they denied Plaintiff basic due process by foreclosing without giving her any opportunity to present defenses to a neutral hearing officer. Early in this case, Defendants filed a motion for judgment on the pleadings. The motion sought to dismiss Plaintiff's due process claim on the grounds that FHFA and Freddie Mac were not government actors.

After complete briefing and oral argument, Judge McConnell denied Defendants' motion and found that it was plausible that Defendants were government actors given the facts alleged in this case and the law. Addendum to Appellants' Brief ("ADD") 001-020 (Ruling on Motion being appealed and Judgment).

The parties agreed to a stipulation and final judgment so that Defendants could appeal Judge McConnell's ruling. Consequently, the only question presented on this appeal is whether: given the facts alleged by Plaintiff, FHFA and the GSE may qualify as government actors for the purposes of Plaintiff's due process claim. The answer is yes.

Judge McConnell correctly found that the question of FHFA's government-actor status is controlled by *FDIC v. Meyer*, 510 U.S. 471 (1994) ("*Meyer*"). *Meyer*, like this case, involved a constitutional claim brought against the government for actions it took when exercising control (as receiver) over a failed savings and loan. Importantly, its government status was not shed by the United States Supreme Court simply because the government was acting as a receiver when it committed the alleged wrongs.

Despite *Meyer's* obvious applicability to this case, Defendants seek to have this court apply *O'Melveny & Meyers v. FDIC*, 512 U.S. 79 (1994) ("*O'Melveny*") to this question. *O'Melveny* is the mirror image of *Meyer*. *O'Melveny* involves a

state law claim (not a constitutional one, as in *Meyer* and this case), brought by the government as receiver (not against the government, as in *Meyer* and in this case), for actions taken by a third party before government control commenced (not during government control, as in *Meyer* and in this case).

Defendants ignore these differences. Instead, they point the court to the numerous cases that misapply *O'Melveny's* "step into the shoes" metaphor to conclude that FHFA is insulated for all actions it takes as a conservator because it "steps into the shoes" of the entity it is controlling. But these cases are wrong. And one not need look any farther than *O'Melveny* itself to prove this point. *O'Melveny* specifically stated its "shoes" metaphor only applies to actions that predate government control. Moreover, the multitude of cases referenced by Defendants that misapply *O'Melveny*, nearly all of which are ultimately based on *Herron v. Fannie Mae*, 857 F. Supp. 2d 87, 94 (D.D.C. 2012), *aff'd*, 861 F.3d 160 (D.C. Cir. 2017) ("*Herron*"), are not binding on this court. In contrast, Supreme Court decisions cited herein (such as *Meyer* and others) **are** binding authority. Application of that precedent requires findings of government actor status for purposes of Plaintiff's due process claim.

Moreover, as for the GSE, ongoing plenary government control by FHFA, a government agency, is not in dispute. *See, e.g.*, Joint Appendix ("JA") 060. Here, the plenary control continues unabated, unless the government itself chooses to

voluntarily relinquish it. ADD 013. Under controlling Supreme Court authority, that plenary and unchecked control is sufficient to find that government action is, at the very least, "plausible," which is a relatively low bar.

This is not the first time the government has tried to evade its constitutional obligations by using creative end-runs, nor will it likely be the last. When it happens, as in this case, courts have the indispensable role of identifying the abuse and putting a stop to it. Examples like *LeBron* and *DOT* (both discussed and defined below) make one thing clear: Judges are free to look beyond labels and disclaimers to focus on the practical realities when fulfilling this critical function.

Focus on governing Supreme Court precedent, the practical realities, and the procedural posture, show that Judge McConnell was right and that he should be affirmed.

ISSUES PRESENTED

1. When deciding a motion for judgment on the pleadings, a Plaintiff's claim must survive unless it appears beyond a doubt that Plaintiff cannot prevail. The question presented here is whether Judge McConnell was wrong when he concluded that the Federal Housing Finance Agency ("FHFA") may be a government actor for the purposes of Plaintiff's due process claim which arises from acts that were: (1) taken pursuant to policies the FHFA implemented as the

government regulator of the GSE; and (2) performed solely during the FHFA's ongoing conservatorship of the GSE.

2. Given that various facts were undisputed in this case, a court could conclude that the GSE is a government actor if – when reviewing the practical realities and specific facts alleged – the court determines that the GSE is under the requisite government control. The question presented here is whether Judge McConnell was wrong when he decided that Plaintiff plausibly established the requisite government control when: (1) the government control at issue is total and complete; (2) the control continues indefinitely despite the GSE's rehabilitation; and (3) the control cannot ever end automatically, but only ends by additional government fiat.

STATEMENT OF THE CASE

All the facts pled by Plaintiff can be found at JA 008-31 which includes the amended complaint (without exhibits that were incorporated by reference). But the relevant facts for this appeal are fairly straightforward and set out in Judge McConnell's ruling. ADD 001-019.

During the mortgage crisis, Congress passed the Housing and Economic Recovery Act of 2008 ("HERA"), 12 U.S.C. § 4501, *et seq*. HERA created FHFA and empowered FHFA to supervise, regulate and control the GSE. Specifically, HERA empowered FHFA to place the GSE in conservatorship or receivership for

the purposes of reorganizing, rehabilitating, or winding up the affairs of the GSE. FHFA exercised those powers, and in the fall of 2008, placed the GSE into conservatorship. ADD 002.

FHFA totally controls the business activities of the GSE. *Id.* There is neither a specific date upon which FHFA's control will end nor any financial metric or external event that will automatically end that control. Moreover, the government owns all senior preferred stock of the GSE, which is senior in right for both dividends and liquidation to all others. The GSE cannot issue new shares, declare dividends or dispose of assets without approval from the U.S. Treasury. ADD 003. In exchange for this controlling interest, the GSE received billions of dollars in liquidity from the government. But, at the time of Plaintiff's complaint, the GSE had paid tens of billions of dollars more to the government than it had received in the financial bailout from the government – a number that has surely become even more lopsided with the passage of time. Whatever those amounts currently are, not a single dollar of the billions paid by the GSE reduces the government's controlling interest in the GSE. Those payments are considered by the Congressional Budget Office to be intragovernmental payments. ADD 003.

Years after appointing itself conservator of the GSE, FHFA, as regulator of the GSE, created and implemented the Servicer Alignment Initiative ("SAI"), which required servicers of GSE mortgages to follow specific timelines for

processing foreclosures. ADD 004. The GSE Defendant, through its servicer, conducted a foreclosure sale of Plaintiff's property. This was a non-judicial foreclosure. Consequently, Plaintiff was deprived of her property without the opportunity to have an evidentiary hearing overseen by a neutral hearing officer. ADD 004.

In March 2017, Plaintiff filed an amended complaint ("Complaint") alleging, among other things, a due process claim against FHFA, as both the regulator of the GSE and conservator, and the GSE.[1] Defendants answered, and moved for a judgment on the pleadings by December 2017. Defendants rescinded the foreclosure by January 2018.

After extensive briefing and oral argument, Judge McConnell denied the motion, finding that government control was plausible given the allegations in the complaint and governing law. Judge McConnell applied *Meyer* to resolve FHFA's government status, but noted (in the alternative) that his conclusion would not change if he applied *O'Melveny*. ADD 016. As for the GSE, Judge McConnell reviewed and applied binding Supreme Court precedent. In doing so, he looked at the "practical realities" before him (as required) and concluded that the GSE could be a government actor for the purposes of Plaintiff's due process claim. ADD 008-

[1] The Complaint also asserted a breach of contract claim and others that are not germane to this appeal.

014. Judge McConnell noted that the unchecked control the government has over the duration of its total takeover of the GSE was a particularly important factor in his decision. He correctly noted that the decision to end the conservatorship is left entirely to the discretion of the government, which is worlds apart from other situations where the control can automatically end. ADD 013. Judge McConnell was right, and correctly denied Defendants' motion.

At the end of September 2020, the parties entered a stipulated judgment so that Defendants could appeal Judge McConnell's ruling. Judge McConnell entered that negotiated judgment, and Defendants filed a timely appeal to this Court.

STANDARD OF REVIEW

Appeals of rulings on motions for judgment on the pleadings are reviewed *de novo*. A motion for a judgment on the pleadings cannot be granted unless it appears **beyond a doubt** that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *See Curran v. Cousins*, 509 F.3d 36, 43 (1st Cir. 2007) (emphasis added). Well-pled facts are to be taken as true, and all reasonable inferences are to be drawn in the non-movant's favor. See ADD 002.

SUMMARY OF ARGUMENT

Whether FHFA and the GSE are government actors for purposes of a Fifth Amendment Due Process claim is a matter of first impression in this Circuit. That

other non-binding cases have misapplied precedent when deciding these issues in the past should not distract this Court during its independent review.

The disagreement with respect to FHFA is simple: Defendants claim that *O'Melveny* "establishes that the FHFA Conservator does not qualify as a government actor" for purposes of constitutional claims. Appellants' Brief ("App. Br."). at 11. That is wrong. *O'Melveny* concerns a state law claim brought **by** the government, for pre-receivership actions. It does not control this case. *Meyer*, which concerns a constitutional claim **against** the government while acting as a receiver, does control the analysis.

Plaintiff agrees that the GSE was not a government actor prior to the conservatorship. But the government control **post**-conservatorship is the issue in the instant case. Here that control is plenary, absolute, unchecked and it can continue until the government--in its sole discretion--decides to relinquish it. Simply put, control that is unending until it is voluntarily relinquished can only be described as "permanent." And permanency is not the only touchstone for this analysis. Judge McConnell was right to also look at the practical realities of the conservatorship when he decided not to blindly accept the stated purpose of the conservatorship (which Defendants claim is a "temporary" one) at face value. This is precisely what governing Supreme Court precedent required him to do.

Lastly, the decision below was not a final determination on the merits. Judge McConnell was right when he let Plaintiff's due process claim survive. He simply needed to find that government control was plausible. This Court must apply the same standard. When viewing the dispute through the lens of plausibility, it is clear that Judge McConnell's decision should be affirmed.

ARGUMENT

I. PROPER APPLICATION OF THE SUPREME COURT'S DECISIONS IN *MEYER* AND *O'MELVENY* CONFIRMS FHFA'S STATUS AS A GOVERNMENTAL ACTOR SUBJECT TO THE CONSTITUTION

There is an undeniable starting point on which all parties can agree: FHFA **is** the government. It is a government agency charged with regulating the GSE. FHFA has routinely argued -- in cases across the country -- that it should be given the full panoply of benefits that accompany its venerated governmental status. JA 087 (citing cases where FHFA sought government status); *see also* ADD 016 n.8 (citing cases where FHFA found to be government actor even when conservator). At the same time, however, FHFA has vigorously claimed exactly the opposite in this case: that it is **not** the government when that status might saddle it with inconvenient burdens, such as adhering to basic constitutional obligations. Defendants try to square this contradiction by claiming that, when acting as a conservator, FHFA steps into the shoes of the private entity that is in conservatorship for constitutional purposes; and therefore, FHFA cannot be subject

to constitutional constraints for any action it takes as conservator. App. Br. 14-20. FHFA is wrong. To support its self-serving contention, FHFA conveniently overlooks applicable Supreme Court precedent (*Meyer*) and stretches inapplicable case law beyond the limits of its own text (*O'Melveny*).

Meyer -- not *O'Melveny* -- controls the determination of FHFA's governmental actor status. In *Meyer*, the Supreme Court ruled that FDIC, acting as receiver for a failed bank, was a governmental actor for purposes of a *Bivens* claim[2] alleging a due process violation under the Fifth Amendment. Whereas *Meyer* governs the determination of FHFA's status as a governmental actor; *O'Melveny* merely governs the interpretation of FHFA's successor clause contained in HERA. Further, *Herron's* – and those cases that follow *Herron* – use of *O'Melveny's* "steps into the shoes" rule to determine FHFA's non-governmental status exceeds *O'Melveny's* explicit limitations on the applicability of that rule and defies the plain and unambiguous language of HERA which delineates FHFA's conservatorship powers.

[2] A *Bivens* claim, frequently referred to as a "Constitutional tort claim," allows an injured party to recover money damages for alleged violations of the Constitution perpetrated by federal agents.

A. *Meyer* Establishes FHFA as a Governmental Actor for Purposes of Plaintiff's Fifth Amendment Claim and *O'Melveny* has No Bearing on FHFA's Governmental Actor Status

The *Bivens* claim in *Meyer* was brought by an employee of a failed California savings and loan association who was fired by the federal agency appointed receiver over the failed thrift.[3] The employee, Meyer, a senior officer of the failed thrift, was fired **after** the agency was appointed receiver, pursuant to the agency's general policy of terminating the employment of the failed thrift's senior management. The employee alleged his summary discharge by the federal agency without providing him with a pre-deprivation hearing[4] deprived him of a property right, his right to continued employment under California law, without due process of law in violation of the Fifth Amendment.

The *Meyer* Court first examined whether the agency's sovereign immunity had been waived, since sovereign immunity shields the Federal Government and its agencies from suit and is, therefore, "jurisdictional in nature." *Meyer*, 510 U.S.

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[3] The federal agency appointed as receiver was the Federal Savings and Loan Insurance Corporation ("FSLIC"). FSLIC was abolished by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub.L. 101–73, 103 Stat. 183, and the Federal Deposit Insurance Corporation ("FDIC") was substituted for FSLIC in the *Meyer* litigation. *Meyer*, 510 U.S. at 475, n.1.

[4] Although the Supreme Court's decision in *Meyer* does not specifically mention the lack of a hearing, the Ninth Circuit ruled that FSLIC's failure to provide Meyer, the terminated employee, with a pre-deprivation hearing deprived him of his due process rights. *Meyer v. Fid. Sav.*, 944 F.2d 562, 575 (9th Cir. 1991), *rev'd sub nom. F.D.I.C. v. Meyer*, 510 U.S. 471 (1994).

at 475. After determining the waiver of sovereign immunity contained in the Federal Torts Claims Act was inapplicable to the *Bivens* claim, the Court next examined the "sue and be sued" clause contained in FDIC's predecessor agency, the FSLIC. FDIC argued that the "sue and be sued" waiver be limited to cases in which FSLIC was subject to liability as a private entity, and a constitutional tort claim would fall outside the sue-and-be-sued waiver because the Constitution generally does not restrict the conduct of private entities. *Meyer*, 510 U.S. at 480. The Court rejected FDIC's argument, as it would have required the Court to "engraft" language from the Federal Tort Claims Act onto the language of FSLIC's "sue and be sued" clause; and ruled FSLIC's "sue and be sued" clause waived the agency's sovereign immunity for the constitutional tort claim. *Id.* at 483 ("FSLIC's sue and be sued clause waives the agency's sovereign immunity for Meyer's constitutional tort claim").

Having determined that FDIC was a "sovereign" whose immunity had been waived, the Court turned to the *Bivens* claim to decide whether "to expand the category of defendants against whom *Bivens*-type actions may be brought to include not only federal *agents*, but federal *agencies* [such as FHFA][5] as well." *Id.*, at 484 (emphasis original). The Court declined to extend *Bivens* liability to federal

[5] Likewise, FHFA is an "independent agency of the Federal Government." 12 U.S.C. § 4511(a).

agencies for reasons wholly unrelated to FDIC's status as a governmental actor – a status that, critically, **was not shed** simply because it was acting as a receiver. Thus, in *Meyer* the receiver maintained its government status when sued for a constitutional violation based on actions it took as receiver.

The *Herron* cases addressing FHFA's governmental status determined that status by applying *O'Melveny*, decided the same term as *Meyer*. Also decided unanimously, *O'Melveny* involved a different failed California savings and loan association, whose failure was attributed to losses due to the thrift's violation of law and unsound business practices. After being appointed receiver of the failed thrift, the FDIC sued the law firm of O'Melveny and Myers, which performed work for the thrift before being placed under FDIC's receivership. FDIC's suit alleged professional negligence and breach of fiduciary duty for the firms' **pre-receivership actions** with the failed thrift. The issue decided in *O'Melveny* was whether California law or federal common law governed the resolution of the FDIC's claims **against the law firm**.

To answer this question, the *O'Melveny* Court turned to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub.L. 101–73, 103 Stat. 183. FIRREA contains a successor clause governing FDIC's receivership powers that "contains virtually identical language" as FHFA's successor clause in HERA. *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012).

The *O'Melveny* Court ruled that per the FDIC's successor clause, 12 U.S.C.A. § 1821(d)(2)(A)(i), "FDIC as receiver "steps into the shoes" of the failed S & L . . . ." *O'Melveny*, 512 U.S. at 86. Applying the "step into the shoes" rule, the Court determined that the FDIC's claim would be governed by California law not federal common law:

> It is hard to avoid the conclusion that § 1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent S & L, to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise. To create additional "federal common-law" exceptions is not to "supplement" this scheme, but to alter it.

Id., at 86-87.

One would expect that two unanimous Supreme Court decisions interpreting FDIC's authority when acting as receiver, decided by the same nine judges within weeks of each other, would not yield conflicting opinions. But Judge McConnell's interpretation (in *Boss* and *Sisti*) is the only interpretation that is consistent with the text of both cases.

Plaintiff's Fifth Amendment claim is identical -- in relevant substance -- to the Fifth Amendment claim asserted in *Meyer*. Both Plaintiff and the terminated employee alleged they were deprived of a property interest because of the application of a policy of a federal agency acting as receiver or conservator, without the agency providing them a pre-deprivation hearing guaranteed by the

Fifth Amendment.[6] Thus, *Meyer* controls the determination of FHFA's status as a governmental actor.

Unlike *Meyer*, *O'Melveny* was **not** concerned with constitutional claims against the government, but state law claims the FDIC was asserting as receiver that the entity under receivership **could have asserted** had it not been placed into receivership. *O'Melveny* merely holds that the succession clause in FDIC's statute enabled FDIC to "step into the shoes" of the private entity for purposes of determining the choice of law governing those claims. Accordingly, the claims at issue in *O'Melveny* were to be determined as if they were brought by a private entity as opposed to a governmental entity.

B. *O'Melveny's* "Steps into the Shoes" Rule Applies Only to Waive FHFA's Sovereign Immunity Status and Has No Bearing on FHFA's Governmental Actor Status

Herron's error, like the cases that blindly follow *Herron*, is not merely choosing *O'Melveny* instead of *Meyer* for determining FHFA's governmental status but also with their interpretation of *O'Melveny* itself. Those cases conclude that FHFA's succession clause transmogrified FHFA from a governmental actor,

[6] "Unless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 62 (1993).

into a private actor, when exercising **any** of its conservatorship powers. That conclusion simply does not comport with *O'Melveny*.

Critically, the *O'Melveny* decision does not state that FDIC's succession clause governed all of FDIC's receivership powers and, thus, converted FDIC, a federal agency, into a private actor. To the contrary, *O'Melveny's* application of the "steps into the shoes" rule was expressly limited to rights that existed **prior to** FDIC's becoming a receiver that FDIC inherited from the institution in receivership:

> [the succession clause's] language appears to indicate that the FDIC as receiver "steps into the shoes" of the failed S & L, obtaining the rights "*of* the insured depository institution" that existed **prior to receivership.**

O'Melveny, 512 U.S. at 86 (quoting 12 U.S.C. § 1821(d)(2)(A)(i)) (citations omitted, italics in original, bold added).

Also, the *O'Melveny* Court stated that its decision to apply California law instead of federal common law was limited to the succession clause, and not the other receivership powers of the FDIC:

> The rules of decision at issue here do not govern the primary conduct of the United States or any of its agents or contractors, but affect only the FDIC's rights and liabilities, as receiver, **with respect to primary conduct on the part of private actors that has already occurred.**

Id. at 88. (Emphasis added).

O'Melveny governs neither the Fifth Amendment claim in *Meyer* nor that of Plaintiff. In both instances, the Fifth Amendment claims stem from the federal agency's actions as receiver or conservator **during** the government's receivership or conservatorship, as opposed to conduct on the part of private actors that occurred **prior** to the receivership **among private parties**, as was the case in *O'Melveny*.

Here, FHFA's actions -- taken as both government regulator and conservator -- giving rise to Plaintiff's due process claim -- began during FHFA's conservatorship of the GSE. FHFA's promulgation of the SAI in 2011 directed the GSE's servicers in Rhode Island to seize defaulted debtors' homes through non-judicial foreclosure procedures; and Rhode Island's non-judicial foreclosure procedures do not provide borrowers a pre-deprivation hearing before borrowers are deprived of their homes. JA 018-19. As a result of the SAI, the GSE foreclosed on Plaintiff's home without affording a pre-deprivation hearing, in violation of the Fifth Amendment. *Id.* at 21; ADD 004.

The only bearing *O'Melveny* has on this case is the succession clause's waiver of FHFA's sovereign immunity such that Plaintiff's Fifth Amendment claim may proceed.[7] The "sue and be sued" clauses were among the "rights, titles,

[7] Under FHFA's succession clause, codified at 12 U.S.C. § 4617(b)(2)(A), FHFA steps into the "sue and be sued" clauses of the GSEs set forth in their

powers and privileges" FHFA succeeded to, as those clauses existed **prior** to the conservatorship. *O'Melveny*, 512 U.S. at 86. Given *Meyers'* holding that FDIC's "sue and be sued" clause waived that agency's sovereign immunity, FHFA's sovereign immunity has been waived by virtue of FHFA's stepping into the shoes of the GSE's "sue and be sued" clause so the Fifth Amendment claim may be further adjudicated. *Meyer*, 510 U.S. at 475. *Accord*, *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 622 (D.C. Cir. 2017). Taken together *Meyer* and *O'Melveny* make clear that the government remains the government when it is being sued for constitutional claims based on acts that occurred post-government control. However, the government can step into "private shoes" for acts that occurred prior to government control.[8]

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respective Charter Acts, 12 U.S.C. § 1723(a) for Fannie Mae and 12 U.S.C. § 1452(c)(7) for Freddie Mac.

[8] In the past, Defendants have tried to use *United States v. Ely*, 142 F.3d 1113, 1121 (9th Cir. 1997) to argue that *Meyer* does not apply by selectively quoting the case and omitting key language. *Ely* does not impact Plaintiff's argument in the slightest (if anything, it supports it). In *Ely*, the government (as receiver) sued **civilly to redress wrongs done to the bank**, which is not the situation here, nor was it the situation in *Meyer*. Similarly, *United States v. Beszborn*, 21 F.3d 62, 68 (5th Cir. 1994) is irrelevant. In both cases, the underlying claims were committed not by a government agency acting as conservator or receiver, but by private actors prior to government control. Thus, they are properly subject to *O'Melveny's* "shoes" rule as described herein (and in *O'Melveny* itself).

C. HERA Established FHFA as an "Independent Agency of the Federal Government" and HERA's Succession Clause does not Transform FHFA into a Private Actor

Defendants' claim that FHFA's succession clause covers all actions of FHFA acting as conservator cannot be squared with the plain and unambiguous language of HERA. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). As discussed above, FHFA's promulgation of the SAI authorizing the use of non-judicial foreclosures in Rhode Island could not arise under the respective succession clauses since FHFA promulgated SAI three years **after** seizing control of the GSEs. JA 018. Thus, FHFA's actions must be derived from the other conservatorship powers accorded to FHFA,[9] the "agency;" including those powers codified at 12 U.S.C. § 4617(b)(2)(B), authorizing FHFA, the "agency . . . as conservator" to operate the GSEs and 12 U.S.C. § 4617(b)(2)(D,) authorizing FHFA, the "agency . . . as conservator" to take necessary actions "to put the [GSEs] in a sound and solvent condition" and "to carry on the business of the [GSEs] and preserve and conserve

[9] Before the Ninth Circuit in *Meyer,* FSLIC maintained its authority for terminating the employee Meyer was found in the "broad power granted by Congress to federal receivers. . . ." *Meyer v. Fid. Sav.*, 944 F.2d 562, 574 (9th Cir. 1991), *rev'd sub nom. F.D.I.C. v. Meyer*, 510 U.S. 471 (1994).

the assets and property of the [GSEs].” As one of several enumerated conservatorship powers, the plain and unambiguous language of FHFA’s succession clause in HERA does not modify or supersede the FHFA’s other conservatorship powers **given to the agency**. Nor does the plain and unambiguous language of the succession clause, 12 U.S.C. § 4617(b)(2)(A), convert FHFA, the “agency” defined at 12 U.S.C. § 4502(2) from “an independent agency of the Federal Government” as set forth in 12 U.S.C. § 4511(a) into a private actor. HERA would require significant redrafting to uphold the *Herron* cases conversion of FHFA, an “independent agency of the Federal Government” to the private status of the entities FHFA placed into conservatorship. The *Herron* cases effective redrafting of HERA does not square with *Meyer*, 510 U.S. at 483 or *O’Melveny*, 512 U.S. at 86-87.[10]

[10] Defendants’ other arguments are irrelevant once *Meyer* is properly applied. Defendants devote six pages of their brief to Judge McConnell’s “alternative justification” for his ruling on the motion for judgment on the pleadings. *See* App. Br. Section I.A. While little attention needs to be devoted to these arguments (since they only become relevant if *Meyer* is not applied), one point is worth clarifying. Presumably to make this case fit more neatly into the flawed line of *Herron* cases, Defendants’ claim that “FHFA is alleged to have acted solely in its capacity as Conservator” in this case. App. Br. 13; *see also Id*. at 18 (same). That is not true. In this case, the FHFA is specifically alleged to have acted as both government regulator **and** conservator. *See, e.g.*, JA 013. Indeed, there can be little dispute that FHFA “the agency” is given certain powers as conservator and has other powers as a regulator. Thus, based on the allegations in this Complaint, which controls the analysis in this case, FHFA is undoubtedly alleged to have acted as the government (even if it were allowed to step into “private shoes” for certain actions).

II. PLAINTIFF'S COMPLAINT PLED SUFFICIENT FACTS TO PLAUSIBLY ESTABLISH THAT THE GSE'S FORECLOSURE ON HER HOME IS GOVERNMENT ACTION

Having established FHFA's status as a governmental actor, Plaintiff turns to the governmental status of the GSE. Two Supreme Court decisions are central to this inquiry, *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374 (1995) ("Lebron") and *Dept. of Transportation v. Ass'n of American Railroads*, 575 U.S. 43 (2015) ("*DOT*"). However, those cases are not the only Supreme Court precedent supporting Judge McConnell's conclusion. Various lines of precedent lead to the same inescapable conclusion: a finding of government action is appropriate here.

A. Sufficient Facts Were Pled to Show that the GSE Could Plausibly be a Governmental Actor for Purposes of Constitutional Claims

Plaintiff plausibly established that the GSE is a government actor based on the U.S. Supreme Court's decision in *Lebron* (and progeny) because Plaintiff pled: (1) the GSE is under complete governmental control (JA 010-17); (2) the control persists despite the GSE being financially stable enough to provide tens of billions of dollars more to the government than it received (JA 015-16); and (3) the control cannot end automatically. *See* JA 014. However, Defendants contend that because FHFA is acting as conservator, and the "conservatorship does not grant FHFA permanent, structural control over" the GSE (App. Br. 39), the control cannot be deemed "permanent" under *Lebron*. But Defendants' overreliance on the technical

form of its complete control here, a "conservatorship," amounts to a misapplication of *Lebron* (and its progeny), which requires courts to look at the practical realities and facts rather than blindly follow labels, characterizations or disclaimers.

1. FHFA's complete and permanent control alleged in the complaint is sufficient to render the GSE a plausible governmental actor

Given various concessions by the Defendants, only the third prong of the *Lebron* analysis remains in dispute: whether FHFA has the requisite control over the GSE. *Lebron*, 513 U.S. at 400.[11]

FHFA's complete control over the GSE stems from the broad authority Congress granted to FHFA in HERA.[12] Under HERA, FHFA "as conservator or receiver, and by operation of law . . . "succeed[ed] to all rights, titles, powers, and privileges of [the GSEs], and of any stockholder, officer, or director of [the GSEs] with respect to [the GSEs] and [their] assets." 12 U.S.C. § 4617(b)(2)(A)(i). Similarly, HERA provides that FHFA has the right to "take over the assets of and operate [the GSEs] with all the powers of the shareholders, the directors, and the

[11] The parties agree that the GSE meets the first two prongs of *Lebron's* three-part test for determining whether a government-created corporation such as the GSE is considered an instrumentality of the federal government and, thus, are required to abide by the provisions of the United States Constitution. *See* App. Br. 34.

[12] FHFA also has plenary control over another GSE, Fannie Mae, that has been described as a sibling to the GSE relevant here. On occasion they are referenced together as the GSEs.

officers of the [GSEs] and conduct all business of the [GSEs]." 12 U.S.C. § 4617(b)(2)(B)(i). Moreover, pursuant to HERA, FHFA "may, by regulation or order, provide for the exercise of any function by any stockholder, director, or officer of any [GSE] for which the Agency has been named conservator or receiver." 12 U.S.C. § 4617(b)(2)(C).

Courts construing the powers Congress conferred on FHFA by HERA ruled that HERA vested FHFA with complete control over the GSEs. *See Fed. Hous. Fin. Agency v. City of Chicago*, 962 F. Supp. 2d 1044, 1058 (N.D. Ill. 2013) ("HERA's provisions make it clear that, in the event Fannie and Freddie were placed into conservatorships, Congress intended FHFA to assume complete control of those regulated entities and, in its discretion, 'take such action as may be necessary to put the regulated entity in a sound and solvent condition.'") (quoting 12 U.S.C. § 4617(b)(2)(D)(i)); *see also Oakland County v. Fannie Mae*, 276 F.R.D. 491, 495 (E.D. Mich. 2011); *In re Fed. Home Loan Mortg. Corp. Derivative Litig.*, 643 F. Supp. 2d 790, 797 (E.D. Va. 2009). There is no dispute that the degree of control here is plenary, and the degree of control counsels in favor of a finding that the GSE is a government actor.

a) Sufficient control was plausible because the plenary control: (1) persisted (and continues) after objectives of government control had been met; (2) cannot end automatically; and (3) is perpetual absent additional government fiat

Plenary control aside, the *Lebron* court distinguished permanent government control from temporary government control when it compared Amtrak to the Consolidated Rail Corporation ("Conrail"). The Supreme Court had previously determined Conrail not to be a federal instrumentality because it had a provision automatically terminating the government's control: "Full voting control . . . will shift to the [private] shareholders if federal obligations fall below 50% of Conrail's indebtedness." *Lebron.*, at 399 (citing *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 152 (1974)). The Court held that the government's interest in Conrail was the same as that of other directors – maximizing profits for the shareholders. *Id.*

In *Lebron*, Justice Scalia distinguished Amtrak from Conrail in finding the former was an instrumentality of the United States, noting that ". . . no provision exists that will automatically terminate control [of Amtrak by the federal government] upon termination of a temporary financial interest." *Id.*[13] Thus, the

[13] In footnote 5 of the *Lebron* decision, Justice Scalia considered one section of Amtrak's charter that appeared to allow for release of control from the government after a certain condition was met, but found that it was too ambiguous to be relied upon. 513 U.S. at 399 n.5.

GSE under FHFA conservatorship is more like Amtrak than Conrail. Whereas Conrail had an automatic, external trigger to end government control, the GSE has no such external trigger that would end government control. Rather, the decision of whether or when to end the conservatorship rests completely with the FHFA. *See* 12 U.S.C. § 4617(a).

As alleged, the GSEs have already paid the government back more than they received in the 2008 bailout – tens of billions more as of the time of the Complaint. Tellingly, the Congressional Budget Office considers these payments to be **intragovernmental transfers.** JA 016. Despite this financial wherewithal, the conservatorship remains in place and shall remain in place until FHFA and the United States Department of Treasury, in their sole discretion, decide to end it. JA 013-014; ADD 10, 13.

To the extent "permanence" is required, it simply cannot be disputed that "permanent" does not always mean "forever" as FHFA implies. Under that unduly narrow definition, "permanent" fixtures could never be uninstalled, "permanent" residents could never decide to change their domicile, and "permanent" appointees could never retire. Judge McConnell was right to give "permanent," the natural and common sense meaning it so often has in other contexts: continuing without end until it is voluntarily relinquished (which may not ever happen here). This interpretation is entirely consistent with *Lebron* (and subsequent cases) and is

particularly prudent within the procedural context of Judge McConnell's decision. Defendants also argue that "*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." App. Br. 37. Here, FHFA's control over the GSEs is complete in that FHFA can decide when, if ever, to end the conservatorship and thus end its control. ADD 10.

The Defendants try to draw a distinction between Amtrak's Charter and HERA's enablement of FHFA to make itself conservator and appoint the GSE's board of directors, stating that but for the conservatorship, the GSE directors would be elected by the shareholders and that the FHFA authority to appoint the directors will expire upon the end of the conservatorship. App. Br. 39. This, however, is a distinction without a difference since the FHFA has the ability to decide when, if ever, the conservatorship ends. There is no functional difference between a congressional charter that gives government control to appoint a majority of an entity's board of directors (as in *Lebron*) and a congressional act that grants a government entity the sole discretion to enact a conservatorship which allows it to appoint an entity's board of directors in perpetuity until the empowered government entity relinquishes its right to do so (as in this case).

b) Even if the FHFA's conservatorship had stated a facially temporary purpose, that stated purpose cannot override reality

The Defendants further contend that FHFA's conservatorship should be considered temporary because HERA states a statutory purpose of "reorganizing, rehabilitating, or winding up the affairs of a [GSE]," 12 U.S.C. § 4617(a)(2), and that purpose, the Defendants argue, naturally limits the Conservator's authority to a certain resolution. App. Br. 40. The Defendants rely on *Rubin v. Fannie Mae*, which called this provision of the statute "an inherently temporary purpose." 587 Fed. App'x 273, 275 (6th Cir. 2014). Ironically, this pronouncement was made more than six years ago. It should be viewed as less and less persuasive with each passing year.

Characterizations aside, it cannot be disputed that HERA does not mandate that the conservatorship ever be brought to a close or terminated, unless FHFA decides to appoint itself receiver of the GSEs. And by Defendants' flawed logic, courts should view the so-called "temporary purpose" as dispositive no matter how many decades the conservatorship lasts – which obviously makes no sense.

In fact, rehabilitation has already been achieved and yet the conservatorship remains in place. As alleged, the GSE is financially sound enough to return to the government tens of billions of dollars **more** than it received during the financial bailout. JA 15-16. Nevertheless, despite the GSE having been rehabilitated, the

government conservatorship continues for the foreseeable future. If the statutory purpose of "reorganizing, rehabilitating, or winding up" the GSE were anything more than window dressing to camouflage FHFA's complete, unbridled and permanent control, then the conservatorship should have ended years ago. Clearly, this statutory purpose is not a termination provision and it cannot properly be relied upon to make the conservatorship temporary when the so-called temporary nature of this endeavor has been disregarded. FHFA may disagree that it has been disregarded, but that is a disputed issue of fact that is considered in the light most favorable to the Plaintiff (as the non-moving party) during a motion for a judgment on the pleadings.

c) Control over a GSE is not "temporary" simply because it is labeled a "conservatorship"

Citing dicta from other courts, the Defendants claim that government conservatorship is a "quintessential example of temporary control that does not convert a private corporation into a government actor." App. Br. 40. Defendants' argument that a conservatorship is always temporary and therefore exempt from the *Lebron/DOT* framework errs by focusing its analysis on the form of entity chosen by Congress to control the GSEs: a conservatorship. *Lebron* explicitly rejected the Defendants' argument, requiring instead a determination as to whether the entity in question, in whatever form the entity is constituted by Congress, is what the Constitution regards as the government:

> [I]t is not for Congress to make the final determination of Amtrak's status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions. If Amtrak is, by its very nature, what the Constitution regards as the Government, congressional pronouncement that it is not such can no more relieve it of its First Amendment restrictions than a similar pronouncement could exempt the Federal Bureau of Investigation from the Fourth Amendment. The Constitution constrains governmental action "by whatever instruments or in whatever modes that action may be taken." *Ex parte Virginia*, 100 U.S. 339, 346-347, 25 L. Ed. 676 (1880). And under whatever congressional label. As we said of the Reconstruction Finance Corporation in deciding whether debts owed it were owed the United States Government: "That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is . . . ." *Cherry Cotton Mills, Inc. v. United States*, 327 U.S. 536, 539, 90 L. Ed. 835, 66 S. Ct. 729 (1946).

Lebron, 513 U.S. at 392-93.

Under Defendants' reasoning, Congress could establish conservatorship entities completely controlled by the government and with indefinite duration as a means of avoiding compliance with the United States Constitution. This outcome violates *Lebron*.[14]

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[14] This point can be demonstrated by replacing reference to the "corporate form" with "conservatorship" in the following excerpt from the *Lebron* decision:

> It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the [conservatorship] form. On that thesis, *Plessy v. Ferguson*, 163 U.S. 537, 41 L. Ed. 256, 16 S. Ct. 1138 (1896), can be resurrected by the simple device of having the State of Louisiana operate segregated trains through a state-owned [conservatorship entity.]

Id. at 397 (modified as explained above).

d) Supreme Court decisions subsequent to *Lebron* make clear that courts can look at more than "permanence"

Putting aside the above, subsequent decisions make clear that courts are free to look at more than "permanency" when analyzing whether the requisite control exists. The Supreme Court's subsequent interpretations of the third factor of the *Lebron* test expands the analysis. In *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 296 (2001), the Supreme Court stated that *Lebron* "held that Amtrak was the Government for constitutional purposes, regardless of its congressional designation as private; it was organized under federal law to attain governmental objectives and was directed and controlled by federal appointees."

Recently, in the *DOT* case, the Supreme Court revisited the *Lebron* ruling in a case challenging Congress' delegation of rulemaking powers to Amtrak. Relying largely on its prior ruling in *Lebron*, the *DOT* Court, in an 8-1 decision concluded 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 (emphasis added).

Notably absent from the *DOT* Court's analysis of Amtrak's status as a federal actor or instrumentality is any requirement that the government's control over the corporation be "permanent." Thus, even though permanency is met in the

instant case, the gravamen of the *Lebron* test is the degree and practical realities of government control, not simply the duration of control or the label used to exercise that control. *See also Barrios-Velazquez v. Asociacion de Empleados del Estado Libre Asociado de P.R.*, 84 F.3d 487, 492 (1st Cir. 1996) ("*Lebron* focused on the degree of control that the federal government had over Amtrak"); *Becker v. Gallaudet Univ.*, 66 F. Supp. 2d 16, 21 n.6 (D.D.C. 1999) (recognizing that courts should look at control from a "functional perspective" under *Lebron*).

By enacting HERA, Congress effectively stripped the directors of the GSE of authority to manage and set policy and handed those functions over to FHFA post-conservatorship. Functionally, FHFA controls every action of the GSEs; thus FHFA cannot "evade the most solemn obligations imposed in the Constitution by simply resorting to the [conservatorship] form." *Lebron*, 513 U.S. at 397.

Regardless of the labels Congress used to transfer complete control of the GSEs to FHFA, a government agency, *Lebron's* "authority" test is satisfied, where, as here, government control over the federally created corporation's board of directors is complete and perpetual (until FHFA, if ever, decides to end it). Like Amtrak, the GSEs are "created by the Government, are controlled by the Government, and operate for the Government's benefit." *See DOT*, 575 U.S. at 53; JA 15-16 (Freddie Mac is benefitting the government by paying it tens of billions of dollars more than it received).

2. The district court did not misapply *DOT*

The Defendants claim that Judge McConnell misapplied precedent when he found that 4617(a)(2) of HERA had the effect of disclaiming permanent control of the GSE. Defendants argue that section 4617(a)(2) is a "substantive provision[] that statutorily define[s] the scope and extent of the Conservator's control." App. Br. 44-45. But that claim is wrong and conveniently ignores the unfettered discretion given to FHFA here.

Section 4617(a)(2) of HERA states that the purpose for the conservatorship is "reorganizing, rehabilitating, or winding up" the affairs of the GSEs. This is not an express disclaimer of permanent control. But *DOT* simply does not require any sort of express disclaimer for a court to consider the practical realities. 575 U.S. at 55. Here, the indisputable reality is this: HERA gives FHFA the sole and absolute authority to decide when, or whether, the conservatorship will end. There is no date, no financial metric, or other achievable milestone that will automatically end the conservatorship. This omission is critical. Judge McConnell correctly recognized, "[a]bsent an act of Congress, 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 . . . Either way, the decision to end the conservatorship is left entirely to the discretion of the government." ADD 013.

Judge McConnell was right not to be blinded by the ostensible purpose of the conservatorship – which, as pled, has been achieved given the massive government windfall – when the well-pled practical realities before him revealed unfettered and endless government control that has continued despite the GSE's ability to pay tens of billions of dollars more than the GSE received to the government.[15]

3. Other Supreme Court precedent confers "government actor" status

Even if the court were to hold that government actor status were somehow not even plausible under *Lebron* (and other cases), FHFA's complete control over the GSE subjects the GSE to constitutional constraints under other U.S. Supreme Court precedent. FHFA's control of the GSE and its "pervasive entwinement" in the GSE's composition and workings requires the GSE's actions to be considered government actions under *Pennsylvania v. Board of Directors of City Trusts of Philadelphia*, 353 U.S. 230, 231 (1957) (describing "agency of the State" theory)

[15] Even if the permanent, complete control of the GSE by FHFA was not sufficient control under the *Lebron* analysis, the GSE is also alleged to be under the permanent, complete control of the United States Treasury. In the present case, the United States Treasury does not merely hold some shares of the GSEs; the Treasury holds ***a controlling interest***. See JA 015-16. Whether or not they are a "majority shareholder" in the technical is of no moment. The government control is obvious.

and *Brentwood Acad.* (discussing the "entwinement" theory and others). These cases buttress the conclusion that government actor status is appropriate here.

Brentwood Acad., described various approaches to the government actor inquiry:

> We have, for example, held that a challenged activity may be state action when it results from the State's exercise of "coercive power," when the State provides "significant encouragement, either overt or covert," or when a private actor operates as a "willful participant in joint activity with the State or its agents,". . . . We have treated a nominally private entity as a state actor when it is controlled by an "agency of the State," when it has been delegated a public function by the State, when it is "entwined with governmental policies" or when government is "entwined in [its] management or control,"

Id. at 296 (citations omitted).[16] Numerous alternative approaches apply to this case.

Alternative approaches were argued below (but resolution was unnecessary given Judge McConnell's finding on the applicability of *Lebron*). First, a nominally private actor can be considered a state actor when it is controlled by an

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[16] Similarly, the First Circuit listed a range of approaches to deciding whether a private entity is a governmental actor:

> Yet under several doctrines, acts by a nominally private entity may comprise state action--e.g., if, with respect to the activity at issue, the private entity is engaged in a traditionally exclusive public function; is "entwined" with the government; is subject to governmental coercion or encouragement; or is willingly engaged in joint action with the government.

Logiodice v. Trs. of Me. Cent. Inst., 296 F.3d 22, 26 (1st Cir. 2002) (citing *Brentwood Acad.*, 531 U.S. at 295-96).

"agency of the state." *Pennsylvania*, 353 U.S. at 231. Here, the Supreme Court ruled that the privately endowed Gerard College was a state actor and enforcement of its private founder's limitation of admission to whites was attributable to the State, because, consistent with the terms of the settlor's gift, the college's board of directors was a state agency established by state law. Under this theory there is no articulated "permanency" requirement. Given that the GSE's directors were completely replaced by FHFA pursuant to authority granted to it by an act of Congress, the GSE is controlled by an agency of the government, and are thus, a governmental actor under *Pennsylvania.*

Second, the "entwinement" theory provides another obvious and well-worn path to state actor status. Using this theory, the *Brentwood Acad.* court concluded that a non-profit athletic association was a governmental actor since "[t]he nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it." *Brentwood Acad.*, 531 U.S. at 298. As with its ruling in the *Pennsylvania* case, there is no requirement in *Brentwood Acad.* that

the entwinement be permanent: government control is all that is required for a finding that the private entity is a governmental actor for constitutional purposes.[17]

The GSE is clearly "entwined" with governmental policies here. The specifics of that entwinement are pled in detail and provide an alternative basis for upholding Judge McConnell's GSE decision.[18]

Since *Brentwood Acad.* puts fairness at issue, it is worth noting that fairness clearly tilts heavily in favor of Plaintiff here. Indeed, just two years ago a GSE successfully argued to this Court that it ***was*** the government, for the purposes of avoiding liability on certain claims stemming from a foreclosure. *Faiella v. Fannie Mae*, 928 F.3d 141 (1st Cir. 2019) (finding Fannie Mae is the government for the purposes of the *Merrill* doctrine). Plaintiff understands that the GSE can be the government for some purposes, but not others. However, allowing the GSE to flip-flop its status with respect to constitutional claims in this context would achieve undeniably absurd results where the GSE could be deemed both the government, and not the government, in the exact same case to avoid liability

[17] In *Herron*, the District Court for the District of Columbia considered whether Fannie Mae was entwined with the government under *Brentwood;* but, in four brief sentences dismissed its application to FHFA's conservatorship relying, incorrectly, on the "stepping into the shoes" metaphor enunciated in *O'Melveny.*

[18] By way of example, certain facts pled demonstrate how FHFA's direct involvement with the GSE and promulgation of the SAI led to foreclosure without first affording a pre-deprivation hearing. JA 18-22.

altogether (since contract claims and due process claims are often brought together).

And while Defendants are quick to explain away all other cases where they happily cloak themselves in government garb as not involving constitutional claims (*compare* JA 87, citing cases where the Defendants sought to be deemed government actors *with* JA 121-22, Defendant distinguishing cases in which Defendants admitted to be government actors as not involving constitutional claims), it is worth stressing that Defendants reject application of *Meyer* (which does involve a constitutional claim) in favor of *O'Melveny* (which does not). This Court should reject Defendants' self-serving "double speak" once and for all and uphold Judge McConnell's decision.[19]

CONCLUSION

Because FHFA's government-actor status in this case is correctly resolved by *Meyer* (not *O'Melveny*), and FHFA's plenary control over the GSE cannot ever end automatically, Judge McConnell's ruling that Plaintiff's due process claim was plausible should be affirmed.

[19] Even if this Court were to somehow regard the issue of government actor status as a close question (it should not), courts have wisely recognized policy reasons for resolving such close calls in favoring a finding of governmental action. *See, e.g.*, *Clark v. County of Placer*, 923 F. Supp. 1278, 1284-85 (E.D. Cal. 1996) (noting reasons for resolving close calls in favor of finding state action).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE UNDER FED. R. APP. P. 32(a)(7)

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: (1) this brief contains 8,981 words excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14 point proportionally spaced typeface using Times New Roman font.

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Dated: January 15, 2021

CERTIFICATE OF SERVICE

I hereby certify that on January15, 2021, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system and it will be sent electronically to the registered participants as identified in the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants on January 15, 2021.

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