Case No. 20-2026

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIRST CIRCUIT**

JUDITH A. SISTI,
*Plaintiff-Appellee*,

v.

FEDERAL HOUSING FINANCING 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.

# BRIEF FOR *AMICI CURIAE*, INSTITUTIONAL INVESTORS IN FANNIE MAE AND FREDDIE MAC IN SUPPORT OF PLAINTIFF-APPELLEE AND URGING AFFIRMANCE

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the following entities each state as follows:

1. Owl Creek Asia I, L.P. is a limited partnership. It is not a "nongovernmental corporation" for purposes of Rule 26.1. Rule 26.1 therefore does not require any disclosures with respect to it. Nonetheless, it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

2. Owl Creek Asia II, L.P. is a limited partnership. It is not a "nongovernmental corporation" for purposes of Rule 26.1. Rule 26.1 therefore does not require any disclosures with respect to it. Nonetheless, it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

3. Owl Creek I, L.P. is a limited partnership. It is not a "nongovernmental corporation" for purposes of Rule 26.1. Rule 26.1 therefore does not require any disclosures with respect to it. Nonetheless, it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

4. Owl Creek II, L.P. is a limited partnership. It is not a "nongovernmental corporation" for purposes of Rule 26.1. Rule 26.1 therefore does not require any disclosures with respect to it. Nonetheless, it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

5. Owl Creek Asia Master Fund, Ltd. is a Cayman Islands exempted company. It is not a "nongovernmental corporation" for purposes of Rule 26.1. Rule

26.1 therefore does not require any disclosures with respect to it. Nonetheless, it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

6. Owl Creek Credit Opportunities Master Fund, L.P. is a limited partnership. It is not a "nongovernmental corporation" for purposes of Rule 26.1. Rule 26.1 therefore does not require any disclosures with respect to it. Nonetheless, it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

7. Owl Creek Overseas Master Fund, Ltd. is a Cayman Islands exempted company. It is not a "nongovernmental corporation" for purposes of Rule 26.1. Rule 26.1 therefore does not require any disclosures with respect to it. Nonetheless, it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

8. Owl Creek SRI Master Fund, Ltd. is a Cayman Islands exempted company. It is not a "nongovernmental corporation" for purposes of Rule 26.1. Rule 26.1 therefore does not require any disclosures with respect to it. Nonetheless, it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

9. Mason Capital L.P. is a limited partnership. It is not a "nongovernmental corporation" for purposes of Rule 26.1. Rule 26.1 therefore does not require any disclosures with respect to it. Nonetheless, it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

10. Mason Capital Master Fund L.P. is a limited partnership. It is not a "nongovernmental corporation" for purposes of Rule 26.1. Rule 26.1 therefore does not

require any disclosures with respect to it. Nonetheless, it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

11. Akanthos Opportunity Fund, L.P. is a limited partnership. It is not a "nongovernmental corporation" for purposes of Rule 26.1. Rule 26.1 therefore does not require any disclosures with respect to it. Nonetheless, it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

12. Appaloosa Investment Limited Partnership I is a limited partnership. It is not a "nongovernmental corporation" for purposes of Rule 26.1. Rule 26.1 therefore does not require any disclosures with respect to it. Nonetheless, it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

13. Azteca Partners LLC is a limited liability company. It is not a "nongovernmental corporation" for purposes of Rule 26.1. Rule 26.1 therefore does not require any disclosures with respect to it. Nonetheless, it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

14. Palomino Fund Ltd. is a British Virgin Islands company. It is not a "nongovernmental corporation" for purposes of Rule 26.1. Rule 26.1 therefore does not require any disclosures with respect to it. Nonetheless, it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

15. Palomino Master Ltd. is a British Virgin Islands company. It is not a "nongovernmental corporation" for purposes of Rule 26.1. Rule 26.1 therefore does not require any disclosures with respect to it. Nonetheless, it has no parent corporation and

no publicly held corporation owns 10% or more of its stock. But Palomino Fund Ltd., not a publicly held company, owns 100% of Palomino Master Ltd.'s stock.

16. CSS, LLC is a limited liability company. It is not a "nongovernmental corporation" for purposes of Rule 26.1. Rule 26.1 therefore does not require any disclosures with respect to it. Nonetheless, it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

17. CRS Master Fund, L.P. is a limited partnership. It is not a "nongovernmental corporation" for purposes of Rule 26.1. Rule 26.1 therefore does not require any disclosures with respect to it. Nonetheless, it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

18. Cyrus Opportunities Master Fund II, Ltd. is a Cayman Islands exempted limited liability company. It is not a "nongovernmental corporation" for purposes of Rule 26.1. Rule 26.1 therefore does not require any disclosures with respect to it. Nonetheless, it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

19. Cyrus Select Opportunities Master Fund, Ltd. is a Cayman Islands exempted limited liability company. It is not a "nongovernmental corporation" for purposes of Rule 26.1. Rule 26.1 therefore does not require any disclosures with respect to it. Nonetheless, it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

20. Crescent 1, L.P. is a limited partnership. It is not a "nongovernmental corporation" for purposes of Rule 26.1. Rule 26.1 therefore does not require any disclosures with respect to it. Nonetheless, it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

# TABLE OF CONTENTS

**Page**

# TABLE OF AUTHORITIES

**Page**

**CASES**

**STATUTES**



**OTHER AUTHORITIES**

## STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* Institutional Investors in Fannie Mae and Freddie Mac[2] are twenty investment funds that are plaintiffs-appellants in *Owl Creek v. U.S.*, No, 20-1934, *Mason v. U.S.*, No. 20-1936, *Akanthos v. U.S.*, No. 20-1938, *Appaloosa v. U.S.*, No. 20-1954, and *CSS v. U.S.*, No. 20-1955, pending before the United States Court of Appeals for the Federal Circuit and plaintiffs in *CRS v. U.S.*, No. 18-1155 (Fed. Cl. Ct.). The factual and legal issues in *Amici*'s cases and this case are distinct, in particular because *Amici*'s cases challenge actions taken by the Federal Housing Financing Agency, together with the United States Treasury, to benefit taxpayers. But *Amici* have a substantial interest in one issue before this Court: Whether the Federal Housing Financing Agency, when acting as a conservator, is the United States. More broadly, *Amici* have ongoing interests in ensuring, and seek to ensure, that federal agencies cannot act with impunity.

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[1] Counsel for the parties in this case consent to the filing of this *amicus* brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici* made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The Institutional Investors in Fannie Mae and Freddie Mac are Owl Creek Asia I, L.P.; Owl Creek Asia II, L.P.; Owl Creek I, L.P.; Owl Creek II, L.P.; Owl Creek Asia Master Fund, Ltd.; Owl Creek Credit Opportunities Master Fund, L.P.; Owl Creek Overseas Master Fund, Ltd.; Owl Creek SRI Master Fund, Ltd.; Mason Capital L.P.; Mason Capital Master Fund L.P.; Akanthos Opportunity Fund, L.P.; Appaloosa Investment Limited Partnership I; Palomino Master Ltd.; Azteca Partners LLC; Palomino Fund Ltd.; CSS, LLC; CRS Master Fund, L.P.; Cyrus Opportunities Master Fund II, Ltd.; Cyrus Select Opportunities Master Fund, Ltd.; and Crescent 1, L.P. (collectively, "*Amici*").

## ISSUE ON APPEAL

*Amici* address whether the Federal Housing Finance Agency (the "Agency") loses its status as the United States just because it is employing its authority as conservator.

## INTRODUCTION AND SUMMARY OF ARGUMENT

*Amici* agree with plaintiff-appellee Sisti that under *FDIC v. Meyer*, 510 U.S. 471 (1994), the Agency, as conservator, is the United States. Similar to this case, *Meyer* involved a constitutional claim (as opposed to *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), which involved a state law claim) asserted against a federal agency that had been appointed as receiver for a failed bank. On this issue, *Amici* will only add that it is ironic that the government in *Meyer* argued that the FDIC, as a receiver, was the United States to avoid liability, but now reverses course and argues that the Agency, as a conservator, is *not* the United States in a new attempt to avoid liability.

But in addition to *Meyer*, *Amici* provide further reasons supporting the conclusion that the Agency's status as the United States does not disappear simply because it is employing its authority as conservator of Fannie Mae and Freddie Mac (the "Companies"). *First*, under *Lebron*, the Agency, as a conservator, is a federal instrumentality because it is actually a federal agency and also undisputedly (1) was created by special law (the Housing and Economic Recovery Act of 2008

("Recovery Act")), (2) to further public purposes, and (3) is permanently controlled by the federal government, which retains authority to appoint its single director. *Second*, the litany of cases cited by the Agency are not to the contrary. Those cases address the status of the Companies under *Lebron*—not a federal agency. *Third*, at the very least, as the district court recognized, the Agency remains the United States when acting as a conservator given the meaningful differences between conservators and receivers.

## ARGUMENT

### I. *LEBRON* CONFIRMS THAT, AS CONGRESS HAS SPECIFIED, THE AGENCY DOES NOT LOSE ITS STATUS AS THE GOVERNMENT FOR CONSTITUTIONAL CLAIMS JUST BECAUSE IT IS SUED FOR ITS ACTIONS AS CONSERVATOR.

In *Lebron v. Nat'l R.R. Passenger Corp.*, the Supreme Court established that, even if an entity is a corporation and Congress specifies that such entity is not part of the government, it nevertheless is a federal instrumentality, at least for determining the constitutional rights of citizens, if Congress (1) created it by special law, (2) to further governmental objectives, and (3) retains permanent authority to appoint a majority of its directors. 513 U.S. 374, 399 (1995); *see also Slattery v. United States*, 635 F.3d 1298, 1309 (Fed. Cir. 2011) (*en banc*) (recognizing that "a federal instrumentality" is part of "the United States" for purposes of liability under the Tucker Act when it "acts within its statutory

authority to carry out [federal] purposes," absent some "specific provision to the contrary").

Here, the Agency is not a corporation and Congress did not make any disclaimer that it is not part of the government. In fact, Congress declared that the Agency "shall be" an "agency of the Federal Government" and when "acting as conservator or receiver," it "shall not be subject to the direction or supervision of *any other* agency of the United States." 12 U.S.C. § 4511(a); 12 U.S.C. § 4617(a)(7) (emphasis added). Where Congress has said that the Agency is a federal agency, and also said that it remains so when it is acting as conservator, *Lebron* confirms that Congress should be taken at its word: (1) Congress created the Agency by special law (the Recovery Act); (2) the Agency furthers public purposes, including, as the government has recognized, as conservator to benefit Treasury and taxpayers; and (3) the federal government (the President, with the advice and consent of the Senate) retains permanent authority to appoint the Agency's single director.[3] Congress did provide in the "Succession Clause" that the Agency as conservator takes on the rights, titles, powers, and privileges of the Companies to be conserved. 12 U.S.C. § 4617(b)(2). However, Congress did not

[3] In *Collins v. Mnuchin*, the *en banc* Fifth Circuit held that the director of the Agency was removable at will. 938 F.3d 553, 587 (5th Cir. 2019). That issue is now before the Supreme Court. *Collins v. Mnuchin*, Case Nos. 19-422 & 19-563. If the Court were to affirm the Fifth Circuit's decision it would increase even further the government's control over the Agency.

say that the Agency thereby *loses* its governmental character.

The Federal Circuit's post-*Lebron* decision in *Lion Raisins, Inc. v. United States*, 416 F.3d 1356 (Fed. Cir. 2005), is consistent with and reinforces this logic. In that case, the court held that a government instrumentality (the Raisins Administrative Committee), established and subject to the control of a principal officer (the Secretary of Agriculture), under authority vested in him by federal statute, was the United States for purposes of a takings claim (and it did not matter that the Committee did not receive federal appropriations). *Id.* at 1358–59, 1364, 1368. It was enough that the Committee was an "arm[]" of the government carrying out "governmental functions." *Id.* at 1363 (internal quotation marks omitted).

Here, under *Lion Raisins*, even if one were to (counterfactually, *see* 12 U.S.C. § 4617(a)(7)) imagine the Agency-as-conservator as distinct from the Agency itself, it would not matter: The Agency-as-conservator is, at least (like the Committee), a government instrumentality established by and subject to the complete control of a principal officer (the Director), under authority vested in him by the federal Recovery Act (12 U.S.C. § 4617(a)) for government purposes. *See also Slattery*, 635 F.3d at 1309.

In sum, the Recovery Act itself says what *Lebron* here requires, that the Agency is an agency of the United States, including when acting as conservator for

the Companies. And the Agency has identified no credible exception that would apply here. Therefore, any action that the Agency took in connection with the foreclosures here was government action.

## II. THE AGENCY'S LITANY OF CASES ADDRESSING ITS STATUS INVOLVES HOLDINGS DETERMINING THE STATUS OF *THE COMPANIES* UNDER *LEBRON*—NOT THE AGENCY.

The cases the Agency invokes reinforce that the Agency does not lose its governmental status due to "stepping into the shoes" of the Companies. *See* Defendants-Appellants' Opening Brief at 19. And while circuit courts have concluded that the conservatorship did not transform the Companies into federal instrumentalities under *Lebron*, no circuit has held that the Agency ceases to be the government simply because it is employing its authority as conservator. *See e.g., Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017) ("conservatorship over Fannie Mae did not create the type of permanent government control that is required under *Lebron*"). The Defendants-Appellants acknowledge this in their brief explaining that "conservatorship 'places [the Agency] in the shoes of Fannie Mae and Freddie Mac and gives the [Agency] *their* rights and duties, not the other way around." Defendants-Appellants' Opening Brief at 18 (quoting *U.S. ex rel. Adams v. Aurora Loan Servs., Inc.*, 813 F.3d 1259, 1261 (9th Cir. 2016)) (emphasis in original).

Those cases apply *Lebron* to determine the status of *the Companies*, rather

than the Agency, as conservator. The courts agreed that the first two *Lebron* requirements – that Congress created the Companies by special law to further governmental objectives – were met because Congress chartered the Companies to accomplish "governmental objectives for the national housing market." *See e.g.*, *Herron*, 861 F.3d at 168. The only question was whether the third requirement, permanent governmental control, was satisfied given the indefinite but theoretically-not-permanent conservatorship. *See Sisti v. FHFA*, 324 F. Supp. 3d 273, 279-81 (D.R.I. 2018) (collecting cases, and noting no dispute over first two requirements). They mention the Agency's stepping into the shoes of the Companies in rejecting the argument that the conservatorship transformed *the Companies* into a government entity, reasoning that "the conservatorship . . . did not create the type of permanent government control that is required under *Lebron*." *See Herron*, 861 F.3d at 169. That the Agency as conservator may not *impart* its governmental character to another entity hardly establishes that the Agency as conservator *loses* its governmental character.

Given that, as to the Agency, the third *Lebron* requirement is obviously satisfied (as noted above), it follows that the Agency remains the United States when exercising its statutory authority as conservator. Accordingly, as the court below noted, courts actually considering the Agency's status have, in various contexts, "found [it] to be a government actor, even when acting as conservator."

*Sisti*, 324 F. Supp. 3d at 282 n.8 (collecting cases, involving statute of limitations, "private action" under securities law, and removal, and so holding as to due-process challenge to foreclosure); *FHFA v. Royal Bank of Scot. Grp. PLC*, 2012 WL 3580522, at *4 (D. Conn. Aug. 17, 2012) (recognizing that "courts have treated federal agencies acting in their capacities as receivers or conservators differently from private litigants").

## III. REGARDLESS OF THE AGENCY'S STATUS WHEN ACTING AS RECEIVER, IT AT LEAST REMAINS THE GOVERNMENT WHEN ACTING AS CONSERVATOR, AS THE DISTRICT COURT RIGHTLY RECOGNIZED IN THE ALTERNATIVE.

As the district court correctly held, whatever might be the case had the Agency appointed itself receiver of the Companies (on an analogy to the FDIC's role as receiver for banks), the Agency at least remains the government when it appoints itself as a conservator given the meaningful difference between conservators and receivers. In a different context, the Court of Federal Claims in a series of related decisions (now on appeal) recently adopted this reasoning describing it as "artfully explained." *E.g., Owl Creek Asia I, L.P. v. United States*, 148 Fed. Cl. 614, 636 (2020); *see also Phoenix Bond & Indem. Co. v. FDIC*, No. 18 C 6897, 2020 WL 7223710, at *3 (N.D. Ill. Dec. 8, 2020) (noting the difference between the Agency as conservator and FDIC as receiver and citing *Sisti*, 324 F.3d at 283).

The characteristics of the "roles of a conservator and a receiver are

meaningfully different." *Owl Creek*, 148 Fed. Cl. at 636. As the Agency itself "has described," the district court recognized, a conservatorship's purpose is "to establish control and oversight of a company to put it in a sound and solvent condition" so it may continue its operations. *Sisti*, 324 F. Supp. 3d at 283; *see* 76 Fed. Reg. 35724, 35727, 35730 (June 20, 2011). In the context of FIRREA (on which Congress based the Recovery Act), an earlier court likewise explained that the "purpose of a conservator is to maintain the viability of a troubled institution and place it in a sound and solvent condition." *Gibraltar Fin. Corp. v. Fed. Home Loan Bank Bd.*, 1990 WL 394298, at *5 n.7 (C.D. Cal. June 15, 1990); *Ameristar Fin. Serv. Co. v. United States*, 75 Fed. Cl. 807, 808 n.3 (2007) ("A conservator is a person or entity, including a government agency, appointed by a regulatory authority to operate a troubled financial institution in an effort to conserve, manage, and protect the troubled institution's assets."). Given this task of continuing and restoring operations (not winding-down, liquidating, and paying claims), a conservator has "a fiduciary duty running to the corporation itself," like that of a director or officer. *Sisti*, 324 F. Supp. 3d at 283. The court in *Gibraltar* confirmed this reasoning recognizing that a conservator "'step[s] into the shoes' of the officers and directors" of a bank and "therefore owe[s] the same fiduciary duties as those officers and directors" "entail[ing] an obligation of the highest good faith to the corporation and its shareholders." 1990 WL 394298, *2–3.

This posture, the court below explained, is different from that of a receivership, which involves the narrow task of "preserv[ing] a company's assets, for the benefit of creditors, in the face of bankruptcy." *Sisti*, 324 F. Supp. 3d at 282 (quoting Goldman, *The Indefinite Conservatorship of Fannie Mae and Freddie Mac is State-Action*, 17 J. Bus. & Sec. L. 11, 23 (2016)). Given that task, a receiver takes on the fiduciary duties of the company it oversees, including the duty that an insolvent company owes to its creditors. As a result, a receiver might be thought of as "stepping into the shoes" of the company, and thus, for that purpose, as being the company and even ceasing to be itself. *Id.* ("the receiver steps into the shoes of the private entity, because it assumes the fiduciary duties of that entity"). Even then, however, the FDIC, a government corporation and the paradigmatic federal receiver, "does not automatically lose its governmental status when it acts as receiver" of a failed bank. *Slattery v. United States*, 583 F.3d 800, 827 (Fed. Cir. 2009).

The Defendants-Appellants argue that the Recovery Act "contains no provision that supports the district court's conclusion that the Conservator owes any fiduciary duty that a receiver would not" and that "anything about fiduciary relationships or the like" is not important. Defendants-Appellant's Brief at 22. But they ignore that the Recovery Act does not define the term "conservator," thus implicitly drawing on, and certainly not throwing out, the background principles

defining this term of art. And they do not cite any case law to the contrary.

Moreover, other courts have recognized the importance of fiduciary relationships and the differences between conservators and receivers. For example, in *DeKalb Cty. v. Fed. Hous. Fin. Agency*, the Seventh Circuit determined that as long as the Companies' "conservator is the United States, and the assets and income in question are those of entities charged with a federal duty (that of promoting the federal policy of encouraging home ownership), the conservator's suit against a state's tax collector is a suit by the United States" and thus, the Agency as conservator could take advantage of an exception under the Tax Injunction Act that generally bars such suits by private entities. 741 F.3d 795, 804 (7th Cir. 2013).

However, in *Phoenix Bond*, the court, citing *DeKalb*, concluded that the FDIC as a receiver was not the United States, and thus not entitled to the exception under the Tax Injunction Act, because "there are important differences between" the Agency as conservator and the FDIC as receiver. 2020 WL 7223710 at *3. Whereas the FDIC as receiver "steps into the shoes" of a failed entity, and its "obligations therefore flow to the creditors of the institution," "[a] conservator [ ] owes duties to the entity, rather than assuming the role of the entity." *Id.*

This receiver/conservator distinction is one among several grounds that distinguish *O'Melveny* from this case. *O'Melveny* is further inapposite because it

presented no question whether a receiver was part of the United States, nor any question of an agency's avoiding liability, nor any constitutional question. The Supreme Court simply declined to invent pre-emptive federal common law for a state-law claim that the FDIC had brought for a failed S&L. *See* 512 U.S. at 80-81, 83; *id.* at 87 (seeing no justification for "judicial creation of a special federal rule").

The Agency therefore does not lose its government character simply because it acts as conservator. *Owl Creek*, 148 Fed. Cl. at 636 ("the [Agency] does not shed its government character when acting as conservator because it does not step into the shoes of the [Companies]. Otherwise stated, the [conservator] is the United States because it retains the [Agency's] government character.").

## CONCLUSION

As to the district court's finding that the Agency, as conservator, is the United States, the Court should affirm.

Date: January 22, 2021

Respectfully submitted,

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