No. 20-02026

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JUDITH A. SISTI,

Plaintiff-Appellee,

v.

FEDERAL HOME LOAN MORTGAGE CORPORATION, FEDERAL HOUSING FINANCE AGENCY, 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.

APPELLANTS' REPLY BRIEF

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INTRODUCTION

This appeal involves two straightforward questions: (1) Whether FHFA, when acting as conservator of a private corporation—Freddie Mac—and exercising non-governmental powers it inherited as Freddie Mac's successor, is a government actor for purposes of a constitutional claim; and (2) Whether, by virtue of FHFA's conservatorship, Freddie Mac became a government actor for purposes of such claims. Defendants showed that the answer to each is "No." *See generally* Appellants' Opening Brief ("AOB").

Plaintiff's opposition is unpersuasive.

On FHFA's status, Plaintiff's argument boils down to a claim that every other court to examine the question not only got the answer wrong, but also overlooked a dispositive doctrine purportedly lurking behind two 26-year-old Supreme Court decisions: *FDIC v. Meyer*, 510 U.S. 471 (1994), and *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994). That is incorrect. There is no hidden meaning in either decision, and both support Defendants' position.

Plaintiff's argument that Freddie Mac is a government actor fares no better. It too rests on the notion that every prior court to consider the issue—including several Courts of Appeals—misapplied the governing Supreme Court precedent.

ARGUMENT

I. FHFA AS CONSERVATOR IS A PRIVATE ACTOR

No one disputes that FHFA is a federal agency. Sisti Br. 10. But unlike many other federal agencies, FHFA acts in two distinct capacities—on the one hand, as a governmental regulator, and on the other, as the conservator or receiver of, and legal successor to, private corporations. AOB 13. Here, FHFA took the actions Plaintiff alleges—a non-judicial foreclosure pursued by Freddie Mac—in its distinct, statutorily authorized capacity as Conservator.

Plaintiff's argument that FHFA as Conservator is a government actor hinges on her interpretation of *Meyer* and *O'Melveny*. Sisti Br. 10-19. In the district court, Plaintiff argued *Meyer* implies that any federal receiver or conservator must be a government actor, because *Meyer* supposedly holds that such entities possess—and have waived—sovereign immunity. JA088-90. The district court agreed. ADD15-16. Plaintiff now abandons that broad reading, Sisti Br. 19, and also disavows "Judge McConnell's 'alternative justification' for his ruling," *id*. at 21 n.10, which is that conservators purportedly differ materially from receivers for these purposes. ADD16-19. Thus, Plaintiff offers this Court an entirely new argument ungrounded in the decision on appeal. No court has ever read *Meyer* and *O'Melveny* as Plaintiff proposes; this Court should not be the first.

A. Plaintiff's Analysis of *Meyer* and *O'Melveny* Is Incorrect

Under *O'Melveny* and the many cases that apply it—including several virtually identical to this, *see* AOB 19-20 (citing cases)—FHFA as Conservator is not a government actor for purposes of constitutional claims. Instead, the Conservator "steps into the shoes" of Freddie Mac, "obtaining [Freddie Mac's] rights ... that existed prior to [conservatorship]," such as the right to foreclose non-judicially. *See O'Melveny*, 512 U.S. at 86. As the D.C. Circuit held, in addressing a constitutional claim and applying *O'Melveny*'s analysis, FHFA as Conservator "shed[s] its government character." *Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017). Several district courts have followed suit,[1] and the Fourth and Ninth Circuits reached the same conclusion when applying the constitutional standard in the context of other claims. *Meridian Invs., Inc. v. Freddie Mac*, 855 F.3d 573, 579 (4th Cir. 2017); *United States ex rel. Adams v. Aurora Loan Servs., Inc.*, 813 F.3d 1259, 1261 (9th Cir. 2016).

To avoid this authority, Plaintiff asks the Court to read a heretofore unrecognized distinction into *O'Melveny*, based on Plaintiff's flawed interpretation of *Meyer*. According to Plaintiff, "*Meyer* and *O'Melveny* make clear that [a] government [agency acting as a conservator or receiver] remains the government when it is being sued for constitutional claims based on acts that occurred post-

[1] *See* AOB 19-20 (citing cases).

government control. However, the government can step into 'private shoes' for acts that occurred prior to government control." Sisti Br. 19.[2]

Plaintiff's position is unsupported, incorrect, and illogical.

1. Plaintiff's Reliance on *Meyer* Is Misplaced

Meyer does not address the government-actor issue directly, because the issue of whether the FDIC receiver was a government actor was not before the Court. *See* AOB 27. Plaintiff does not dispute that, but instead argues that "*Meyer* governs the determination of FHFA's status as a governmental actor," because *Meyer* "first examined whether [FDIC]'s sovereign immunity had been waived." Sisti Br. 11-12. Plaintiff posits that the Supreme Court must have concluded that the FDIC receiver was a government actor, reasoning that otherwise there would be no reason to analyze sovereign immunity. *Id*.

Plaintiff reads far too much into *Meyer*. That decision articulates a narrow holding—that a *Bivens* claim cannot be pled against a federal agency, but must instead be pled against individuals. 510 U.S. at 486. Having resolved the case on that threshold issue, the Court had no occasion to address any other merits issue, such as whether the challenged acts of the FDIC as receiver constituted governmental action giving rise to a constitutional claim. Indeed, the Court

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[2] Plaintiff's contention that *Herron* and its progeny "effective[ly] redraft[ed]" HERA, Sisti Br. 21, lacks merit. Those cases applied HERA faithfully in determining that as Freddie Mac's legal successor under 12 U.S.C. § 4617(b)(2)(A), FHFA as Conservator stepped into Freddie Mac's private shoes.

expressly disclaimed having done so: "Because we find that Meyer had no *Bivens* action against [FDIC], *we do not reach the merits of his due process claim*." *Id.* at 486 n.12 (emphasis added).

Plaintiff ignores that express limitation—which Defendants highlighted, AOB 28-29—and argues that *Meyer*'s discussion of sovereign immunity amounts to an implicit holding on the merits issue of whether the receiver was a government actor. Sisti Br. 13-14. In *United States v. Ely*, the Ninth Circuit analyzed that argument and rejected it. 142 F.3d 1113, 1121 (9th Cir. 1997). *Ely* involved directors of a failed bank that was placed into FDIC receivership. The receiver then brought a civil action against them and sought punitive damages. *Id.* at 1118, 1121. When the Department of Justice later charged the directors with criminal fraud, they cited the punitive-damages claim and argued that "*[t]he government* cannot constitutionally seek to punish us twice for the same acts." *Id.* at 1121 (emphasis added).

The Ninth Circuit held that "argument does not succeed because the FDIC did not sue the defendants as the United States. *The FDIC was acting only as the receiver of a failed institution*." *Id*. (internal quotation marks and citation omitted) (emphasis added). The court squarely rejected the contention that *Meyer* implied the receiver must have been a government actor, noting that in *Meyer*, "it was *assumed* that the FDIC was an agency of the United States, possessing sovereign

immunity unless that immunity was waived" so "*Meyer* did not purport to *determine* the status of the FDIC when, as here, taking over a failed bank as receiver." *Id*. (emphases added).[3]

A recent Supreme Court decision confirms the point. In *Thacker v. Tennessee Valley Authority*, the Court considered the scope of a sue-and-be-sued clause like the one at issue in *Meyer*, repeatedly citing *Meyer* in so doing. 139 S. Ct. 1435 (2019). In holding that the TVA's clause waived sovereign immunity for actions taken in a *commercial* capacity, the Court noted that "TVA *sometimes resembles a government actor, sometimes a commercial one*," and held that to determine whether the sue-and-be-sued clause applied, a court "*must first decide whether the conduct alleged to be negligent is governmental or commercial in nature*." *Id*. at 1444 (emphasis added). The Court reasoned that "if the conduct is commercial—the kind of thing any power company might do—[] the TVA's sue-and-be-sued clause" waives sovereign immunity. *Id*. *Thacker* therefore shows that, contrary to Plaintiff's theory, *Meyer*'s analysis of sovereign immunity and the FDIC's sue-and-be-sued clause does not suggest the FDIC receiver was a government actor.

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[3] Plaintiff accuses Defendants of "selectively quoting the [*Ely*] case and omitting key language." Sisti Br. 19 n.8. Curiously, Plaintiff identifies neither any excerpt Defendants ever presented that does not fairly represent the decision's substance, nor any "key language" that could call any part of Defendants' discussion of it into question. *Ely* is instructive, and it supports Defendants.

If, by contrast, Plaintiff's interpretation of *Meyer* was correct, courts would have to hold that any FDIC or RTC receiver is a government actor, period. Not only does that interpretation conflict with *Thacker*, it cannot be squared with the post-*Meyer* jurisprudence of other circuits. AOB 29-30 (citing *United States v. Beszborn*, 21 F.3d 62, 68 (5th Cir. 1994); *Ely*, 142 F.3d at 1121; *United States v. Heffner*, 85 F.3d 435 (9th Cir. 1996)). These decisions—like *Herron*—reject arguments that a receiver's actions are governmental for constitutional purposes, and therefore refute any suggestion that *Meyer* mandates the opposite outcome or somehow limits the effect of *O'Melveny*, under which conservators and receivers "step into" the private "shoes" of the entity in conservatorship or receivership.

For these reasons, Plaintiff's analysis of *Meyer* is incorrect; as *Thacker* and *Ely* confirm, *Meyer* does *not* suggest that federal conservators or receivers are government actors for constitutional purposes.

2. Plaintiff's Interpretation of *O'Melveny* Is Wrong

Plaintiff's efforts to neutralize *O'Melveny* fare no better. Plaintiff asserts that *O'Melveny* has no application here because the "'steps into the shoes' rule [i]s expressly limited to rights that exist[] prior" to receivership or conservatorship. Sisti Br. 17. Plaintiff then shifts ground slightly, arguing that the rule actually depends on when the "acts" underlying the claim occurred—i.e., that the "shoes" analysis does not apply when a receiver or conservator "is being sued for

constitutional claims based on acts that occurred post-government control." Sisti Br. 19. Either way, the argument fails.

a) Plaintiff's Substantive Analysis of *O'Melveny* Is Incorrect

In contending that *O'Melveny*'s "'steps into the shoes' rule [i]s expressly limited to rights that exist[] prior" to receivership or conservatorship, Sisti Br. 17, and does not apply when a receiver or conservator "is being sued for constitutional claims based on acts that occurred post-government control," *id*. at 19, Plaintiff mistakes the facts of the *O'Melveny* case for a holding. *O'Melveny* arose from a lawsuit the receiver brought based upon pre-receivership conduct, 512 U.S. at 86; that the opinion says so is unremarkable. But nothing in *O'Melveny* suggests the Court intended that factual *description* to set a *limitation* on the doctrine's application.[4]

And courts routinely apply the *O'Melveny* analysis to conduct that took place *during* a conservatorship or receivership. In *Beszborn*, for example, the event that triggered the constitutional claim was *the receiver*'s demand for punitive damages, something that by definition had to happen *during—not before*—the

[4] Similarly, *O'Melveny*'s reference to the "rules of decision at issue" applying "with respect to primary conduct on the part of private actors that has already occurred" is simply a statement that the imputation rules in question would—in the factual context of the case—determine whether knowledge the bank's former officers obtained before receivership could be imputed to the receiver as successor to the bank. *See* Sisti Br. 17 (quoting 512 U.S. at 88). It is not a limitation on the operation of the succession clause in other contexts.

receivership. "The defendants argued that because the RTC is a government entity, and the Government *has sought and was awarded punitive damages* by the jury against entities in which the defendants have an interest, the Double Jeopardy Clause has been violated." *Beszborn*, 21 F.3d at 67 (emphasis added). The Fifth Circuit rejected that. *Id*. at 68. Plaintiff's argument here that "the underlying claims were committed not by a government agency acting as conservator or receiver" misunderstands *Beszborn*. Sisti Br. 19 n.8. The RTC receiver is the entity that "sought and was awarded punitive damages," *Beszborn*, 21 F.3d at 67; the facts underlying the "claims" in the punitive-damages action were irrelevant to the constitutional issue of whether those claims placed the directors in "jeopardy" for purposes of the Double Jeopardy Clause.

Ely is virtually identical. There, too, defendants moved to dismiss a criminal indictment, arguing "that the Double Jeopardy Clause is offended because they were all sued civilly by the FDIC [receiver] for the same acts and the FDIC [receiver] sought punitive as well as actual damages." 142 F.3d. at 1121. The relevant action—the receiver's request for punitive damages—occurred *during* the receivership. *Id.* at 1118. Just as in *Beszborn*, the *Ely* court held that the receiver's actions were non-governmental for purposes of the plaintiff's constitutional claim. *Id.* at 1121.

To the same effect—and outside the Double Jeopardy context—the Ninth

Circuit applied *O'Melveny* in addressing a choice-of-law issue presented in *Monrad v. FDIC*, 62 F.3d 1169 (9th Cir. 1995). *Monrad* concerns post-receivership conduct; the plaintiffs claimed *the receiver* improperly denied them severance pay. *Id*. at 1170-71. The Ninth Circuit nevertheless applied *O'Melveny*'s "shoes" analysis in deciding what law governed the claim. *Id*. at 1173.[5] *See also Waterview Mgmt. Co. v. FDIC*, 105 F.3d 696 (D.C. Cir. 1997) (applying *O'Melveny*'s "shoes" analysis in case involving whether receiver's acts constituted a Fifth Amendment taking); *Ameristar Financial Servicing Co. v. United States*, 75 Fed. Cl. 807, 808-809, 812 (Fed. Cl. 2007) ("as … conservator, the FDIC 'stepped into the shoes' of Superior Federal ... and was not acting as the United States").

Plaintiff has no plausible response to these decisions. The closest she comes is to assert that it somehow matters that in *Ely* and *Beszborn* the receiver "sued civilly to redress wrongs done to the bank." Sisti Br. 19 n.8. But Plaintiff does not, and cannot, explain why that makes any difference. The key question in both cases was whether the receiver acted as the government in seeking punitive damages, not whether the wrong for which those damages were sought was committed against the government.

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[5] *Monrad* does not involve a constitutional claim. But Plaintiff never explains why that would matter to *O'Melveny*'s application, and Defendants have identified no decision holding that it does.

In contrast to the several cases refuting her theory, Plaintiff cites no decision—none—adopting or even articulating it. There is none, because the rule *O'Melveny* sets is far simpler than Plaintiff posits. It is that as the successor to a *private* corporation, a federal receiver (or, by extension, conservator) is a *private* actor bound by whatever law would ordinarily govern a dispute involving the predecessor entity, unless Congress has expressly provided a governing federal rule. In other words, federal receivers are to be treated as private actors; as such, they must take the bitter with the sweet—although not generally subject to constitutional constraints, they are generally (i.e., absent a specific preemptive provision) not insulated from state-law doctrines. *See FDIC v. Ernst & Young LLP*, 374 F.3d 579, 581 (7th Cir. 2004) (under *O'Melveny*, a "[r]eceiver steps into the shoes of the failed bank and is bound by the rules that the bank itself would encounter in litigation").

The Supreme Court's subsequent decision in *Atherton v. United States*, 519 U.S. 213 (1997), confirms that conclusion. There, citing *O'Melveny*, the Court held that a federal statute supplying a minimum standard of care for certain tort claims brought by the FDIC receiver did not displace a higher state-law standard. The court explained that "as in *O'Melveny,* the FDIC is *acting only as a receiver of a failed institution; it is not pursuing the interest of the Federal Government as a bank insurer*" and concluded that therefore "we can find no significant conflict

with, or threat to, a federal interest." *Id*. at 225 (emphasis added).

b) Plaintiff's Interpretation of *O'Melveny* Is Self-Defeating

Even if Plaintiff's theory that *O'Melveny* applies only to rights that predate the conservatorship or receivership were plausible, it would not serve Plaintiff here, because Defendants seek to enforce rights that existed *before* the conservatorship.

Plaintiff's mortgage, which authorizes non-judicial foreclosure, was executed in 2005—three years *before* FHFA became Freddie Mac's conservator. JA019-20 ¶¶ 41-42. By Plaintiff's reasoning, this means *O'Melveny* applies—Plaintiff concedes that *O'Melveny* applies if "the entity under receivership could have asserted [the right] had it not been placed into receivership." Sisti Br. 16. Had Freddie Mac "not been placed into [conservatorship]," there is no doubt that it "could have asserted" its right to foreclose non-judicially.

In the end, *O'Melveny* and *Meyer* do "not yield conflicting opinions." Sisti Br. 15. Each supports Defendants; the only conflict is between the governing law and the viability of Plaintiff's claim.

B. Plaintiff's Assertions About Actions FHFA Supposedly Took as Regulator Do Not Support Her Claim

Plaintiff argues that she "alleg[ed] a due process claim against FHFA, as both … regulator … and conservator." Sisti Br. 7. But the word "regulator"

appears in the complaint only twice, and those allegations are not connected to the foreclosure or to the substance of Plaintiff's claim. The first asserts that "Freddie Mac's conservator and regulator, the Federal Housing Finance Agency ("FHFA"), [is] a federal agency." JA008 ¶ 1. No one disputes that, but it does not allege that FHFA as regulator did anything connected to the foreclosure at issue. The second alleges that "FHFA, as both conservator and regulator, and the United States Treasury, pursuant to the senior preferred stock purchase agreement, prohibits Freddie Mac from paying any dividends to common shareholders." JA013 ¶ 19. This too has nothing whatsoever to do with the foreclosure. The Court can and should ignore these irrelevant allegations.[6]

In her brief, Plaintiff strays beyond the allegations of the complaint, seeking to connect FHFA as regulator to the foreclosure by asserting that "as regulator[, FHFA] created and implemented the Servicer Alignment Initiative ("SAI")." Sisti Br. 6. That effort fails. As the document Plaintiff cited in her complaint makes clear, the SAI was created and implemented by FHFA *as Conservator*. ECF No. 1-8 at 2 ("As the Enterprises' conservator, [FHFA] established the [SAI] in April 2011.").

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[6] An additional allegation uses a cognate word—"regulate." It is equally irrelevant, asserting that "the federal government established FHFA as a federal agency to supervise and regulate Freddie Mac … Fannie Mae … and any Federal Home Loan Bank." JA010 ¶ 10.

Plaintiff's assertion that the SAI mandated non-judicial foreclosure, Sisti Br. 18, is also unfounded and incorrect.[7] But that is immaterial—under Rhode Island law, Freddie Mac always had the right to foreclose nonjudicially. *Bucci v. Lehman Bros. Bank, FSB*, 68 A.3d 1069, 1085 (R.I. 2013) (noting nonjudicial foreclosures since 1895). Thus, Plaintiff contends only that the SAI directed Freddie Mac's exercise of a private right Freddie Mac already had. Because, as described above in Section I.A, the Conservator's exercise of powers it inherited as Freddie Mac's successor does not constitute government action, the SAI does not support Plaintiff's government-actor argument.

Nor would it matter if—contrary to the pleadings and exhibits—FHFA had promulgated the SAI in its regulatory capacity. Government regulation of a financial institution's foreclosure procedures does not support a due process claim. *See, e.g., Apao v. Bank of N.Y.*, 324 F.3d 1091, 1095 (9th Cir. 2003) ("[T]he development of the extensively regulated secondary mortgage market does not convert the private foreclosure procedures at issue here into state action."). Indeed, "the 'being heavily regulated makes you a state actor' theory of state action is entirely circular and would significantly endanger individual liberty and private

[7] Plaintiff asserts that FHFA "directed the GSE's servicers in Rhode Island to seize defaulted debtors' homes through non-judicial foreclosure." Sisti Br. 18. Plaintiff's cited exhibit does not support that assertion, so the Court need not credit it. *Rosenblum v. Travelbyus.com Ltd.*, 299 F.3d 657, 661 (7th Cir. 2002).

enterprise." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1932 (2019).

Plaintiff's scant allegations about FHFA as regulator are irrelevant, and her efforts to portray the SAI as governmental action fail.

C. Amici's Arguments Do Not Support Plaintiff's Position

Amici offer several arguments that FHFA is a government actor. Some rehash Plaintiff's arguments without meriting additional discussion. Others transgress the rule that "[a]mici 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). In any event, amici's arguments lack substantive merit.

Investor Amici offer the argument—not asserted by Plaintiff—that FHFA as Conservator is governmental under *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995). Investor Amici 3-4. *Lebron* governs the analysis of whether a *federally chartered, private corporation* can be deemed a government actor for constitutional purposes. It does not address the status of a federal agency acting as conservator or receiver of a private corporation; as such, it is not germane. Regardless, to whatever extent *Lebron* might apply to a federal conservator, the Fourth Circuit "[a]ppl[ied] the reasoning of *Lebron*" and held that although "FHFA is a federal agency, as conservator it steps into Freddie Mac's shoes, shedding its

government character and also becoming a private party." *Meridian Invs., Inc.*, 855 F.3d at 579.

Nor does Investor Amici's citation to *Lion Raisins, Inc. v. United States*, 416 F.3d 1356 (Fed. Cir. 2005), support affirmance. Investor Amici 5-6. There, the court held that a Takings claim against the Raisin Administrative Committee ("RAC")—an agent of the United States known as a non-appropriated funds instrumentality—was attributable to the government. 416 F.3d at 1367-68. Amici's argument that FHFA 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 [HERA § 4617(a)] for government purposes" (Investor Amici 5), proves too much—under that argument, FDIC receivers would *always* be governmental. But the same court that decided *Lion Raisins* has rejected that proposition. *See, e.g.*, *Frazer v. United States*, 288 F.3d 1347, 1354 (Fed. Cir. 2002) ("the FDIC [receiver] is not the government for purposes of *Winstar* claims"). Hence, whether or not the RAC was deemed governmental has no bearing on the status of FHFA as Conservator. In any event, the Conservator's statutory purpose differs from the RAC's. FHFA as Conservator acts as the successor to the private Enterprises and therefore assumes the mission set forth in their charters—not a general "government purpose[]." And courts routinely recognize Fannie Mae and Freddie Mac as private entities. *See,*

e.g., *Am. Bankers Mortg. Corp. v. Freddie Mac*, 75 F.3d 1401, 1406-09 (9th Cir. 1996); *Herron*, 861 F.3d at 160; *Mik v. Freddie Mac*, 743 F.3d 149, 168 (6th Cir. 2014).

Investor Amici also assert the "alternative justification" underlying the district court decision, i.e., that conservators differ materially from receivers. Investor Amici 8-12. Plaintiff has expressly waived that argument, deeming it "irrelevant," Sisti Br. 21 n.10; Defendants hold them to that waiver. Nevertheless, the argument lacks merit. *See* AOB 20-26.

II. FREDDIE MAC IS A PRIVATE ACTOR FOR CONSTITUTIONAL PURPOSES

If the Court agrees that, as argued above, FHFA as Conservator is not a government actor, then that conclusion also answers the second question in this appeal: Whether, by virtue of FHFA's conservatorship, Freddie Mac became a government actor for purposes of a constitutional claim. As the D.C. Circuit explained in *Herron*, the succession clause in HERA "evinces Congress's intention to have the FHFA step into Fannie Mae's private shoes." 861 F.3d at 169 (For present purposes, Freddie Mac is substantially identically situated to Fannie Mae.) And "[w]hen it stepped into these shoes, the FHFA shed its government character and became a private party." *Id.* (alterations and quotation marks omitted). As a result, "while the FHFA's status changed, the status of Fannie Mae, as the 'shoes'

into which the FHFA stepped, did not." *Id.* That conclusion is correct, and is sufficient, standing alone, to resolve this appeal.

But Plaintiff's arguments as to Freddie Mac's status fail for other reasons as well. The Supreme Court confirmed recently that "a private entity can qualify as a state actor" for constitutional purposes in only "a few limited circumstances." *See Halleck*, 139 S. Ct. at 1928. Plaintiff argues primarily that her complaint sufficiently pleads government control for the Court to conclude that Freddie Mac "could plausibly be a government actor" under *Lebron*. Sisti Br. 22; *id.* 23-27. Plaintiff is wrong—pervasive, or in Plaintiff's lexicon, "complete" or "plenary," control is not enough. *See, e.g.*, Sisti Br. 23-25. *Permanent* control, as described in *Lebron*, is necessary.

A. *Lebron* Requires that the Government Retain Permanent Control

Plaintiff urges the Court to write the permanence requirement out of *Lebron*, arguing that "control that is unending until it is voluntarily relinquished can only be described as 'permanent.'" Sisti Br. 9. More specifically, Plaintiff contends that the absence of a predetermined end date, a "financial metric," or an automatic termination "milestone" renders control permanent under *Lebron.* Sisti Br. 33. But *Lebron* says the opposite—it confirms that control is "temporary" when "a private corporation['s] stock comes into federal ownership." 513 U.S. at 398. Stock ownership involves plenary "control that is unending until it is voluntarily

relinquished," and has no predetermined "financial metric" or automatic termination "milestone"; by Plaintiff's definition, it could "only be described as 'permanent.'" Sisti Br. 9. But *Lebron* says otherwise. Plaintiff's theory therefore fails at the outset, as it conflicts with the authority upon which Plaintiff relies.

Plaintiff also claims that Freddie Mac "under FHFA conservatorship is more like Amtrak than Conrail," Sisti Br. 26, arguing that the key distinction between the two railroads was a provision "that will automatically terminate" the federal government's control over Conrail once the railroad's financial status improved. That is among the distinctions cited in *Lebron*, but it supports Defendants' position—the Court's point was that the *indefinite* nature of the government's control over Conrail rendered the control *temporary* rather than *structurally permanent*. In distinguishing Conrail from Amtrak, the Court relied on the fact that the government's control over Conrail could end without legislative intervention, while the government's control over Amtrak could not. *Lebron*, 513 U.S. at 397-99 (contrasting statutorily required government control over appointments to Amtrak's board with fact that "[f]ull voting control" over Conrail's board "will shift to the shareholders" without legislative action under certain circumstances (citation omitted)).

Here, likewise, legislative action is not necessary to end the conservatorship. HERA gives FHFA the right to appoint Freddie Mac's directors until certain

outcomes are achieved, which include "reorganizing, rehabilitating, or winding up [Freddie Mac's] affairs." 12 U.S.C. § 4617(a)(2). Plaintiff's argument that "[t]here 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)," Sisti Br. 27, fails.

Plaintiff attempts to undermine Section 4617(a)(2) and its "statutory purpose," by arguing that it 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." Sisti Br. 29. Plaintiff also criticizes the Sixth Circuit's conclusion that this provision gives the conservatorship "an inherently temporary purpose." Sisti Br. 28 (citing *Rubin v. Fannie Mae*, 587 F. App'x 273, 275 (6th Cir. 2014)). Putting aside Plaintiff's unfounded assertions about whether FHFA has "disregarded" its organic statute, Plaintiff's argument conflicts with decisions holding FDIC receivers, which operate under a similar statutory framework, not to be government actors. *See supra* at 5-10. FDIC receiverships have an average duration of about 8.7 years. FDIC OIG, *Receivership Termination Activity* at 2 (Sept. 20, 2002),

https://www.fdicoig.gov/sites/default/files/publications/02-032.pdf ("The 168 receiverships active as of January 1, 2002 had an average age of 8.7 years.").

In a further attempt to evade *Lebron*'s permanency requirement, Plaintiff offers semantic arguments to refute the proposition that "permanent" must "always mean 'forever,'" which Plaintiff mistakenly ascribes to Defendants. *See* Sisti Br. 26. Defendants' brief explains that under *Lebron*, permanent control is structural control that can be altered only by an act of Congress. AOB 36-47. Having set up the straw argument, Plaintiff then provides counterexamples, such as "'permanent' fixtures" to property, "'permanent' residents," and "'permanent' appointees," none of which endure "forever." Sisti Br. 26. But Defendants apply the meaning the Supreme Court ascribed to the term in *Lebron*; alternate meanings that might apply if this case were about fixtures, immigration, or civil service are irrelevant.

Plaintiff then admonishes the Court to deem Freddie Mac a government actor while in conservatorship because otherwise, "Congress could establish conservatorship entities ... as a means of avoiding compliance with the United States Constitution." Sisti Br. 30. This case is not about Congress or Freddie Mac avoiding the Constitution; it is about Plaintiff seeking to avoid a private contractual outcome. JA020 ¶ 42. No one doubts the importance of constitutional constraints on *governmental* action. But by the same token, no one should question the value

of *private* commercial activity. *See Halleck*, 139 S. Ct. at 1934 (cautioning against "restricting individual liberty and private enterprise" by "[e]xpanding the state-action doctrine"). The due process constraints Plaintiff seeks to impose here "serve[] as a limitation only on governmental, not private, action." *Velez-Diaz v. Vega-Irizarry*, 421 F.3d 71, 79 (1st Cir. 2005) (citation omitted).

Finally, Plaintiff argues "that courts are free to look at more than 'permanency' when analyzing whether the requisite control exists." Sisti Br. 31. No one disputes that, as *Lebron* requires control that is not merely substantive but also permanent. That courts often evaluate the *degree* of government influence over a corporation before assessing whether it is also permanent is unsurprising and irrelevant here, as the parties to this case dispute not the *degree* of FHFA's control over Freddie Mac but its *duration*.

Plaintiff touts *Department of Transportation v. Association of American Railroads* ("*AAR*"). Sisti Br. 31-34 (discussing 575 U.S. 43 (2015)). But the *AAR* decision endorses *Lebron*, and includes nothing suggesting the Court jettisoned permanence as a required element. Although *AAR* does not analyze whether the government's control over Amtrak was permanent, that is because the question had already been answered in *Lebron*. *See* 575 U.S. at 53-55. The dispute in *AAR* focused instead on whether a "disclaimer of agency" in Amtrak's charter

superseded the *Lebron* test in the separation-of-powers context, a point not at issue here. *Id.* at 54.

Becker v. Gallaudet University, Sisti Br. 32, also supports Defendants; the court explains that "[t]he dispute in this case centers on … whether the government has retained for itself 'permanent authority to appoint a majority of the directors of [the] corporation ….'" 66 F. Supp. 2d 16, 20 (D.D.C. 1999) (quoting *Lebron*, 513 U.S. at 400). Gallaudet University was not a government actor because "[t]he number of public positions on Gallaudet's Board of Trustees, [3 of 21], is a strong indication that the federal government does not exercise sufficient control." *Id.* at 20-21. Permanence was not an issue because the court found that the government did not exert *any* control.

Nor does *Barrios-Velazquez v. Asociacion de Empleados del Estado Libre Asociado de P.R.* support Plaintiff. Sisti Br. 32 (citing 84 F.3d 487, 492 (1st Cir. 1996)). That decision does not suggest that permanent, structural control need not be shown under *Lebron*; rather, this Court 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).

More-recent decisions confirm that permanence is a required element of the *Lebron* analysis. *See, e.g.*, *Herron*, 861 F.3d at 168 ("[P]ermanency is 'a necessary condition precedent' to consider a government-created corporation part of the

government." (citation omitted)); *Rubin*, 587 F. App'x at 275 (similar); *Adams*, 813 F.3d at 1261 (similar); *Meridian Invs., Inc.*, 855 F.3d at 579 (similar); *Sprauve v. W. Indian Co.*, 799 F.3d 226, 234 n.8 (3d Cir. 2015) (similar); *Kerpen v. Metropolitan Washington Airports Authority*, 907 F.3d 152, 158-59 (4th Cir. 2018) (similar).

In substance, Plaintiff contends that indefinite control equates to permanent control. That is wrong. *Lebron* implies—and appellate decisions following *Lebron* squarely hold—that a receiver or conservator's control over a private corporation, though indefinite, is inherently temporary.

B. Treasury's Financial Support of the Conservatorship Does Not Establish Permanent Government Control

In a footnote, Plaintiff argues that Freddie Mac is "under the permanent, complete control of the United States Treasury." Sisti Br. 34 n.15. But under *Lebron*, Treasury's financial investment in Freddie Mac—and whatever level of practical control that might imply—is irrelevant because it does not give Treasury *permanent* control over Freddie Mac. *See Herron v. Fannie Mae*, 857 F. Supp. 2d 87, 96 (D.D.C. 2012).

Again, *Lebron* identifies "a private corporation whose stock comes into federal ownership" as illustrating the *absence* of permanent government control. 513 U.S. at 398. And *Lebron*'s discussion of *Regional Rail* confirms the same point applies where the government's investment involves other forms of financial

support. *See supra* at 1-20.

Treasury (and FDIC) often invest in troubled financial institutions to support the broader financial system. *See, e.g.*, *Holland v. United States*, 75 Fed. Cl. 483 (2007); *Caroline Hunt Tr. 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 those institutions into government actors. *See, e.g.*, *Wiggins v. JP Morgan Chase Bank*, No. 2:14-cv-11103, 2015 WL 868933, at *9 (S.D.W. Va. Feb. 27, 2015) (recipient of TARP funds not a government actor). Plaintiff identifies no case—because there is none—in which a private financial institution has been deemed a government actor by virtue of accepting federal assistance while in conservatorship or receivership.

C. The Alternative Doctrines Plaintiff Cites Do Not Supplant *Lebron*

Plaintiff alternatively claims that Freddie Mac can be held liable for a due process violation under "other U.S. Supreme Court precedent." Sisti Br. 34. To that end, Plaintiff argues that Freddie Mac is "pervasive[ly] entwine[d]" with the government, constituting "state action" under *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 291 (2001), or is "an agency of the State" under *Pennsylvania v. Board of Directors of City Trusts of Philadelphia*, 353 U.S. 230, 231 (1957). Sisti Br. 34-38. Those tests are inapplicable here.

As an initial matter, *Lebron* is the more specific—and therefore controlling—precedent; it articulates how the principles animating the cases Plaintiff identifies apply in the context of federally created corporations. *See Mik*, 743 F.3d at 168 ("*Lebron* … established a framework for determining when a government-sponsored corporation is a government actor" (footnote omitted)). And under *Lebron*, Freddie Mac cannot be deemed a government actor regardless of FHFA's status. Plaintiff's suggestion that *Logiodice v. Trustees of Maine Central Institute*, 296 F.3d 22 (1st Cir. 2002), implies *Lebron* can be discarded in favor of *Brentwood* here is incorrect. *See* Sisti Br. 35 n.16. *Logiodice* involved a local private school, not a federally created corporation. 296 F.3d at 24. *Lebron* therefore could not apply, and the Court correctly did not address it.

Regardless, Plaintiff's theories depend on a faulty premise—that FHFA as Conservator is a government actor. FHFA as Conservator is a *private* actor for constitutional purposes. *Supra* Section I. Hence, conservatorship is irrelevant under *Brentwood*. *Herron*, 857 F. Supp. 2d at 96 (rejecting plaintiff's "entwinement" theory because "*Brentwood* did not change the law of conservatorship and receivership"). Similarly, Treasury is not pervasively entwined with Freddie Mac because "when the government acquires an ownership interest in a corporation, it acts—and is treated—as any other shareholder." *Meridian Invs., Inc.*, 855 F.3d at 579.

Plaintiff's citation of *City Trusts*, a three-paragraph opinion that pre-dates *Lebron*, is no more persuasive. Sisti Br. 34-35 (citing 353 U.S. 230). There, "an act of the Pennsylvania legislature" provided for the board of a state college to be controlled by "an agency of the State." 353 U.S. at 231. Unsurprisingly, the Court concluded that the college's admission decisions constituted state action. *Id*. By contrast, when FHFA acts as Conservator, it directs Freddie Mac's operations in a non-governmental capacity and without permanent structural control. *See supra* at 2-17.

Finally, Plaintiff and the National Consumer Law Center ("NCLC") amicus offer arguments about the *Merrill* doctrine and other contexts in which other tests govern the determination of whether an entity is governmental for various purposes. Sisti Br. 37 (citing *Faiella v. Fannie Mae*, 928 F.3d 141 (1st Cir. 2019)); *see generally* NCLC Amicus Br. These arguments are beside the point. "[J]ust because an entity is considered a federal instrumentality for one purpose does not mean that the same entity is a federal instrumentality for another purpose." *Adams*, 813 F.3d at 1261 (citation omitted); *see also Faiella*, 928 F.3d at 148 (similar) (citing *Adams*).

Plaintiff's argument that the government controls Freddie Mac for purposes of *Lebron* or any other test applicable to constitutional claims fails.

CONCLUSION

As the Supreme Court explained in 2019, "[e]xpanding the state-action doctrine beyond its traditional boundaries would expand governmental control while restricting individual liberty and private enterprise." *Halleck*, 139 S. Ct. at 1934. Plaintiff asks this Court to do just that. The Supreme Court "decline[d] to do so" in *Halleck*, and this Court should decline to do so here.

Because no Defendant is a government actor, Plaintiff's due process claim fails as a matter of law. Defendants therefore respectfully request that the Court reverse the judgment and vacate the district court's August 2, 2018 order.

DATED: February 19, 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 Appellants' Reply Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) as it contains 6,216 words. I further certify Appellants' 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: February 19, 2021 /s/ Michael A.F. Johnson

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2021, I electronically filed the foregoing APPELLANTS' REPLY 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: February 19, 2021 /s/ Michael A.F. Johnson