No. 20-01673

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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

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

v.

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

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

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

APPELLEES' OPPOSITION TO PETITION TO RECALL THE MANDATE

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INTRODUCTION

In a decision issued June 8, 2021, the Court held that in this case, "FHFA acted privately and not as the government…." *See Montilla v. Fed. Nat'l Mortg. Ass'n*, 999 F.3d 751, 762 (1st Cir. 2021). Because the Court held that FHFA had acted privately and not as the government, Federal Rule of Appellate Procedure 40(a)(1) required Plaintiffs to petition for rehearing, if at all, within 14 days—by June 22.

Plaintiffs let that deadline pass, and the Court issued the mandate seven days later, on June 29. Plaintiffs offered no objection that day, that week, the next week, or the week after that. Instead, Plaintiffs sat on their hands for 23 days, and then improperly combined a motion to recall the mandate with a petition for rehearing that depends upon the Court's having already recalled the mandate.[1]

Plaintiffs knew the Court had held that "FHFA acted privately and not as the government." Yet Plaintiffs argue that FHFA—in the non-governmental capacity as Fannie Mae's and Freddie Mac's (together, the GSEs) private successor and conservator in which it appeared in this case—must be treated as "a United States

[1] Appellees believe this matter closed upon the mandate's issuance and that Plaintiffs' untimely rehearing petition is therefore a nullity; Appellees accordingly do not respond to Plaintiffs' arguments for rehearing. In the event the Court recalls the mandate and entertains Plaintiffs' rehearing petition, Appellees respectfully reserve the right to respond to Plaintiffs' argument that *Collins v. Yellen*, 141 S. Ct. 1761 (2021) refutes this panel's decision that the Conservator is not a government actor for purposes of the due process claim at issue.

agency" for purposes of Rule 40. In essence, Plaintiffs assume that regardless of the role in which it acts or the powers it exercises in a given case, FHFA is inherently governmental under that Rule.

Plaintiffs' assumption is not correct. As the Court recognized, "[t]hat a federal agency exercising a portion of its statutory powers in one role is a government actor does not as a matter of law mean that it is a government actor for all purposes or in all exercises of its statutory powers." *Montilla*, 999 F.3d at 756 (citation omitted). In this case, FHFA was not alleged to have acted in any capacity other than as the GSEs' private successor, and the Court therefore specifically held that FHFA "acted privately," which by definition means that FHFA did *not* act as "a United States agency" for purposes of Rule 40.

Under the circumstances, Plaintiffs cannot rely on the "United States agency" provision of Rule 40(a)(1)(B), and the Court should not recall the mandate.

ARGUMENT

The Court properly issued the mandate on June 29, 2021 and should not recall it now.

In this case, FHFA acted solely as a private corporation's statutory successor and conservator—not as the government. As the Court held, "after stepping into the GSEs' shoes under HERA and exercising their private contractual rights to

nonjudicially foreclose on [Plaintiffs'] properties, *FHFA did not act as the government*." *Montilla*, 999 F.3d at 757 (emphasis added). For that reason, Rule 40(a)(1) required Plaintiffs to seek rehearing within 14 days of the decision, which made the deadline June 22. Rule 41, in turn, specified that in the absence of a timely rehearing petition, the mandate would issue seven days after that. Hence, once Plaintiffs let the deadline to petition for rehearing pass, the Court properly issued the mandate on June 29.

Plaintiffs argue that Rule 40(a)(1)(B) extended the time for them to petition for rehearing to 45 days, because FHFA is a "United States agency." Pet. 5-6. Plaintiffs' argument fails. No one disputes that FHFA "*sometimes* acts as the government." *Montilla*, 999 F.3d at 756 (emphasis added). But not always, and not in this case. Unlike most other federal agencies, but like the FDIC, FHFA "is authorized by statute to function in two separate and distinct capacities"—that of a regulatory agency and that of the conservator or receiver (and statutory successor) of a private corporation. *See FDIC v. Bernstein*, 944 F.2d 101, 106 (2d Cir. 1991) (discussing FDIC). Thus, FHFA can act in a purely private capacity, and in this case the Court held that it did so. *Montilla*, 999 F.3d at 757. It stands to reason that once an entity has been conclusively held to have "acted privately and not as the government," it cannot be treated as a government agency for purposes of Rule 40.

While we have identified no cases directly on point involving Rule 40, a few decisions apply a different rule (FRAP 4) to other bodies, including the FDIC as receiver. *See, e.g.*, *Waldron, Chapter 7 Trustee for Venture Fin. Grp., Inc. v. FDIC*, 935 F.3d 844 (9th Cir. 2019) (FRAP 4(a)(1)(B)(ii) applies to FDIC as receiver). Plaintiffs do not cite any of these cases, and for good reason.[2] Although FHFA's organic statute generally parallels FDIC's, one of the few differences is crucial here. A provision of the FDIC's statute, 12 U.S.C. § 1819(b)(1), provides that "[t]he [FDIC], *in any capacity*, *shall be an agency of the United States* for purposes of section 1345 of Title 28," which concerns jurisdiction over government agencies. (Emphasis added.) FHFA's organic statute, by contrast, contains no comparable provision. Because of that difference, cases that cite Section 1819(b)(1) as support for the proposition that FDIC as receiver is a United States agency for Rule 4 purposes, such as *Waldron*, do not apply to FHFA.

But even without that statutory distinction, Rule 4 is not analogous to Rule 40. Rule 4 extends the deadline to *initiate* an appeal if a federal agency is party to that case; the rule operates at the *beginning* of an appeal—*before* the appellate court could have held that the receiver acted in its purely private capacity, if the question is even at issue. Rule 40, by contrast, operates at the *end* of an appeal, in

[2] Plaintiffs have thereby forfeited any argument that such cases are relevant. Without waiving that forfeiture, we explain in the narrative why they do not apply in any event.

this instance, *after* the Court had specifically determined that "FHFA acted privately and not as the government…." *Montilla*, 999 F.3d at 762.

Another factor, which courts sometimes identify as the "most important[]"—"the rationale behind Rule 4, that it is necessary to provide extra time for government agencies to decide how to handle an appeal," *see Scott v. Fed. Rsrv. Bank of Kansas City*, 406 F.3d 532, 538 (8th Cir. 2005)—confirms that Plaintiffs' position conflicts with sound policy.[3] *Plaintiffs*, not the Conservator, was the party considering petitioning for rehearing. And in any event, FHFA has independent litigation authority, 12 U.S.C. § 4513(c), so the Solicitor General would not be involved in proceedings before this Court. Hence, no additional time for consultation is necessary, and "the rationale behind Rule 4" does not apply.[4]

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[3] Indeed, the drafters of Rule *40* specifically identified the same policy rationale. Fed. R. App. P. 40 advisory committee's note to 1994 amendment.

[4] Even if the Court were to assume that Rule 4's *prospective* analysis rather than a *retrospective* analysis under Rule 40 applied, FHFA in its capacity as conservator and successor to a private corporation would still not be deemed a "United States agency" for purposes of Rule 40. *Waldron* identifies six factors: (1) "the extent to which the alleged agency performs a governmental function," which this Court held that the Conservator did not; (2) "the scope of government involvement in the organization's management," which here is nil because Plaintiffs did not allege FHFA took any relevant action in any capacity other than as successor to the private GSEs; (3) whether the organization's operations are financed by the government, which here they are not because FHFA is not funded by appropriations; (4) whether persons other than the government have a proprietary interest in the alleged agency, which here they do, because the GSEs' common and junior preferred stock is held by private shareholders, and whether the government's interest is merely custodial or incidental, which it is, because the conservator's mission is to rehabilitate the GSEs; (5) whether the organization is

Cases applying Rule 4 are therefore inapposite in the narrow circumstance presented here. This lawsuit does not involve FHFA in its capacity as a governmental agency, and the Rule 40 deadline was therefore 14 days, not 45.

Plaintiffs might argue that the portion of *Collins* addressing whether FHFA wields "executive power" for separation-of-powers purposes suggests that for Rule 40 purposes, FHFA is inherently governmental in every circumstance—regardless of whether it acts solely as Conservator, and if so, whether it exercises any authority beyond that of the private corporations to which it succeeded. *Cf.* Pet. at 9-10 n.2 (citing 141 S. Ct. 1761). Such an argument misreads *Collins*. The statutory powers of the Conservator that the Supreme Court indicated could be "executive"—and upon which Plaintiffs therefore must rely to argue that the Conservator should be treated as a governmental party here—include the powers to issue rules, orders, and subpoenas, and to "subordinate the best interests of the [GSEs]." 141 S. Ct. at 1785-86. But there is no allegation that FHFA exercised any of those powers in this case. And the GSEs' pre-existing powers do not become governmental merely because they now rest with the Conservator. The

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referred to as an agency in other statutes, which it is not, as HERA consistently distinguishes between the Agency generally and the Agency in its distinct role as conservator or receiver; and (6) whether the organization is treated as an arm of the government for other purposes, such as amenability to suit under the Federal Tort Claims Act, which it is not, as this case demonstrates—Plaintiffs (like many others in a variety of cases) sued the Conservator without pleading any waiver of sovereign immunity. *See Waldron*, 935 F.3d at 847–48 (citation omitted).

GSEs routinely conducted non-judicial foreclosures prior to conservatorship, and as this Court held, FHFA merely "exercise[ed] [the GSEs'] private contractual rights" as their successor under HERA. *Montilla*, 999 F.3d at 757. This Court's holding was correct and is entirely consistent with *Collins*.[5]

Plaintiffs argue that *Collins* reflects an "exceptional circumstance" that warrants recalling the mandate. Pet. at 6. But if Plaintiffs believed the issues before the Supreme Court in *Collins* had any relevance to this case, they could have informed this Court, or even the district court, long ago—*Collins* involved a constitutional challenge to a statutory provision enacted in 2008, well before Plaintiffs commenced this case. The *Collins* litigation has been percolating through the courts for several years, as have several similar cases. If Plaintiffs believed *Collins* had any relevance to this case, Plaintiffs could have asked the Court to extend the deadline to petition for rehearing once this Court issued its decision, Fed. R. App. P. 40(a)—with the Supreme Court's term ending, *Collins* was all but certain to be issued in days or weeks. *Collins* was in fact issued June 23, 2021, *before* this Court issued its mandate. But instead of arguing that *Collins* had any potential relevance to this case before it came out, or promptly bringing the *Collins* decision to the Court's attention once issued, Plaintiffs sat on their

[5] As noted above, this brief does not address Plaintiffs' arguments in support of their petition for rehearing. *See supra* n.1.

hands *for nearly a month* after the Supreme Court issued its ruling and this Court issued the mandate.

"F.R.A.P. 40 was not promulgated as a crutch for dilatory counsel." *United States v. Doe*, 455 F.2d 753, 762 (1st Cir.), vacated and remanded on other grounds sub nom. *Gravel v. United States*, 408 U.S. 606 (1972). Plaintiffs have not acted diligently, and has therefore forfeited any argument that *Collins*'s issuance is the kind of "exceptional circumstance" that could warrant recalling the mandate. And in any event, Plaintiffs can still petition for certiorari, as counsel has already publicly stated it intends to do. Sup. Ct. R. 13; *see also* Brian Dowling, 1st Circ. Says Fannie, Freddie Can Foreclose Out Of Court, Law360, https://www.law360.com/articles/1392262/1st-circ-says-fannie-freddie-can-foreclose-out-of-court (June 9, 2021) ("The borrowers' attorney, Todd Dion, told Law360 on Wednesday that he plans to ask the U.S. Supreme Court to review the First Circuit's decision.").

CONCLUSION

Once this Court held that FHFA "acted privately" in this case, Plaintiffs could not plausibly have believed that the case involved a "United States agency" for purposes of Rule 40—Plaintiffs knew FHFA's role was that of the *private* successor to a *private* corporation. Plaintiffs could and should have either filed

their rehearing petition or moved for an extension of time for doing so before Rule 40(a)'s 14-day deadline passed, but did not.

Nor did Plaintiffs act diligently once the Supreme Court issued the ruling Plaintiffs now claim is contrary to this Court's decision. Had *Collins* been an "exceptional circumstance" warranting the extraordinary remedy of recalling the mandate, Plaintiffs surely would have brought it to the Court's attention immediately. Instead, Plaintiffs waited nearly an entire month before doing so.

The Court should deny the motion.

DATED: August 2, 2021

By: */s/ Michael A.F. Johnson*

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2021, I electronically filed the foregoing APPELLEES' OPPOSITION TO PETITION TO RECALL THE MANDATE 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: August 2, 2021 /s/ Michael A.F. Johnson