No. _____

In the
Supreme Court of the United States

NERIS MONTILLA AND MICHAEL KYRIAKAKIS,
Petitioners,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION AND FEDERAL HOUSING FINANCE AGENCY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal National Mortgage Association, when under the conservatorship of the Federal Housing and Finance Agency, is a state actor for purposes of constitutional claims.

2. Whether the Federal Housing and Finance Agency, when acting as conservator for the Federal National Mortgage Association, is a state actor for purposes of constitutional claims.

PARTIES TO THE PROCEEDINGS

Petitioners Neris Montilla and Michael Kyriakakis were plaintiffs in the District Court and plaintiffs-appellants in the Court of Appeals. Plaintiffs Ruben Velasquez and Roselia Montufar were voluntarily dismissed at the District Court and did not take part in the Court of Appeals proceedings.

Respondents Federal National Mortgage Association (Fannie Mae or Fannie) and Federal Housing Finance Agency (FHFA) were defendants at the District Court and defendant-appellees at the Court of Appeals. Defendant C.I.T. Bank, N.A. was a defendant at the District Court and was voluntarily dismissed at the Court of Appeals. Defendants Seterus, Inc., and Mr. Cooper f/k/a Nationstar Mortgage, LLC, were voluntarily dismissed at the District Court and did not take part in the Court of Appeals proceedings.

STATEMENT OF RELATED PROCEEDINGS

- *Montilla v. Federal National Mortgage Association*, No. 20-1673 (1st Cir.) (opinion and judgment issued June 8, 2021).
- *Montilla v. Federal National Mortgage Association*, No. 18-632 WES (D.R.I.) (memorandum and order dismissing case issued May 26, 2020).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 999 F.3d 751 and reproduced at App. 1. The opinion of the District Court for the District of Rhode Island is unreported but can be accessed at 2020 WL 9934769 and is reproduced at App. 25.

JURISDICTION

The Court of Appeals issued its judgment on June 8, 2021. By this Court's order dated March 19, 2020, the deadline for this Petition is extended 150 days from the date of the lower court judgment, or through November 5, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2, Clause 1 of Article III of the United State Constitution provides in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;

Amendment V of the United State Constitution provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law;

Section 4511 of Title 12 of the United States Code provides:

> (a) Establishment
> There is established the Federal Housing Finance Agency, which shall be an independent agency of the Federal Government.
> (b) General supervisory and regulatory authority
> (1) In general
> Each regulated entity shall, to the extent provided in this chapter, be subject to the supervision and regulation of the Agency.
> (2) Authority over Fannie Mae, Freddie Mac, the Federal Home Loan Banks, and the Office of Finance
> The Director shall have general regulatory authority over each regulated entity and the Office of Finance, and shall exercise such general regulatory authority, including such duties and authorities set forth under section 4513 of this title, to ensure that the purposes of this Act, the authorizing statutes, and any other applicable law are carried out.
> (c) Savings provision
> The authority of the Director to take actions under subchapters II and III shall not in any way limit the general supervisory and regulatory authority granted to the Director under subsection (b).

Section 4513(a)(1)(B) of Title 12 of the United States Code provides in relevant part:

> (iv) each regulated entity carries out its statutory mission only through activities that are authorized under and consistent with this chapter and the authorizing statutes; and
> (v) the activities of each regulated entity and the manner in which such regulated entity is operated are consistent with the public interest.

Section 4588 of Title 12 of the United States Code provides in relevant part:

> (a) In general
> In the course of or in connection with any administrative proceeding under this subpart, the Director shall have the authority--
> (1) to administer oaths and affirmations;
> (2) to take and preserve testimony under oath;
> (3) to issue subpoenas and subpoenas duces tecum; and
> (4) to revoke, quash, or modify subpoenas and subpoenas duces tecum issued by the Director.
> (b) Witnesses and documents
> The attendance of witnesses and the production of documents provided for in this section may be required from any place in any State at any designated place where such proceeding is being conducted.
> (c) Enforcement

> The Director may bring an action or may request the Attorney General of the United States to bring an action in the United States district court for the judicial district in which such proceeding is being conducted, or where the witness resides or conducts business, or the United States District Court for the District of Columbia, for enforcement of any subpoena or subpoena duces tecum issued pursuant to this section. Such courts shall have jurisdiction and power to order and require compliance therewith.

Section 4617 of Title 12 of the United States Code provides in relevant part:

> (a) Appointment of the Agency as conservator or receiver
>
> (1) In general
>
> Notwithstanding any other provision of Federal or State law, the Director may appoint the Agency as conservator or receiver for a regulated entity in the manner provided under paragraph (2) or (4). All references to the conservator or receiver under this section are references to the Agency acting as conservator or receiver.
>
> (2) Discretionary appointment
>
> The Agency may, at the discretion of the Director, be appointed conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity.
>
> . . .

(b) Powers and duties of the Agency as conservator or receiver

. . .

(2) General powers

(A) Successor to regulated entity

The Agency shall, as conservator or receiver, and by operation of law, immediately succeed to--

(i) all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity; and

(ii) title to the books, records, and assets of any other legal custodian of such regulated entity.

(B) Operate the regulated entity

The Agency may, as conservator or receiver--

(i) take over the assets of and operate the regulated entity with all the powers of the shareholders, the directors, and the officers of the regulated entity and conduct all business of the regulated entity;

(ii) collect all obligations and money due the regulated entity;

(iii) perform all functions of the regulated entity in the name of the regulated entity which are consistent with the appointment as conservator or receiver;

(iv) preserve and conserve the assets and property of the regulated entity; and

(v) provide by contract for assistance in fulfilling any function, activity, action, or duty of the Agency as conservator or receiver.

(C) Functions of officers, directors, and shareholders of a regulated entity

The Agency may, by regulation or order, provide for the exercise of any function by any stockholder, director, or officer of any regulated entity for which the Agency has been named conservator or receiver.

. . .

(G) Transfer or sale of assets and liabilities

The Agency may, as conservator or receiver, transfer or sell any asset or liability of the regulated entity in default, and may do so without any approval, assignment, or consent with respect to such transfer or sale.

. . .

(I) Subpoena authority

(i) In general

(I) Agency authority

The Agency may, as conservator or receiver, and for purposes of carrying out any power, authority, or duty with respect to a regulated entity (including determining any claim against the regulated entity and determining and realizing

> upon any asset of any person in the course of collecting money due the regulated entity), exercise any power established under section 4588 of this title.
>
> . . .
>
> (J) Incidental powers
>
> The Agency may, as conservator or receiver--
>
> . . .
>
> (ii) take any action authorized by this section, which the Agency determines is in the best interests of the regulated entity or the Agency.
>
> . . .
>
> (f) Limitation on court action
>
> Except as provided in this section or at the request of the Director, no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver.

Section 1716b of Title 12 of the United States Code provides in relevant part:

> The purposes of this title include the partition of the Federal National Mortgage Association as heretofore existing into two separate and distinct corporations, each of which shall have continuity and corporate succession as a separated portion of the previously existing corporation. One of such corporations, to be known as Federal National Mortgage Association, will be a Government-sponsored

> private corporation, will retain the assets and liabilities of the previously existing corporation accounted for under section 1719 of this title, and will continue to operate the secondary market operations authorized by such section 1719.

Section 1717 of Title 12 of the United States Code provides in relevant part:

> (a) Creation; succession; principal and other offices
>
> (1) There is created a body corporate to be known as the "Federal National Mortgage Association", which shall be in the Department of Housing and Urban Development. The Association shall have succession until dissolved by Act of Congress.
>
> . . .
>
> (2) On September 1, 1968, the body corporate described in the foregoing paragraph shall cease to exist in that form and is hereby partitioned into two separate and distinct bodies corporate, each of which shall have continuity and corporate succession as a separated portion of the previously existing body corporate, as follows:
>
> . . .
>
> (B) The other such separated portion shall be a body corporate to be known as Federal National Mortgage Association
>
> . . . .

Section 1723a(a) of Title 12 of the United States Code provides in relevant part:

> Each of the bodies corporate named in section 1717(a)(2) of this title shall have power . . . to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal . . . .

Section 1821(d)(2)(A) of Title 12 of the United States Code provides in relevant part:

> The Corporation shall, as conservator or receiver, and by operation of law, succeed to--
> (i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution;

Section 24301(a)(2) of Title 49 of the United States Code provides in relevant part:

> (a) Status.--Amtrak--
> (2) shall be operated and managed as a for-profit corporation;

Section 4 of Chapter 27 of Title 34 of the General Laws of Rhode Island provides in relevant part:

> (a) Whenever any real estate shall be sold under any power of sale mortgage . . . and the mortgage shall provide for the giving of notice of the sale by publication in some public newspaper at least once a week for three (3) successive

> weeks before the sale, the first publication of the notice shall be at least twenty-one (21) days before the day of sale, including the day of the first publication in the computation, and the third publication of the notice shall be no fewer than seven (7) days before the original date of sale listed in the advertisement, including the day of the third publication in the computation, and no more than fourteen (14) days before the original date of sale listed in the advertisement. The sale may take place no more than fourteen (14) days from the date on which the third successive notice is published . . .
> (b) Provided, however, that no notice shall be valid or effective unless the mortgagor has been mailed written notice of the time and place of sale by certified mail . . . at least twenty (20) days . . . prior to the first publication, including the day of mailing in the computation.

Section 22 of Chapter 11 of Title 34 of the General Laws of Rhode Island provides in relevant part:

> The following power shall be known as the "statutory power of sale" and may be incorporated in any mortgage by reference:
> . . .
> But if default shall be made in the performance or observance of any of the foregoing or other conditions, or if breach shall be made of the covenant for insurance contained in this deed, then it shall be lawful for the mortgagee . . . to sell, together or in parcels, all and singular the premises hereby granted or intended to be

> granted, or any part or parts thereof, and the benefit and equity of redemption of the mortgagor and his, her or its heirs, executors, administrators, successors and assigns therein, at public auction . . . which sale or sales made as aforesaid shall forever be a perpetual bar against the mortgagor and his, her or its heirs, executors, administrators, successors and assigns, and all persons claiming the premises, so sold, by, through or under him or her, them or any of them.

INTRODUCTION

"Liberty requires accountability." *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 57 (2015)(Alito, J., concurring). However, "by passing off a Government operation as an independent private concern," the Government can regulate without such accountability. *Id*. This case provides the Court with an opportunity to ensure that Executive agencies and any private entities they control are held accountable to their constitutional obligations. This Court's review is required to uphold the Judiciary's role in checking the Executive branch from constitutional overreach and defending the individual liberties enshrined in our Constitution.

1. Petitioners have a meritorious claim that Fannie Mae's use of non-judicial foreclosures under the direction of the FHFA violates the Fifth Amendment's prohibition against "any state deprivation of life, liberty, or property without due process of law." *Ingraham v. Wright*, 430 U.S. 651, 672 (1977). The Due Process Clause requires, at a minimum, that any such state deprivation "be preceded by notice and

opportunity for hearing appropriate to the nature of the case." *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

Petitioners allege that Fannie Mae's and the FHFA's foreclosure practices lack these basic safeguards. Petitioners received just over a month's notice prior to Fannie's and the FHFA's foreclosure on their homes. Petitioners had no opportunity for a hearing or to be represented by counsel at a hearing in front of a neutral officer prior to foreclosure. Without a hearing, Petitioners could not confront those responsible for the foreclosure and present evidence and arguments to dispute the allegations supporting foreclosure. By providing inadequate notice and no opportunity to be heard before foreclosing on Petitioners' homes, Fannie Mae and the FHFA have deprived Petitioners of their constitutionally protected interests in their homes without the constitutionally required due process of law.

Petitioners' allegations raise important due process questions. Once ostensibly private corporations, Fannie Mae and Freddie Mac[1] have been operating since 2008 under the conservatorship of the FHFA, an "independent" federal agency. Through these conservatorships, the federal government is now the dominant player in the home mortgage market,[2] and as Justice Alito recently observed, "there can be no question that the FHFA's control over Fannie Mae and

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[1] The Federal Home Loan Mortgage Corporation, or "Freddie Mac," is not a named defendant in this case.

[2] Fannie and Freddie collectively own or guarantee nearly half of all home mortgages in the U.S.

Freddie Mac can deeply impact the lives of millions of Americans by affecting their ability to buy and keep their homes." *Collins v. Yellen*, __ U.S. at __, 141 S.Ct. 1761, 1786 (2021). Home ownership is a critical component of an individual's life, and affects mental and physical health, educational performance, employment, access to food, and safety. *See generally* Christopher C. Ligatti, *Max Weber Meets the Fair Housing Act: "Life Chances" and the Need for Expanded Lost Housing Opportunity Damages*, 6 Belmont L. Rev. 78 (2018). Given the complete discretion the FHFA holds over the conservatorships' durations and the immense financial benefit the government realizes thereby, the FHFA's dominance and impact on the U.S. housing market and millions of individual homeowners is likely to continue into the foreseeable future.

Although non-judicial foreclosures may be a prevalent practice in the private home mortgage market,[3] the federal government "surely cannot . . . evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995). It is therefore a matter of great importance that the Judiciary have the opportunity to measure the government's use of non-judicial foreclosures against its constitutional obligations. However, the First Circuit, by its holding that Fannie Mae and the FHFA are private actors not subject to the Constitution's dictates, is preventing review of this important due process issue.

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[3] At least thirty states plus Washington, D.C. currently allow for such proceedings.

* * *

The First Circuit's and other circuits' state action conclusions rest on faulty readings of this Court's decisions. This Court should grant certiorari to clarify the state action doctrines at issue and allow this important due process issue to be properly reviewed in the lower courts. Without this Court's review, the circuit courts will continue to misapply the state action precedents at issue to the detriment of millions of homeowners.

2. The Fifth and Fourteenth Amendments' Due Process Clauses distinguish "between deprivation by the State, subject to scrutiny under its provisions, and private conduct, however discriminatory or wrongful, against which [those Amendments offer] no shield." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974) (quotation marks omitted). Therefore, a threshold matter in any due process claim is whether the alleged wrong was the result of "state action," i.e., a "deprivation by the State." Though this dichotomy "is well established and easily stated," the answer to whether particular conduct is attributable to the state "frequently admits of no easy answer." *Id.* at 349–50. The instant case is no exception, as it presents state action questions in two unique contexts.

3. The first state action issue here involves the constitutional status (i.e., state actor or private actor) of a "private" government-sponsored enterprise—in this case, Fannie Mae. This Court has on two occasions addressed this topic, both in connection with the National Railroad Passenger Corporation (Amtrak). Those cases involved the argument that because

Amtrak's authorizing statute disclaimed agency status and declared it to be a private entity, Amtrak could not be a state actor.

The first case, *Lebron v. Nat'l R.R. Passenger Corp.*, concerned a First Amendment claim over Amtrak's refusal to allow an artist to place a political advertisement in Penn Station. There, the Court considered the government's relationship with Amtrak and the government's control thereover to determine whether Amtrak was a state actor. The *Lebron* Court concluded that because Amtrak was created by the Legislature to achieve government objectives, and because the government retained the permanent authority to appoint a majority of its board, Amtrak was a state actor for purposes of the First Amendment claim. *Lebron*, 513 U.S. at 399.

The second case, *Dep't of Transp. v. Ass'n of Am. Railroads*, concerned a separation-of-powers challenge to Amtrak's regulatory authority. Looking to *Lebron's* analysis, the Court concluded that "*Lebron* teaches that . . . the practical reality of federal control and supervision prevails over Congress' disclaimer of Amtrak's governmental status," and Amtrak was therefore a state actor. *Am. Railroads*, 575 U.S. at 55. Thus, the challenge to its statutory authority to regulate failed.

From *Lebron*, the courts of appeals have created a three-prong test for determining whether a government-sponsored enterprise is a state actor: (1) it must be created by legislation; (2) it must be created for the purpose of achieving governmental objectives; and (3) the government must have permanent control

over it. Applying this test here, the First Circuit held that as a conservator, the FHFA does not permanently control Fannie Mae, and therefore Fannie Mae is not a state actor. Petitioners argue that the First Circuit has improperly read a "permanent control" *requirement* into *Lebron*, and thus ignored this Court's instruction in *American Railroads*, which teaches that permanency was merely a probative factor in *Lebron*.

When considered under the proper rubric, the instant case satisfies *Lebron's* analytical framework more easily than Amtrak did in *Lebron* itself. This Court should grant review to correct the erroneous approach of the courts of appeals and clarify its *Lebron/American Railroads* standard.

4. Even if the FHFA's conservatorship does not transform Fannie Mae into a state actor, the FHFA itself remains a federal agency, and its actions as conservator should be subject to constitutional restrictions. However, the First Circuit held otherwise based on a line of this Court's opinions involving the Federal Deposit Insurance Corporation (FDIC) acting as receiver for failed savings and loans.

The chief opinion the panel relies on is *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79 (1994), which concerned a state tort claim brought by the FDIC on behalf of its failed ward. On a question wholly unrelated to whether the FDIC's conduct comprised state action, the *O'Melveny* Court found that by virtue of the succession provision in its authorizing statute, "the FDIC as receiver 'steps into the shoes' of the failed S & L." *Id*. at 86. Because the FHFA's authorizing statute contains an identical succession clause, the First Circuit found

by analogy that as conservator, the FHFA steps into the shoes of Fannie Mae, and therefore its actions as conservator are not state action.

However, Petitioners pointed the First Circuit to another FDIC-as-receiver case, *F.D.I.C. v. Meyer*, 510 U.S. 471 (1994), which involved a due process claim brought *against* the FDIC as receiver (as is the claim here against the FHFA as conservator). The *Meyer* Court found that by virtue of the sue-and-be-sued clause in its authorizing statute, the FDIC had waived its sovereign immunity and was therefore subject to constitutional claims. Because the FHFA holds Fannie Mae's power to sue and be sued via HERA's succession clause, Petitioners argued by analogy that the FHFA has waived sovereign immunity and is therefore subject to Petitioner's due process claim (and is necessarily a state actor). The First Circuit disagreed based on its erroneous belief that a finding of private action goes to the merits of a due process claim.

There is a conflict between the *O'Melveny* and *Meyer* decisions: the FHFA cannot at the same time waive its sovereign immunity and be subject to a constitutional claim as *Meyer* provides and also step into the shoes of Fannie Mae and be a private actor as *O'Melveny* provides. Either both decisions are wrong, or one must give way. This Court should grant review to resolve the conflict and confirm that the FHFA is a state actor when acting as conservator of Fannie Mae.

* * *

By virtue of the First Circuit's misinterpretations of and incorrect approaches to this Court's decisions, the

Government has realized Justice Alito's fear: the FHFA has insulated itself from constitutional review by assuming the corporate form of an ostensibly private entity and is therefore free of any accountability to its constitutional constraints. It is therefore of vital importance that this Court answer the questions presented to ensure that the Legislative and Executive branches adhere to their constitutional obligations and so that the Judiciary may perform its important constitutional role of safeguarding individual liberties. This Court should grant certiorari and reverse the erroneous judgment of the First Circuit so that the lower courts can review the merits of Petitioners' important due process claims against Fannie and the FHFA and remedy any violation found.

STATEMENT

I. The FHFA Appoints Itself Conservator of Fannie Mae to the Significant Benefit of the Treasury.

Fannie Mae is a government-sponsored enterprise (GSE) that Congress chartered by statute for the purpose of providing liquidity and stability to the home mortgage market. Fannie Mae accomplishes this by buying and selling mortgages in the secondary mortgage market to help ensure that primary mortgage sources have sufficient funds to lend to home buyers. Originally established as a federal agency in 1938, Congress chartered Fannie as a private, for-profit, shareholder-owned corporation in 1968.

During the financial crisis of the late 2000's, Fannie Mae, along with its brother company Freddie Mac,

suffered immense financial losses. In 2008 alone, the two companies together lost $47 billion. To keep Fannie and Freddie from collapsing and potentially taking the entire U.S. economy with them, Congress passed the Housing and Economic Recovery Act of 2008 (HERA), which established the FHFA as an "independent" federal agency to supervise and regulate Fannie and Freddie. 12 U.S.C. § 4511.

In addition to providing supervisory and regulatory powers, HERA also empowered the FHFA to appoint itself as Fannie's and Freddie's conservator. 12 U.S.C. § 4617(a)(1). The FHFA Director exercised that power over thirteen years ago, in September 2008. At that time, the FHFA also entered Fannie and Freddie into Preferred Stock Purchase Agreements (PSPAs) with the United States Treasury.

Under the PSPAs, the Treasury provided Fannie and Freddie a line of credit of $100 billion (which was later increased) upon which they could draw to avoid insolvency. In return, Fannie and Freddie issued warrants to the Treasury for the purchase of 79.9% of their common stock. Fannie and Freddie also issued the Treasury a new class of senior preferred stock with a $1 billion liquidation preference, which would increase dollar-for-dollar with each draw Fannie and Freddie made from the credit line. Fannie and Freddie are not permitted to redeem the Senior Preferred Stock or cancel the warrants without the consent of the Treasury.

Initially, the PSPAs required Fannie and Freddie to issue quarterly dividends to the Treasury on the liquidation preference. This was amended in 2012 to

require Fannie and Freddie to send the Treasury nearly all of their net worth in what is known as the "Net Worth Sweep." That arrangement ended by way of an additional amendment to the PSPAs in January 2021, by which the Treasury's liquidation preference on its preferred stock would quarterly increase by Fannie's and Freddie's increase in net worth in the prior quarter, rather than quarterly divesting Fannie and Freddie of all net worth.

II. The FHFA Exercises Total and Limitless Control over Fannie Mae.

The FHFA wields powers that are significantly different than ordinary conservatorships. *See Collins*, __ U.S. at __, 141 S.Ct. at 1776. These powers include the power to:

- Appoint itself as conservator of Fannie Mae, 12 U.S.C. § 4617(a)(1);
- Hold all rights, titles, powers, and privileges of Fannie Mae's shareholders and board of directors, 12 U.S.C. § 4617(b)(2)(A)(i);
- Take over Fannie Mae's assets and operate it with all the powers of its shareholders, directors, and officers, 12 U.S.C. § 4617(b)(2)(B)(i);
- Require stockholders, directors, and officers to exercise any function, 12 U.S.C. § 4617(b)(2)(C);
- Issue and enforce subpoenas, 12 U.S.C. § 4617(b)(2)(I), § 4588(a) & (c); and

- **Take any action** it determines is **in its own best interests** regardless of Fannie's best interests, 12 U.S.C. § 4617(b)(2)(J)(ii).

By these powers, the FHFA determines the size of Fannie Mae's Board of Directors and has elected all of its directors and officers since the conservatorship's inception. The FHFA also determines the scope of the Board's authority. While the FHFA has delegated certain authority to the Board, it retains certain significant authorities for itself and holds sole discretion to claw back the Board's authority at will.

The FHFA's actions as conservator of Fannie Mae are also shielded from judicial review. Unless HERA provides otherwise, "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver." 12 U.S.C. § 4617(f). This clause allows for judicial relief only when the FHFA acts outside of its authority as conservator. *Collins*, __ U.S. at __, 141 S.Ct. at 1776.

Importantly, the decision to end this powerful conservatorship is at the FHFA Director's sole discretion and it thus has no ascertainable end point. At its inception, the FHFA stated that there was no exact timeframe for ending the conservatorship and that it will end after the Director determines that the FHFA has succeeded in restoring Fannie to a safe and solvent condition. Nevertheless, the conservatorship's mission of "reorganizing, rehabilitating, or winding up the affairs"[4] of Fannie Mae is long since completed, but

[4] 12 U.S.C. § 4617(a)(2).

the Director has not exercised his power to end the conservatorship. Despite statements from the Trump Administration's FHFA Director indicating the agency was working toward ending the conservatorship, those efforts are expected to stall with the Biden Administration, which is expected to use its control of Fannie and Freddie to advance affordable housing goals. Given this expectation and the significant financial benefit the conservatorship provides the Treasury, the conservatorship will in all likelihood continue to wield its plenipotentiary power over Fannie Mae and the U.S. housing market without any foreseeable end point.

III. The FHFA Directs Fannie Mae to Perform Non-Judicial Foreclosures.

In its ordinary course of business, Fannie Mae provides liquidity to the home mortgage market by purchasing mortgages from loan originators, which it either retains or packages into mortgage-backed securities for sale to investors. Fannie Mae engages with third parties to service the loans it owns. Fannie's servicers must follow the rules and standards of its "Servicing Guide," including specific instructions on mitigating losses after defaults and conducting foreclosures on behalf of Fannie Mae.

After placing Fannie Mae into conservatorship, the FHFA has continuously controlled and supervised Fannie's oversight of its servicers. The FHFA created the "Servicer Alignment Initiative" (SAI) in April 2011, by which the FHFA directs the actions of Fannie's servicers. Through the SAI, the FHFA directed Fannie Mae to update its servicing guidelines to add new

standards and timelines for servicer management of delinquent mortgages.

One SAI policy requires Fannie's servicers to follow specific state-level timelines for processing foreclosures. Through that policy, the FHFA directs Fannie Mae's servicers to use non-judicial foreclosure procedures. To carry out a non-judicial foreclosure in Rhode Island, a mortgagee must: (1) send the mortgagor written notice of the time and place of sale at least thirty days prior to the first publication of notice to the public; and (2) publish notice of the sale in a public newspaper at least once a week for three successive weeks before the sale. Once these conditions are met, the mortgagee may sell the mortgaged property. The mortgagor is provided no opportunity for a hearing to challenge the foreclosure. *See* 34 R.I. Gen. Laws § 34-27-4. Moreover, 34 R.I. Gen. Laws § 34-11-22 provides that a non-judicial foreclosure shall be a perpetual bar to future claims by the mortgagor.

IV. Petitioners Challenge the Constitutionality of the FHFA's and Fannie Mae's Foreclosure Practices.

Petitioners are representatives of a putative class of former Fannie Mae mortgagors who sued the FHFA, Fannie Mae, and certain mortgage servicers seeking relief from mortgage practices that violate the FHFA's and Fannie Mae's constitutional obligations. The District Court had jurisdiction over this dispute under 28 U.S.C. § 1331. Petitioners alleged that the FHFA's foreclosure policy of requiring Fannie Mae's mortgage servicers to carry out non-judicial foreclosures violates the Due Process Clause of the Fifth Amendment by

depriving homeowners, like the Petitioners and others similarly situated, of their primary residences without adequate notice or an opportunity for a prior hearing. The District Court dismissed the complaint on grounds that neither the FHFA nor Fannie Mae are state actors and therefore are not subject to Petitioners' constitutional claims. App. 32–34.

On appeal, the First Circuit affirmed. The panel found that: (1) under this Court's *Lebron* precedent, the FHFA did not have the permanent control of Fannie Mae allegedly necessary to convert Fannie into a state actor; and (2) the FHFA, as conservator of Fannie, steps into the shoes of the private Fannie Mae under this Court's *O'Melveny* precedent, and thus its actions as conservator are not state action. App. 13–14. In so holding, the panel rejected Petitioners' arguments that *Lebron* does not require permanent control and that this Court's *Meyer* precedent, rather than *O'Melveny*, controls the determination of the FHFA's constitutional status.

Petitioners petitioned the First Circuit for rehearing and rehearing en banc. The panel construed the petition as a motion to recall mandate and denied the motion. App. 37.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Review to Correct the First Circuit's Misinterpretations of *Lebron* and *American Railroads* and to Confirm that Fannie Mae is a State Actor when under the Conservatorship of the FHFA.

The Court addressed the question of the constitutional status of a "private" government-sponsored enterprise in its *Lebron v. Nat'l R.R. Passenger Corp.* and *Dep't of Transp. v. Ass'n of Am. Railroads* decisions. Because Fannie Mae is a creature of statute, the First Circuit below looked to *Lebron* and applied what is known as the "*Lebron* test," by which it determined that the FHFA's conservatorship does not convert Fannie Mae into a state actor because the FHFA does not retain permanent control over it. This holding is in error, as the "permanent control" requirement of the "*Lebron* test" derives from the lower courts' consistent misreading of the *Lebron* and *American Railroads* decisions.

This Court should grant certiorari to clarify its *Lebron* and *American Railroads* decisions, correct the erroneous approach of the courts of appeals to those decisions, and ensure that the government cannot evade its constitutional duties by embedding itself within the corporate form. *See Lebron*, 513 U.S. at 397.

A. The First Circuit's Approach to this Court's *Lebron* Decision is in Conflict with That Decision and this Court's *American Railroads* Decision.

1. In *Lebron*, the Court considered whether Amtrak could be subject to a First Amendment claim in view of its authorizing statute's directive that it "shall be operated and managed as a for-profit corporation." 49 U.S.C. § 24301(a)(2). There, the plaintiff filed suit on First Amendment grounds after Amtrak refused his request to place a political billboard in Penn Station. After discounting Amtrak's statutory label and reviewing the nature of the government's relationship with and control over Amtrak, the *Lebron* Court concluded that "where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." *Lebron*, 513 U.S. at 399. From this holding, the circuit courts developed the three-prong "*Lebron* test" by which an entity is a government actor where: (1) it is created by special law; (2) it is meant to further governmental objectives; and (3) the government permanently controls it. *See, e.g.,* App. 14.

In *American Railroads*, the Court was again confronted with the argument that Amtrak could not be a government actor because its authorizing statute said so. Rather than an individual liberties challenge, however, *American Railroads* concerned a separation-of-powers challenge to Amtrak's statutory authority to

issue "metrics and standards" on grounds that Amtrak, as a private entity, could not exercise regulatory authority. The *American Railroads* Court disagreed with the challenge, finding that "the practical reality of federal control and supervision prevails over Congress' disclaimer of Amtrak's governmental status." *Am. Railroads*, 575 U.S. at 55. The Court thus held that Amtrak was a state actor. Significantly, the Court there did not pin its holding on a finding that Amtrak was under the government's permanent control, nor did it even discuss this as a factor. Nonetheless, the First Circuit found that the "practical reality of federal control" language had no effect on *Lebron's* holding or the panel's implementation of the *Lebron* test. App. 18.

2. That Fannie Mae satisfied the first two prongs of the *Lebron* test was not in dispute. App. 14 ("The parties do not dispute that the first two prongs of the Lebron test are satisfied."). This left only the "permanent control" prong at issue. The First Circuit held that because a conservatorship is inherently temporary, the FHFA did not have the permanent control required to convert Fannie Mae into a state actor under *Lebron*. App. 15.

A closer look at *Lebron* calls the circuit courts' *Lebron* test into question. The First Circuit derived the permanent control requirement from *Lebron's* "retains for itself permanent authority" language. App. 14 (quoting *Lebron*, 513 U.S. at 399) ("The issue before us is whether, through FHFA's conservatorship over the GSEs, the government has 'retain[ed] for itself permanent authority' over Fannie Mae and Freddie Mac.") (alteration in original). However, the panel

omitted the language immediately succeeding that phrase: "where . . . the Government . . . retains for itself permanent authority *to appoint a majority of the directors of that corporation*." *Lebron*, 513 U.S. at 399 (emphasis added). This is an important omission that changes the character of *Lebron's* actual holding from a specific conclusion ("where . . . the Government . . . retains for itself permanent authority to appoint a majority of the directors of that corporation"), *id.*, to a nebulous "permanent authority" requirement (under which the government must retain a general permanent authority over an entity). Petitioners here assert that *Lebron* did not hold that an entity *must* be under the government's permanent control in order to be a state actor and indeed, that element could never be possible, as the Legislature could always change the legal relationship between the government and an entity through subsequent legislation.

3. The circuit courts' approach to *Lebron* improperly limits *Lebron's* scope by reading a "permanent control" requirement into its holding. Thus, under the First Circuit's opinion, and those of the other circuits to have addressed this issue,[5] Fannie

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[5] *See, e.g., Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017) ("[T]he conservatorship over Fannie Mae did not create the type of permanent government control that is required under Lebron . . . ."); *U.S. ex rel. Adams v. Aurora Loan Servs., Inc.*, 813 F.3d 1259, 1261 (9th Cir. 2016) ("[R]elators do not allege that the conservatorship represents the federal government's retention of permanent authority to control Fannie Mae and Freddie Mac."); *Garcia v. Fed. Nat. Mortg. Ass'n*, 782 F.3d 736, 744 (6th Cir. 2015)

Mae is not a state actor solely because the FHFA's authorizing statute does not explicitly vest it with permanent control over Fannie, despite the reality of the FHFA's plenary control over Fannie and complete discretion over the length of the conservatorship.

This conflicts not only with the language and spirit of *Lebron*, but also with *American Railroads*, which renders *Lebron's* permanency language extraneous to the analytical framework described in that decision. *Lebron* and *American Railroads* both dealt with whether a *nominally-private* GSE is nonetheless a government entity for constitutional purposes.[6] In both cases, the Court addressed the argument that because of its statutory designation as a private entity, Amtrak could not be a government agency. The *Lebron* Court rejected this argument, with Justice Scalia forcefully declaring that:

> [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,

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(Bouie Donald, J., concurring) ("[A] necessary condition precedent to consider a once-private entity a state actor is that the government has 'permanent' control over the entity.").

[6] *Lebron* concerned a First Amendment claim; however, the *Lebron* Court declared Amtrak to be a state actor "for the purpose of individual rights guaranteed against the Government by the Constitution," and thus its analysis is applicable to the instant case. *Lebron*, 513 U.S. at 394.

> 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." And under whatever congressional label.

Lebron, 513 U.S. at 392–93 (quoting *Ex parte Virginia*, 100 U.S. 339, 346–347 (1879)) (internal citation omitted).

The *Lebron* Court instead scrutinized Amtrak's constitutional status by looking at the relationship between it and the government in light of the historical legal treatment of "[g]overnment-created and -*controlled* corporations." *Lebron*, 513 U.S. at 394 (emphasis added). The Court noted: (1) the government controlled Amtrak's board of directors; (2) the government was "not merely in temporary control" of Amtrak; (3) Amtrak was established by federal law to pursue federal objectives "under the direction and control of federal governmental appointees," and (4) the government controlled Amtrak as a policymaker. *Lebron*, 513 U.S. at 397–99. From that analysis, the Court concluded: "We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." *Lebron*, 513 U.S. at 399.

4. The circuit courts' *Lebron* test derives directly from *Lebron's* conclusion but completely ignores the analysis that led to that conclusion. This is based on the faulty notion that "[i]n *Lebron*, the Supreme Court articulated a three-part test to determine when a private corporation is a government actor for purposes of certain constitutional claims against it." App. 14. Yet, any such test is notably absent in *Lebron*.[7] Rather than setting out a three-part test as the courts of appeals have done, *Lebron* provides an analytical framework for determining the constitutional status of a private GSE. Under that framework, a GSE's constitutional status is determined by the nature of the government's relationship with and control over that entity, rather than any congressional disclaimer thereof. Consequently, the circuit courts' approach to *Lebron*, which requires "permanent" control, is in conflict with its actual holding.

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[7] Remarkably, *Herron*, on which the First Circuit here relied, treats *Lebron* as if it first *created* a test and *then* applied it. *See Herron*, 861 F.3d at 167 (quoting *Lebron*, 513 U.S. at 399) ("The Court then concluded that a corporation is 'part of the Government' for constitutional purposes when: '(1) the Government creates the corporation by special law, (2) for the furtherance of governmental objectives, and (3) retains for itself permanent authority to appoint a majority of the directors of that corporation.' Applying these criteria, the Court held that Amtrak was a government actor . . . .") (cleaned up). In reality, *Lebron* did not set forth a test, let alone apply one. Instead, the Court determined Amtrak's constitutional status by considering the nature of the government's control over it and coming to a conclusion therefrom, while refusing to defer to any legislative declarations in that regard.

American Railroads reinforces this notion. Faced with the same argument as in *Lebron*, the *American Railroads* Court naturally looked to *Lebron*, but rather than pointing to the rigid test that the courts of appeals had created from that decision, *American Railroads* instead followed *Lebron's* analytical framework. First, the *American Railroads* Court looked at the nature of the government's relationship with and control over Amtrak and determined that because of its "unique features and its significant ties to the Government, Amtrak is not an autonomous private enterprise." *Am. Railroads*, 575 U.S. at 51–53. Justice Kennedy concluded, "*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).

It is easy to understand how by focusing on *Lebron's* conclusion the courts of appeals have read a permanency requirement into *Lebron*. However, this conflicts with a proper reading of *Lebron* and *American Railroads*, which together stand for the propositions that: (1) it is the nature (i.e., practical reality) of the government's relationship with and control over a GSE that determines that entity's constitutional status; and (2) a statutory disclaimer of agency status is not dispositive. Permanent authority to appoint the board of directors was merely one probative factor the *Lebron* Court considered in its constitutional analysis of Amtrak; by *requiring* permanent control, the courts of appeals are in conflict with *Lebron's* and *American Railroads'* analytical framework. This Court should

grant review to clarify that the *Lebron* and *American Railroads* standard does not include a permanent control requirement.

B. *Collins v. Yellen* Is Exemplary of the First Circuit's Erroneous Approach to *Lebron* and *American Railroads*.

1. This Court's recent *Collins* decision is instructive of the fundamental errors in the circuit courts' misinterpretations of *Lebron* and *American Railroads* and the practical effect thereof. *Collins v. Yellen* concerned a shareholder challenge to the Net Worth Sweep, an agreement by which the Treasury would receive quarterly payments from Fannie Mae and Freddie Mac encompassing nearly all of their net worth. Responding to the shareholders' argument that the FHFA was improperly moving to liquidate Fannie and Freddie, Justice Alito looked at the characteristics of the FHFA's conservatorships and found that the FHFA has much greater powers than ordinary conservators, and that the reality of the situation did not suggest impending liquidation.

In contrast, in *Montilla*, the First Circuit's analysis of the FHFA's permanent control over Fannie Mae focused on HERA's language defining the purpose of an FHFA conservatorship and found that the "FHFA controls [Fannie Mae] for the limited purpose of 'reorganizing, rehabilitating, or winding up [its] affairs." App. 14 (quoting 12 U.S.C. § 4617(a)(2)). This limited statutory purpose confirmed to the First Circuit panel that an FHFA conservatorship, like all conservatorships, "has an inherently temporary purpose." App. 15 (quotation marks omitted). The panel

concluded that such temporary control does not meet the permanent control requirement of the *Lebron* test. App. 15.

By focusing on HERA's language concerning an FHFA conservatorship's purpose, the First Circuit made the same mistake of relying on a statutory label as seen in *Lebron* and *American Railroads*. And, by applying its analysis to a strict permanency requirement that does not exist in *Lebron*, the First Circuit ignored *American Railroads'* instruction to look to "the practical reality of federal control and supervision[, which] prevails over Congress' disclaimer" of the FHFA's "status as a federal actor or instrumentality under the Constitution." *Am. Railroads*, 575 U.S. at 55.

2. These fundamental errors conflict with *Lebron* and *American Railroads*, and *Collins* shows how they led to the wrong result, with the consequence of the federal government being free to deprive countless Americans of their constitutional rights without any constitutional scrutiny. *Collins* teaches that the practical reality is that the FHFA's control of Fannie Mae as its conservator is at least equal to, if not more than, the level of control *Lebron* found converted Amtrak into a state actor. First, *Collins* notes that the FHFA's conservatorship is unlike most other conservatorships, as "its authority stems from a special statute, not the laws that generally govern conservators and receivers." *Collins*, __ U.S. at __, 141 S.Ct at 1785. Consequently, *Montilla's* reliance on the "inherently temporary purpose" of conservatorships is

inappropriate in a proper *Lebron/American Railroads* analysis.

Second, and more importantly, *Collins* shows that despite HERA limiting the FHFA's powers of conservancy to "reorganizing, rehabilitating, or winding up [its] affairs," 12 U.S.C. § 4617(a)(2), the *practical reality* of the conservatorship shows no end in sight. The *Collins* court found that under the conservatorship, Fannie Mae has "operat[ed] at full steam in the marketplace, . . . amassed over $200 billion in net worth [along with its brother entity Freddie Mac] and, as of November 2020, [grown its] mortgage portfolio [to] $163 billion." *Collins*, __ U.S. at __, 141 S.Ct at 1778. Per Justice Alito, "[t]his evidence does not suggest that the companies were in the process of winding down their affairs." *Id*. Had the First Circuit applied the correct standard and looked to the practical reality of the FHFA's control over Fannie Mae rather than imposing a strict permanent control requirement, it would have properly found Fannie Mae to be a state actor.

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In *Lebron*, Justice Scalia acknowledged that "our cases deciding when private action might be deemed that of the state have not been a model of consistency." *Lebron*, 513 U.S. at 378 (quotation marks omitted). The courts of appeals have made that true of *Lebron* itself by continuing to require permanent control despite *American Railroads* making it clear that *Lebron* does not require it. In doing so, the courts of appeals have created a set of precedents that is in conflict with this Court's actual holdings in those cases and that gives

incorrect guidance and parameters to district courts across the country. This Court should grant certiorari to correct the circuit courts' erroneous approach to *Lebron*, clarify the *Lebron/American Railroads* standard in this important area of law, and confirm that Fannie Mae is a state actor when acting under the FHFA's conservatorship.

II. This Court Should Grant Review to Correct the First Circuit's Misinterpretation of *Meyer*, to Resolve a Conflict Between its *Meyer* and *O'Melveny* Decisions, and to Confirm the that the FHFA is a State Actor when Acting as Conservator over Fannie Mae.

In considering the constitutional status of the FHFA in its conservatorship over Fannie Mae, the First Circuit relied on a line of this Court's decisions involving the FDIC acting as receiver over failed financial institutions. The panel's finding that the FHFA is not a state actor turned on its application of a case from that line of decisions, *O'Melveny & Myers v. F.D.I.C.*, and its concomitant refusal to apply this Court's *F.D.I.C. v. Meyer* decision, which involved a due process claim against the FDIC as a receiver.

Montilla misinterpreted *Meyer's* actual holding. When *Meyer* is correctly read and applied to the FHFA's conservatorship, *Meyer* and *O'Melveny* are in clear conflict with each other. Coming in the wake of the recent *Collins* decision, this case provides the perfect opportunity to this Court to resolve the conflict and declare that a federal agency cannot disclaim its

constitutional duties by acting through an ostensibly private entity.

A. The First Circuit's Application of *O'Melveny* and Misinterpretation of *Meyer* Reveal a Conflict Between Those Decisions.

1. In *O'Melveny*, petitioner-defendant law firm was counsel for a failed savings and loan (S&L) in connection with two real estate syndications The S&L's officers had engaged in numerous acts of fraud, and shortly after the two syndications closed, federal regulators found the S&L to be insolvent due to substantial losses resulting from its illegal and unsound practices. After the FDIC took over as the S&L's receiver, the syndications' deceived investors began demanding refunds. The FDIC sued, alleging that counsel was professionally negligent and breached its fiduciary duties by not uncovering the bank's fraud and poor financial shape during its representation. Counsel argued, *inter alia*, that knowledge of the officers' fraud was imputed to the S&L, and therefore, as receiver, the FDIC stood in the S&L's shoes and its imputed knowledge estopped it from bringing its tort claim.

The issue before the *O'Melveny* Court was whether a federal common law rule preempted state common law on imputed knowledge, both generally and specifically on the question of "whether knowledge by officers [acting against the corporation's interests] will be imputed to the FDIC when it sues as receiver of the corporation." *O'Melveny*, 512 U.S. at 83. The *O'Melveny* Court held that there is no federal common law of

imputed knowledge. It also held that there was no statutory preemption of the state common law because "the FDIC as receiver 'steps into the shoes' of the failed S & L" by virtue of the FDIC's authorizing statute's succession clause. *Id*. at 86 (interpreting 12 U.S.C. § 1821(d)(2)(A)(i)). Therefore, when the FDIC asserted claims on behalf of the S&L, any defense good against the S&L, such as the imputed knowledge defense at issue, was good against the FDIC as receiver.

The First Circuit below found this "steps into the shoes" language to be dispositive of the question of the FHFA's constitutional status because HERA contains a succession clause substantially identical to that of § 1821.[8] App. 9. The panel found support for its conclusion in the decisions of its sister circuits on the same question. App. 9–10 (citing *Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017); *Meridian Invs., Inc. v. Fed. Home Loan Mortg. Corp.*, 855 F.3d 573, 579 (4th Cir. 2017); and *U.S. ex rel. Adams v. Aurora Loan Servs., Inc.*, 813 F.3d 1259, 1261 (9th Cir. 2016)).

2. As noted, the First Circuit also considered Petitioners' claim that this Court's *Meyer* decision is determinative of the FHFA's constitutional status. In

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[8] HERA's succession clause provides that the FHFA "shall, as conservator or receiver, and by operation of law, immediately succeed to . . . all rights, titles, powers, and privileges of the regulated entity." 12 U.S.C. § 4617(b)(2)(A)(i). Likewise, the Financial Institutions Reform, Recovery, and Enforcement Act's succession clause provides that the FDIC "shall, as conservator or receiver, and by operation of law, succeed to . . . all rights, titles, powers, and privileges of the insured depository institution." 12 U.S.C. § 1821(d)(2)(A)(i).

that case, the FDIC's predecessor[9] took over a failed S&L as its receiver. The FDIC immediately terminated plaintiff-respondent, a senior officer of the S&L, pursuant to its policy of terminating all senior management when stepping in as receiver of a failed S&L. The senior officer sued on grounds that his summary termination deprived him of a property right (continued employment under state law) without due process of law. The FDIC argued that its sovereign immunity precluded the Fifth Amendment claim. The Court held that the FDIC, when acting as a receiver, waived its sovereign immunity by virtue of its statutory "sue-and-be-sued" clause[10] and was accordingly subject to the Fifth Amendment claim.

In other words, the FDIC, as a receiver, can be sued as a state actor for a constitutional claim when it has waived its immunity. Petitioners argued that by analogy, the FHFA, which as conservator holds Fannie Mae's power to sue and be sued, is a state actor that has waived immunity and therefore can be sued for violating the Fifth Amendment. However, the First Circuit rejected the idea that *Meyer's* holding controlled the FHFA's constitutional status on grounds that its holding is purely "jurisdictional" and therefore "did not decide that a federal agency is a government actor whenever it acts as a receiver or conservator." App. 12. The panel further reasoned that to so hold would be

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[9] This petition will refer to the defendant entity in *Meyer* as the FDIC for simplicity's sake.

[10] The FDIC's sue-and-be-sued provision is codified at 12 U.S.C. § 1723a(a).

inconsistent with post-*Meyer* opinions from this Court and other circuits. App. 12–13.

3. The First Circuit's interpretation of *Meyer* as it relates to this case is in conflict with the *Meyer* Court's actual holding. This misinterpretation stems from the panel's distinguishment of *Meyer* and the state action question here as the difference between "the absence of a valid cause of action and subject-matter jurisdiction, i.e., the courts' statutory or constitutional power to adjudicate the case." App. 12 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)) (quotation marks omitted) (alterations omitted). It appears that the panel considered a finding of state action as a finding on the merits, rather than a jurisdictional finding. App. 12 ("*Meyer* never addressed the merits of the plaintiff's claim, including the argument that his claim must fail because [the FDIC] was not acting as the government."). The First Circuit supported this rationale by noting that the *Meyer* decision acknowledged that it did "not reach the merits of [the] due process claim." App. 12 (quoting *Meyer*, 510 U.S. at 486 n.12).[11]

Despite the First Circuit's suggestion to the contrary, the district court here, like the *Meyer* Court, did not reach the merits of Petitioners' due process claim. App. 28 n.2 (noting that the court did not need to reach the due process claim by virtue of its findings

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[11] The *Meyer* Court did not reach the merits of the due process claim because the Court found there is no *Bivens* cause of action against federal agencies. *See Meyer*, 510 U.S. at 483–86 (discussing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)).

of private action). This is because the requirement of state action for constitutional claims *is jurisdictional*, just like the sovereign immunity claim considered in *Meyer*, as "the conduct of private parties lies beyond the Constitution's scope in most instances." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991). Consequently, a plaintiff has no standing to bring a constitutional claim against a private actor, and the federal courts do not have jurisdiction to entertain such a claim. *See Citizens for a Better Env't*, 523 U.S. at 109–10 ("[W]e must conclude that respondent lacks standing to maintain this suit, and that we and the lower courts lack jurisdiction to entertain it.").

4. Thus, *Meyer's* sovereign immunity holding meant that the FDIC, when acting as receiver, was a state actor that waived its immunity to suit and was therefore subject to the constitutional claim brought against it.[12] Because the particulars of this holding mirror those of the instant case, the conclusion logically follows: the FHFA, when acting as conservator, is a state actor that waived its immunity to suit and is therefore subject to Petitioners' constitutional claim. The decisions the panel cites as inconsistent with this "categorical reading of *Meyer*" are not inconsistent, but inapposite, as they concerned issues connected to claims brought *by* the FDIC as receiver, rather than

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[12] Indeed, *Meyer's* holding logically requires that the FDIC be a state actor despite acting as a receiver: if the FDIC was not a state actor, it could not waive immunity because *it would not have immunity to waive*; nor would it need to waive immunity because *it could not be the subject of a constitutional claim*.

constitutional claims brought *against* the FDIC as receiver.[13] App. 12–13.

Accordingly, *Montilla's* conclusion that "*Meyer* did not decide that a federal agency is a government actor whenever it acts as a receiver or conservator," App. 12, misses *Meyer's* actual holding: when acting as a receiver, a federal agency that has waived sovereign immunity is a state actor for purposes of constitutional claims. Had the First Circuit correctly interpreted *Meyer*, it should have concluded that the FHFA waived its sovereign immunity and therefore is a state actor.

5. However, assuming that the First Circuit here correctly applied *O'Melveny* and that "after stepping into the GSEs' shoes . . . FHFA did not act as the government," App. 10, *Meyer* and *O'Melveny* are in clear conflict. It cannot be that both decisions can be correctly applied to the same situation and lead to opposite results. Such malleability of precedent and the judicial uncertainty it breeds are untenable, as they result in ambiguity over which standards the FHFA's conduct are held to and when those standards would apply. This Court should grant review to reconcile the conflict between the *O'Melveny* and *Meyer* decisions and confirm that a federal agency must be held to its

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[13] *Atherton*, 519 U.S. 213 (1997), involved whether there was a body of federal common law providing the standard of care in a breach of fiduciary duty case brought by the FDIC. *United States v. Ely*, 142 F.3d 1113 (9th Cir. 1997), concerned a double jeopardy challenge based in part on a civil action brought by the FDIC against the defendants. *United States v. Heffner*, 85 F.3d 435 (9th Cir. 1996), concerned a similar double jeopardy challenge.

constitutional obligations, even when acting in its capacity as a conservator over a private entity.

B. This Court's Recent Decision in *Collins v. Yellen* Provides the Analytical Framework by which This Court Can Resolve the *O'Melveny/Meyer* Conflict.

This case provides a perfect opportunity for this Court to resolve this conflict, as it comes on the heels of its recent *Collins* decision, which provides the analytical framework for doing so. In that case, one column of the shareholders' attack on the Net Worth Sweep argued that HERA's "for cause" provision for removing the FHFA's single director violated separation-of-powers principles. The *Collins* Court agreed and held the "for cause" removal provision unconstitutional.

Important for purposes of the instant case is the *Collins* Court's rejection of an argument that because the FHFA "steps into the shoes" of Fannie and Freddie per *O'Melveny*, it does not wield executive power and thus is not subject to the President's removal powers. The Court disagreed that *O'Melveny* had any relevance to the separation-of-powers question before it, noting that the *O'Melveny* "decision is far afield" because it "held that state law, not federal common law, governed an attribute of the FDIC's status as receiver for an insolvent savings bank." *Collins*, __ U.S. at __, 141 S.Ct at 1786 n.20. Per Justice Alito, "[t]he nature of the FDIC's authority in that capacity sheds no light on the nature of the FHFA's distinctive authority as conservator under [HERA]." *Id*. Having deemed *O'Melveny* inapplicable, the *Collins* Court compared the

FHFA's conservatorship to traditional conservators and receivers and found that in view of the FHFA conservatorship's unique attributes, "the FHFA clearly exercises executive power" and is therefore not exempt from the Executive's removal power. *Id*. at 1785–86.

This reasoning naturally extends to the FHFA's conservatorship over Fannie Mae for purposes of its vulnerability to constitutional claims and provides the basis for resolving the conflict between *Meyer* and *O'Melveny* revealed thereby. The First Circuit determined that *O'Melveny* controls the FHFA's constitutional status by analogizing the FHFA's conservatorship over Fannie Mae to the FDIC's receivership of a failed trust on the basis of their substantially identical statutory succession clauses. But, as *Collins* held, *O'Melveny* is "far afield" and therefore irrelevant to the FHFA's conservatorship over Fannie Mae. And, as *Collins* notes, *O'Melveny* involved state law; this case, on the other hand, involves a constitutional claim.

Accordingly, *Collins* instructs the resolution of the *Meyer/O'Melveny* conflict by rendering *O'Melveny* inapplicable. Moreover, *Collins* does not disturb *Meyer's* holding; that decision concerned whether a federal agency that can sue and be sued has waived immunity to constitutional claims, and the fact that the agency at issue was acting as a receiver was ancillary to its main holding. This Court should grant review to confirm that *Collins* resolves the conflict and to confirm that under a proper reading of the decisions, the FHFA, when acting as conservator of Fannie Mae, is a state actor for purposes of constitutional claims. This will

allow the judiciary to perform its proper function of holding the FHFA accountable to its constitutional obligations.

III. This Case is a Good Vehicle for Resolving these Conflicts.

This case is an excellent vehicle for reconciling these conflicts and faulty approaches and for resolving the state action questions presented. The First Circuit's handling of *Meyers*/*O'Melveny* and *Lebron*/*American Railroads* presents the state action issues squarely, and the dispute on appeal turns on pure questions of law: whether the FHFA and Fannie Mae are state actors. Though state action questions are "necessarily fact-bound inquir[ies]," *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982), the facts before this Court involve the particulars of HERA and the FHFA's conservatorship over Fannie Mae, which are not in dispute. The facts of the underlying dispute are irrelevant to this Court's disposition of the matter. There is no obstacle to keep this Court from deciding these important state action questions.

Furthermore, this case comes before the Court on the heels of *Collins*, which both aids in reconciling the conflict between the *Meyer* and *O'Melveny* decisions and is instructive as to the First Circuit's fundamental errors in interpreting the *Lebron*/*American Railroads* standard. However, further percolation in view of *Collins* would be unhelpful, as *Collins* does not speak to *Lebron* or *American Railroads* (nor did it have reason to), and its instructive benefit is tied solely to the particulars of the FHFA's conservatorship over Fannie. And because *Collins'* holding resides in the

separation-of-powers context, the courts of appeals may stick to their entrenched position that *O'Melveny* precludes a claim to vindicate individual due process rights.

At bottom, the unique structure of the FHFA and its conservatorship over Fannie Mae and the vast discretionary powers conferred to the FHFA thereby highlight the importance of clarifying these state actions concepts so that Fannie Mae, the FHFA, and future GSEs and federal agencies may be properly held to their constitutional obligations. Indeed, it is unlikely that another case will better illustrate the conflicts in this Court's state action decisions and the lower courts' misinterpretations of them. By their misuse of this Court's precedent, the lower courts have allowed the FHFA and Fannie Mae to avoid their constitutional obligations for nearly fifteen years. Unless this Court grants certiorari, the FHFA's and Fannie Mae's constitutional abuses will continue for the foreseeable future.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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