No. 21-688

In the Supreme Court of the United States

NERIS MONTILLA, ET AL.,
Petitioners,
v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION, ET AL.,
Respondents.

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

BRIEF OF *AMICI CURIAE* VIRGINIA POVERTY LAW CENTER, DIRECT ACTION FOR RIGHTS AND EQUALITY, LEGAL AID JUSTICE CENTER, MISSISSIPPI CENTER FOR JUSTICE, AND PUBLIC JUSTICE CENTER IN SUPPORT OF PETITIONERS

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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.

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IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

The **Virginia Poverty Law Center** ("VPLC") is the state support center for all the nine Legal Aid field organizations in the Commonwealth of Virginia, a nonjudicial foreclosure jurisdiction. In this role, VPLC periodically submits amicus-curiae briefs on issues affecting low-income Virginians and the nine Legal Aid organizations. Also, VPLC provides legal support to the nine Legal Aid organizations on issues affecting low-income borrowers in foreclosure matters. VPLC's Litigation Director argued as *Amicus* when this matter was heard by the First Circuit Court of Appeals and prior to moving to Virginia, successfully argued that the Federal Housing Finance Agency ("FHFA"), the Federal National Mortgage Association ("Fannie Mae') and the Federal Home Loan Mortgage Corporation ("Freddie Mac") are governmental actors subject to the due process clause. *Sisti v. Fed. Hous. Fin. Agency*, 324 F. Supp. 273 (D.R.I. 2018).

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[1]Pursuant to this Court's Rule 37.2, all parties with counsel listed on the docket have consented to the filing of this brief. Counsel of record for all listed parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent will be filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members or its counsel made a monetary contribution to its preparation or submission.

Direct Action for Rights and Equality ("DARE") is a grassroots membership organization founded in 1986 that works on a wide range of issues affecting low income and minority residents of Rhode Island, a nonjudicial foreclosure jurisdiction. Since 2010, DARE has organized homeowners and tenants facing the loss of their homes because of foreclosures into a statewide Bank Tenant and Homeowner Association. Since 2013, three members of said Association filed cases in the United States District Court for the District of Rhode Island against FHFA and Fannie Mae, alleging that FHFA and Fannie Mae are governmental actors and are subject to the Due Process Clause of the Fifth Amendment. One of those cases is still pending: *Lilia Maria Abbatematteo v. FHFA et al.*, C.A. No. 1:17-cv-331 WES-LDA.

The **Legal Aid Justice Center** ("LAJC") is a Virginia nonprofit legal aid organization that provides legal advice and direct legal representation each year to thousands of low-income individuals who cannot afford private counsel in civil practice areas such as consumer protection, landlord-tenant, employment, immigration, and civil rights. LAJC's interest in this case flows from its decades-long history of work on low-income housing issues, both as counsel for low-income tenants facing eviction and low-income homeowners facing foreclosure, as well as policy and legislative work aimed at ensuring the availability of stable housing for people at all income levels. Since Virginia is a non-judicial foreclosure state, LAJC knows from firsthand experience the shortcomings of this process in failing to protect the rights of homeowners.

The **Mississippi Center for Justice** ("MCJ") is a non-profit public interest law firm committed to promoting racial and economic justice throughout the state of Mississippi, a non-judicial foreclosure jurisdiction. MCJ has assisted families facing foreclosure since 2009. MCJ has advocated for changes to Mississippi's foreclosure laws for many years because non-judicial foreclosures create great hardship for homeowners who do not always get adequate notice or appropriate due process when facing foreclosure. MCJ is interested in this suit because Mississippi borrowers from Fannie Mae need the protections other borrowers lack in non-judicial foreclosure proceedings.

The **Public Justice Center** (PJC) is a Maryland-based non-profit civil rights and anti-poverty legal organization established in 1985. Maryland is a non-judicial foreclosure jurisdiction. The PJC uses impact litigation, public education, and legislative advocacy through a race equity lens to accomplish law reform for its clients. The PJC's Appellate Advocacy Project expands and improves representation of indigent and disadvantaged persons and civil rights issues before the Maryland and federal trial and appellate courts. The organization has a longstanding commitment to protecting the rights of low-income homeowners and mortgage holders. *See, e.g.*, *Wheeling v. Selene Finance LP*, 473 Md. 356 (2021); *Goshen Run Homeowners Assoc., Inc. v. Cisneros*, 467 Md. 74, 110 (2020); *Wells Fargo Home Mortg., Inc. v. Neal*, 922 A.2d 538 (Md. 2007) (amicus); *Sweeney v. Savings First Mortg.*, 897 A.2d 1037 (Md. 2005) (amicus). In this case, PJC has an

interest in protecting its client community from non-judicial foreclosures with inadequate procedural safeguards.

SUMMARY OF ARGUMENT

The two questions presented by Petitioners' Writ of Certiorari, whether the Federal National Mortgage Corporation ("Fannie Mae") and its conservator, the Federal Housing Finance Agency ("FHFA"), are governmental actors for purposes of Petitioners' due process claims, are inextricably tied to a fundamental principle of Constitutional law: "The Constitution constrains governmental action by whatever instruments or in whatever modes that action may be taken . . . [and] under whatever congressional label." *Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 392–93 (1995)("Lebron*"). The First Circuit's decision undermines this fundamental principle by finding both Fannie Mae and FHFA governmental actors and is contrary to several decisions of this Court.

In addition to the two cases primarily relied upon by Petitioners, and *Dept. of Transportation v. Ass'n of American Railroads*, 135 S.Ct. 1225 (2015) ("*American Railroads*"), Fannie Mae is a governmental actor because the foreclosure of Petitioners' homes is "fairly attributable" to FHFA, *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001), as Fannie Mae has since September of 2008 been under the complete control of FHFA, an "independent agency of the Federal Government," 12 U.S.C. §§ 4502, 4511(b), and a governmental actor by virtue of this Court's decision

last term in *Collins v. Yellen,* ___U.S. ___, 141 S. Ct. 1761 (2021) ("*Collins*").

The *Collins* decision, which found that when acting as conservator, FHFA wields executive power for purposes of a separation of powers challenge, governs the determination of FHFA's governmental status for purposes of an individual rights challenge under the Constitution, since "[t]he structural principles secured by the separation of powers protect the individual as well." *American Railroads, supra,* 575 U.S. at 55. Furthermore, the First Circuit's decision that FHFA "steps into the shoes" of Fannie Mae and shed its governmental character based on the Housing and Economic Recovery Act of 2008's ("HERA") "succession clause," 12 U.S.C. § 4617(b)(2)(A), runs afoul both of this Court's decision in *Collins*, and the plain and unambiguous language of HERA's provisions setting forth FHFA's conservatorship powers. 12 U.S.C. § 4617(b)(2).

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Review to Vindicate the Principle that the Constitution Constrains Governmental Action by whatever modes that action may be taken and under whatever Congressional Label.

The Petition for a Writ of Certiorari (hereafter, "Petition") filed in this matter raises two very important questions of federal law: whether the Federal National Mortgage Corporation ("Fannie Mae") and its conservator, the Federal Housing

Finance Agency ("FHFA") are governmental actors[2] and, thus, subject to the constraints of the U.S. Constitution. These questions are inextricably tied to a fundamental principle of Constitutional law: "The Constitution constrains governmental action by whatever instruments or in whatever modes that action may be taken . . . [and] under whatever congressional label." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392–93 (1995) (citations and quotations omitted). This principle was significantly undermined by the First Circuit's decision finding both FHFA, created by Congress as "an independent agency of the Federal Government," 12 U.S.C. § 4511(a), and Fannie Mae, another entity created by Congress and since 2008 under the complete and indefinite control of its conservator, FHFA, to be free from Constitutional constraints due to the private status accorded to both in the First Circuit's *Montilla* decision.

Not only does the First Circuit's decision undermine the principle that governmental action is subject to Constitutional constraints but does so in the context of governmental action that has the potential to dispossess literally hundreds of thousands of Americans of their most important and valuable asset — their home — through nonjudicial foreclosure, where the home is sold at auction without any

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[2] The term "governmental actor" is used herein instead of "state actor" since Petitioners due process claims are brought under the Fifth Amendment, which applies to the federal government, *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 461 (1952); while the fourteenth amendment due process clause applies to the states. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172-73 (1972).

opportunity to be heard prior to the sale. [3] *See, United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53-56 (1993) (absent extraordinary circumstances, due process requires notice and opportunity to be heard prior to the government's seizure of the homeowner's residence). According to FHFA's Foreclosure Prevention & Refinance Report for the Second Quarter of 2021,[4] the most current report available, in nonjudicial foreclosure states (31 states plus the District of Columbia)[5] there are presently 314,533 single family loans in in the portfolios of the Enterprises under FHFA's conservatorship (Fannie

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[3] Judicial foreclosure proceedings required in the 19 judicial foreclosure states provide homeowners with notice and an opportunity to be heard prior to foreclosure.

[4] The complete report is available at https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/FPR_2Q2021.pdf. Two tables derived from the report are reproduced in the Appendix to this brief. Discussion, *infra*, at A-1 and A-2. The first table was derived from the table appearing on page 36 of the report entitled, "Enterprises Single-Family Book Profile – As of June 30, 2021;" and the second table was derived from the table appearing on page 37 of the report entitled, "Fannie Mae Single Family Book Profile – As of June 30, 2021." The "Enterprises" table attached to the Appendix lists the number of delinquent loans in both Fannie Mae and Freddie Mac's respective single family loan portfolios, while the "Fannie Mae" table lists the number of delinquent single-family loan in Fannie Mae's single family loan portfolio only. The tables in the Appendix provide data for those 31 states plus the District of Columbia with non-judicial foreclosure laws. A list of non-judicial foreclosure jurisdictions is found on pages A-3 to A-6 of the Appendix. The source of the list is BAXTER DUNAWAY, 2 L. DISTRESSED REAL EST. App. 17A (November 2021 Update).

[5] BAXTER DUNAWAY, 2 L. DISTRESSED REAL EST. App. 17A (November 2021 Update).

Mae and its sister corporation, the Federal Home Loan Mortgage Corporation ("Freddie Mac")) (collectively referred to herein as "the GSEs") that are "seriously delinquent", of which 192,275 single family loans are "seriously delinquent" in Fannie Mae's portfolio alone. Discussion, *infra,* at A-1 and A-2, respectively. FHFA defines "seriously delinquent" as "[a]ll loans in the process of foreclosure plus loans that are three or more payments delinquent (including loans in the process of bankruptcy)." Fed. Hous. Fin. Agency, *Foreclosure Prevention and Refinance Report – Second Quarter 2021*, 49 https://www.fhfa.gov/AboutUs/Reports /ReportDocuments/FPR_2Q2021.pdf. These numbers demonstrate how "FHFA's control over Fannie Mae and 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. ___, 141 S. Ct. 1761, 1786 (2021).

To vindicate the principle that the Constitution constrains governmental action as set forth in *Lebron*, and, more specifically, to constrain governmental action that has the potential to dispossess hundreds of thousands of Americans of their homes through nonjudicial foreclosure without the opportunity to be heard prior to the foreclosure, this Court should grant review to confirm that both Fannie Mae and its conservator, FHFA, are governmental actors for purposes of Petitioners' due process claims.

II. The Determination of Fannie Mae's Governmental Status is not Governed Solely by *Lebron* and *American Railroads*, and this Court Should Grant Review to Correct the First Circuit's Improper Refusal to Consider and Determine Fannie Mae a Governmental Actor Under *Brentwood.*

Petitioners urge this Court to determine Fannie Mae a governmental actor under only two Supreme Court decisions, *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374 (1995) ("*Lebron"*) and *Dept. of Transportation v. Ass'n of American Railroads*, 135 S.Ct. 1225 (2015) ("*American Railroads*"). Petition for Writ of Certiorari at 25-33, *Montilla v. Fed. Nat'l Mortg. Ass'n,* No. 21-688 (S.Ct. Nov. 8, 2021) (hereafter, "Pet."). *Amici* agree those two cases support the determination of Fannie Mae as a governmental actor, and that the First Circuit misapplied those two cases; however, they are not the only Supreme Court precedent governing that determination.

Lebron and *American Railroads* govern the determination of governmental actor status for government created corporations; and any government created corporation NOT determined a governmental actor under those two cases is a private actor. The governmental actor status of private actors is subject to a separate test. "State action"[6] on the part

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[6] The standard for finding federal government action under the fifth amendment is the same as that for finding state action under the fourteenth amendment. *Warren v. Gov't Nat. Mortg. Ass'n,* 611 F.2d 1229, 1232 (8th Cir. 1980); *Geneva Towers*

of private actors occurs where there is such a "close nexus between the State and the challenged action" that seemingly private behavior "may be fairly treated as that of the State itself." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) ("*Brentwood*") (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 345 (1974)). Stated differently, where the actions of Fannie Mae, if a private actor under *Lebron* and *American Railroads,* are "fairly attributable" to a governmental actor such as FHFA, *Brentwood,* 531 U.S. at 295, Fannie Mae is, likewise, a governmental actor. Last term this Court found FHFA when acting as conservator wields executive power, *Collins v. Yellen,* ___U.S. ___, 141 S. Ct. 1761 (2021), and thus, is a governmental actor for purposes of Petitioners due process claims, rendering *Brentwood* applicable to the determination of Fannie Mae's status as a governmental actor.[7]

As the First Circuit observed, Petitioners failed to argue that *Lebron* was not the only relevant precedent for determining Fannie Mae's governmental actor status. Pet., at App. 19. However, since that argument was made in two related cases heard the same day as *Montilla*[8]*,* the First Circuit addressed and rejected the argument, holding "that [because] FHFA acted privately and not as the government in its role as the GSE's conservator, we do

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Tenants Org. v. Federated Mortg. Invs., 504 F.2d 483, 487 (9th Cir. 1974).

[7] FHFA's governmental actor status is addressed more thoroughly below. *See,* Discussion, *infra,* at 18-25.

[8] One case was filed by Judith Sisti against Freddie Mac and FHFA and the other was filed by Cynthia Boss against Fannie Mae and FHFA. Pet., at App. 7 n.3.

not need to address whether FHFA's private actions on behalf of the private GSE's constituted state action." Pet., at App. 20. The First Circuit's ruling that FHFA acted privately is wrong as a matter of law,[9] and hence its failure to consider *Brentwood,* too, was improper.

This Court in *Brentwood* Court explained that the determination whether the actions of a private actor are those of a governmental actor does not lend itself to a particular set of facts or a single set legal theory:

> What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.

Brentwood, 531 U.S. at 295–96.

In essence, the "normative judgement" of whether the actions of a private entity are those of the government are akin to Justice Stewart's famous statement in his concurring opinion in *Jacobellis v.*

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[9] *See,* Discussion, *infra*, at 18-25.

State of Ohio, 378 U.S. 184, 197 (1964) ". . . I know [governmental action] it when I see it."

Here, there is an abundance of governmental action for this court to "see." FHFA was established by Congress in the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654 (codified in various sections of 12 U.S.C.) as "an independent agency of the Federal Government" to supervise and regulate the GSEs. 12 U.S.C. §§ 4502, 4511(b). The Director of FHFA was empowered to place Fannie Mae into conservatorship under FHFA, which FHFA did more than 13 years ago on September 7, 2008. Since September 2008, FHFA has controlled and will continue to control indefinitely all rights, titles, powers and privileges of the shareholders and board of directors of Fannie Mae.

Pursuant to its powers to act as conservator of Fannie Mae, FHFA stripped Fannie Mae of key characteristics unique to privately owned corporations. FHFA determines the size of Fannie Mae's Board of Directors and the scope of its authority. Since the inception of the conservatorship, FHFA has elected all the directors and the Chief Executive Officer of Fannie Mae. FHFA delegated certain authority to the Board of Directors, while retaining certain significant authorities for itself. FHFA also controls amendment to or withdrawal of the delegation of authority at any time. Fannie Mae's directors serve on behalf of, and exercise their authority as directed by, FHFA. As a result of the conservatorship, Fannie Mae is being managed to serve a public mission, which may negatively impact Fannie Mae's business and profitability. Under FHFA

conservatorship, Fannie Mae is not managed to maximize shareholder returns. Further, FHFA, as both conservator and regulator, and the United States Treasury, pursuant to a senior preferred stock purchase agreement, prohibit Fannie Mae from paying any dividends to common shareholders.

As a result of FHFA's conservatorship of Fannie Mae, since September 6, 2008, and continuing for the foreseeable future, FHFA directly controls and operates Fannie Mae with all the powers of the shareholders, directors, and officers of Fannie Mae, owns title to all the assets of Fannie Mae, and has broad powers over all business of Fannie Mae. Pursuant to the provisions of HERA, FHFA's conservatorship of Fannie Mae can only be terminated if FHFA's director appoints FHFA as receiver of Fannie Mae. 12 U.S.C § 4617(a)(4)(D). However, FHFA's control over Fannie Mae will not be terminated upon its being appointed as receiver. There is no other law, regulation, policy, or directive that provides either a date or specifies conditions by which FHFA's control over Fannie Mae will terminate.

In its ordinary course of business, Fannie Mae purchases mortgages from originators such as banks. Fannie Mae holds these mortgages in its retained portfolios or packages them into mortgage-backed securities that it sells to investors. For mortgages that Fannie Mae purchases, Fannie Mae enters into contracts with mortgage servicers, which includes a "Servicing Guide" and other agreements. Under the terms of these agreements, the servicer collects mortgage payments, sets aside taxes and insurance premiums in escrow, forwards interest and principal

payments to the contractually designated party, and responds to payment defaults.

With the conservatorship in place and having stripped the GSEs of key characteristics of private ownership, FHFA began engaging in continuous supervision of the GSE's oversight of the GSEs' mortgage servicers. As part of that supervision, FHFA created the Servicer Alignment Initiative in April 2011 ("SAI"), by which FHFA directs the actions of servicers of Fannie Mae's mortgages. In the SAI, FHFA created a policy that requires servicers of Fannie Mae owned mortgages to follow specific state-level timelines for the processing of foreclosures from the date of referral to the attorney/trustee through the date of the foreclosure sale. In the SAI, FHFA directed Fannie Mae's servicers to use non-judicial foreclosure procedures when foreclosing on residential properties in Rhode Island, including Petitioners' homes. FHFA and Fannie Mae foreclosed on Petitioners' homes in 2016 without first providing Petitioners adequate notice and a meaningful hearing prior to the deprivation of Petitioners' property through foreclosure.

Clearly, FHFA's hands were all over Fannie Mae's foreclosure of Petitioners' homes: from developing the policy enabling Fannie Mae and its servicers to foreclose without providing a pre-deprivation hearing, to ensuring that policy was carried out by Fannie Mae through its continuous supervision of the GSEs. Without question, Fannie Mae's foreclosure of Petitioners' homes was plausibly attributable to the actions of FHFA, an independent agency of the Federal Government and a

governmental actor under the Fifth Amendment, rendering Fannie Mae itself a governmental actor.

Of the various approaches endorsed by the Supreme Court this Court could use to find actions of Fannie Mae attributable to FHFA, rending Fannie Mae a governmental actor, four approaches are applicable to the case at hand:

- When the challenged activity results from the State's exercise of "coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) ("Coercion or Encouragement theory");

- When a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a "state actor" for purposes of the Fourteenth Amendment. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982) (Joint Participation theory");

- When a nominally private entity is deemed a state actor because it is controlled by an "agency of the State." *Pennsylvania v. Board of Directors of City Trusts of Philadelphia*, 353 U.S. 230, 231 (1957) *(per curiam)* ("*Philadelphia*") (Government Control theory); and

- When the private actor is "entwined with governmental policies," or when government is "entwined in [its] management or control."

> *Evans v. Newton*, 382 U.S. 296 (1966) and *Brentwood* (Entwinement theory).

Under the "Coercion or Encouragement theory, Fannie Mae's foreclosure on Petitioners homes was either coerced or encouraged by FHFA's promulgation of the SAI, directing Fannie Mae to use non-judicial procedures when it foreclosed on Petitioners' homes without first affording Petitioners a pre-deprivation hearing. Due to Fannie Mae's being under the complete control of FHFA, Fannie Mae had no choice but to comply with FHFA's SAI directive.

Under the Joint Participation theory, the private actor need not be coerced or encouraged by the government to be considered a governmental actor. "It is enough that he is a willful participant in joint activity with the State or its agents." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941, 102 S. Ct. 2744, 2756, 73 L. Ed. 2d 482 (1982) (quoting *United States v. Price*, 383 U.S. 787, 794 (1966)). Thus, if Fannie Mae was not coerced or encouraged by FHFA to foreclose on Petitioners' homes without providing them a deprivation hearing, no doubt, Fannie Mae was a willful participant with FHFA in that activity. Since under HERA, FHFA, as conservator has the ultimate power to operate Fannie Mae, 12 U.S.C. § 4617(b)(2)(B), FHFA has acted jointly with Fannie Mae to deprive Petitioners of their homes through foreclosure.

Under the Government Control theory, there can be little question that FHFA as conservator controls Fannie Mae, and that control led to the loss of Petitioners' homes when Fannie Mae foreclosed on

them. FHFA, a governmental actor, unquestionably has indefinite control over the GSEs. *Herron v. Fannie Mae*, 857 F. Supp. 2d 87, 95 (D.D.C. 2012), *aff'd*, 861 F.3d 160 (D.C. Cir. 2017) ("the duration of [FHFA's] conservatorship [of the GSE's] is indefinite . . . ."). *See, also,* 12 U.S.C. § 4617(b)(2)(B). Unlike *Lebron*, there is no requirement in *Philadelphia* that the government's control be permanent.

Lastly, under the Entwinement theory, Fannie Mae's operations are so intertwined with those of FHFA, that "there is no substantial reason to claim unfairness in applying constitutional standards to it." *Brentwood,* 531 U.S. at 298. Fannie Mae's Board was replaced by FHFA, such that FHFA directly controls and operates Fannie Mae with all the powers of the shareholders, directors, and officers of Fannie Mae, owns title to all the assets of Fannie Mae, and has broad powers over all business of Fannie Mae. By eliminating key characteristics of Fannie Mae's private ownership of the corporation, the governance of Fannie Mae shifted from private to government hands.

The First Circuit's refusal to consider whether Fannie Mae is a governmental actor under *Brentwood* was based on its flawed reasoning that FHFA is not a governmental actor.[10] Thus, this Court should grant certiorari to correct the First Circuit's failure to consider *Brentwood* and determine Fannie Mae a governmental actor under *Brentwood*.

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[10] *See,* Discussion, *infra,* at 18-25.

III. The First Circuit's Ruling in *Montilla* Conflicts With this Court's Ruling in *Collins* that FHFA Acting as Conservator Wields Executive Power and is, thus, a Governmental Actor.

The First Circuit's ruling in *Montilla* that per this Court's ruling in *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994) ("*O'Melveny*"), FHFA "steps into the shoes" of Fannie Mae when acting as its conservator and no longer acts as the government, Pet., at App. 9, conflicts with this Court's ruling in *Collins v. Yellen,* ___U.S. ___, 141 S. Ct. 1761 (2021) ("*Collins")*, decided 15 days later, which expressly rejected the application of *O'Melveny's* "steps into the shoes" metaphor to analyze whether FHFA wielded executive power for purposes of a separation-of powers challenge to FHFA's structure.

When confronted with the argument advanced by court appointed *Amicus* that FHFA, as conservator, stepped into the shoes of the regulated entities such as Fannie Mae and took on the private status of those entities, this Court in *Collins* ruled, ". . . even when it acts as conservator or receiver, [FHFA's] authority stems from a special statute, not the laws that generally govern conservators and receivers . . . [and] the FHFA's powers under the [Housing and Economic] Recovery Act differ critically from those of most conservators and receivers." *Collins,* 141 S. Ct. at 1785. Then, this Court then listed out the many distinctive powers FHFA possessed under that Act:

> [FHFA] can subordinate the best interests of the company to its own best

> interests and those of the public. See 12 U.S.C. § 4617(b)(2)(J)(ii). Its business decisions are protected from judicial review. § 4617(f). It is empowered to issue a "regulation or order" requiring stockholders, directors, and officers to exercise certain functions. § 4617(b)(2)(C). It is authorized to issue subpoenas. § 4617(b)(2)(I). And of course, it has the power to put the company into conservatorship and simultaneously appoint itself as conservator. § 4617(a)(1).
>
> *Id.*, at 1785-86.

This Court concluded, "[f]or these reasons, the FHFA clearly exercises executive power" *Id.*, at 1786, and in a footnote rejected the application of *O'Melveny* from which the "steps into the shoes" metaphor derives. Noting that *O'Melveny* was "far afield," this Court concluded that "[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 the Recovery Act." *Collins,* 141 S.Ct. at 1786 n.20.

While *Montilla* does not involve a separation of powers challenge but a due process challenge under the Fifth Amendment to the Constitution, there is no reason for FHFA to be found a private actor for purposes of a due process challenge. Here, too, FHFA's conservatorship powers derive from HERA, not the laws that generally govern conservators and receivers. Moreover, as was the case in *Collins,* "[i]n deciding what it must do, what it cannot do, and the standards

that govern its work, the FHFA must interpret the Recovery Act, and '[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law.'" *Collins v. Yellen*, ___ U.S. ___,141 S. Ct. 1761, 1785, 210 L. Ed. 2d 432 (2021) (citing *Bowsher v. Synar*, 478 U.S. 714, 733 (1986)).

Support for finding FHFA a governmental actor in the due process context (an individual right provided by our Constitution) when it was found to wield executive power (and hence, governmental actor) in the separation of powers context, is found in this Court's determination that Amtrak is a governmental actor for both an individual rights challenge and a separation of powers challenge to Amtrak's actions. *Compare Lebron* (finding Amtrak a part of the governmental for purposes of a First Amendment challenge), *with American Railroads* (finding Amtrak a governmental entity not a private one for purposes of a separation of powers challenge). While the sequence of constitutional challenges differs here from the Amtrak cases (the separation of powers challenge in *Collins* preceded this Court's review of Petitioners' due process claims), that should be of no consequence since "[t]he structural principles secured by the separation of powers protect the individual as well." *American Railroads*, 575 U.S. at 55 (quoting *Bond v. United States,* 564 U.S. 211, 222 (2011)). *See, also, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 713–14 (2010) (noting that the takings clause of the Fifth Amendment, which immediately follows the due process clause, "is not addressed to the action of a specific branch or

branches . . . [but] is concerned simply with the act, and not with the governmental actor . . . .")

To resolve the conflict between the First Circuit's decision in *Montilla* and its decision in *Collins,* this Court should grant review to confirm that *Collins* resolves the conflict and to confirm that FHFA, when acting as conservator of Fannie Mae is a governmental actor for purposes of Petitioners' due process claims.

IV. The Plain and Unambiguous Language of HERA does not Support the First Circuit's Ruling that FHFA, as Conservator Acts as a Private Entity.

Not only does the First Circuit's *Montilla* decision conflict with this Court's *Collins* decision, but the result in *Montilla* finding FHFA a private entity conflicts with the plain and unambiguous language of HERA, specifically, the provisions in HERA setting forth FHFA's powers and duties as conservator or receiver set forth in 12 U.S.C. § 4617(b)(2). When construing statutes, this Court determines "[t]he plainness or ambiguity of statutory language . . . by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997).

The First Circuit's ruling that FHFA as conservator acts as a private entity is grounded in HERA's "succession clause", codified at 12 U.S.C. § 4617(b)(2)(A). Pet., at App. 9. The succession clause provides:

> 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.

The succession clause is the first of ten "General Powers" Congress delegated to FHFA when acting as conservator or receiver. 12 U.S.C. § 4617(b)(2). HERA defines the term "Agency" as "the Federal Housing Finance Agency established under section 4511 of this title." 12 U.S.C. § 4502(2). Section 4511 of Title 12 "established the Federal Housing Finance Agency . . . [as] an independent agency of the Federal Government." 12 U.S.C. § 4511(a).

Nothing in the plain language of HERA's succession clause provides that by succeeding to the "rights, titles, powers, and privileges of the regulated entity" FHFA's status changes from an "independent agency of the Federal Government" to that of a private entity. The term "rights, titles, powers, and privileges" refers to tangibles possessed the regulated entity, not the regulated entity's private status. FHFA possesses its own rights, titles, powers, and privileges as set forth in HERA and elsewhere, and the succession clause makes no mention that FHFA's "rights, titles, powers, and privileges" or its status as an

"independent agency of the Federal Government" are altered by FHFA's succeeding to those of the GSEs. Moreover, the use of the words "immediately succeeds to" indicates that the succession clause was not intended to apply to rights, titles, powers, and privileges that FHFA accrued after placing the GSEs into conservatorship, but only to those "rights, titles, powers, and privileges" possessed by the GSEs at the time FHFA placed them under conservatorship. *Accord, O'Melveny,* 512 U.S. at 86. ("[the FDIC's "nearly identical"[11] succession clause's] language appears to indicate that the FDIC as receiver "steps into the shoes" of the failed S & L, obtaining the rights "*of* the insured depository institution" that existed **prior to receivership.**" (quoting 12 U.S.C. § 1821(d)(2)(A)(i)) (citations omitted, italics original, bold emphasis added).

Since HERA's succession clause only governs "rights, titles, powers, and privileges" of the GSE's that existed prior to being placed into conservatorship, that clause cannot be the source of authority for the actions complained of here: FHFA's promulgation of the SAI in 2011 and the foreclosures of Petitioners' homes in 2016. These events occurred after, not prior to, FHFA's placing the GSEs into conservatorship 13 years ago. Therefore, FHFA's authority for these actions lies in its other conservatorship powers set forth in 12 U.S.C. § 4617(b)(2). The term "Agency" is used in all ten of FHFA's general powers when acting as conservator or receiver, 12 U.S.C. § 4617(b)(2)(A-J), reinforcing FHFA's status as an "independent agency

[11] Pet., at App. 9.

of the Federal Government," not a private entity, when it exercises any of those powers.

HERA would require significant redrafting to support the First Circuit's conversion of FHFA, an "independent agency of the Federal Government," 12 U.S.C. § 4511(a), to the private status of the entities FHFA placed into conservatorship. At minimum, the succession clause would need language to the effect that "The Agency shall, as conservator or receiver, and by operation of law, obtain the private status of the regulated entity when acting as conservator and immediately succeeds to . . ." for the First Circuit's decision to be consistent with HERA. Such judicial redrafting is impermissible under numerous decisions of this Court. *See, e.g., Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, ___ U.S. ___, 140 S. Ct. 2367, 2381 (2020) ("It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended." (quoting *Lewis v. Chicago*, 560 U.S. 205, 215 (2010)); *Azar v. Allina Health Servs.*, ___ U.S. ___, 139 S. Ct. 1804, 1815 (2019) ("[C] ourts aren't free to rewrite clear statutes under the banner of our own policy concerns."); *Murphy v. Nat'l Collegiate Athletic Ass'n*, ___ U.S. ___, 138 S. Ct. 1461, 1482 (2018) ("[W]e cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole . . . ." (quoting *Railroad Retirement Bd. v. Alton R. Co.,* 295 U.S. 330, 362 (1935)).

To resolve the conflict between the First Circuit's decision in *Montilla* and the plain and unambiguous language of HERA, this Court should grant review to confirm that HERA does not convert

FHFA from being an independent agency of the federal government to a private entity by virtue of HERA's succession clause and to confirm that under HERA, FHFA, when acting as conservator of Fannie Mae, is a governmental actor for purposes of Petitioners' due process claims.

CONCLUSION

For the reasons stated herein this Court should grant the Petition.

Respectfully Submitted,

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Enterprises Single-Family Book Profile - As of June 30, 2021

State	Total Loan Count	Delinquent Loans (DLQ)								
		Total	30-59 Days DLQ[1]	60-89 Days DLQ	90-179 Days DLQ	180-364 Days DLQ	365+ Days DLQ	Serious Delinquent (90+ FC In)	Serious Delinquent (90+ FC In) Rates	% of DLQ Loans > =365 Days DLQ
AK	55,234	1,487	338	103	183	300	563	1,046	1.9%	37.9%
AL	342,725	10,803	3,408	957	1,264	1,979	3,195	6,442	1.9%	29.6%
AR	191,571	5,052	1,570	405	597	1,024	1,456	3,077	1.6%	28.8%
AZ	845,838	17,989	4,872	1,236	2,075	3,819	5,987	11,891	1.4%	33.3%
CA	3,901,131	100,273	22,795	6,317	11,248	18,616	41,297	71,180	1.8%	41.2%
DC	72,599	3,145	517	179	355	623	1,471	2,449	3.4%	46.8%
GA	924,787	32,074	8,166	2,367	3,776	6,018	11,747	21,547	2.3%	36.6%
IA	289,312	5,419	1,823	510	644	984	1,458	3,087	1.1%	26.9%
ID	210,528	3,757	1,407	244	360	759	987	2,107	1.0%	26.3%
MA	714,606	19,135	5,115	1,434	2,161	3,597	6,828	12,593	1.8%	35.7%
MD	676,364	24,938	5,323	1,698	3,138	4,784	9,995	17,920	2.6%	40.1%
ME	108,688	2,805	782	188	243	405	1,187	1,836	1.7%	42.3%
MI	1,012,233	23,578	7,935	2,075	2,574	4,110	6,884	13,569	1.3%	29.2%
MN	718,782	14,835	4,081	1,079	1,656	3,194	4,825	9,679	1.3%	32.5%
MO	567,117	13,062	4,057	1,105	1,508	2,439	3,953	7,909	1.4%	30.3%
MS	138,615	5,605	1,735	468	687	1,080	1,635	3,402	2.5%	29.2%
MT	109,403	1,869	552	144	202	368	603	1,173	1.1%	32.3%
ND	60,004	1,152	291	78	126	244	413	783	1.3%	35.9%
NE	177,535	3,435	1,082	296	411	705	941	2,057	1.2%	27.4%
NH	152,334	3,427	1,053	280	388	609	1,097	2,095	1.4%	32.0%
NV	335,755	12,657	1,896	670	1,325	2,836	5,930	10,098	3.0%	46.9%
OK	247,612	7,905	2,157	608	890	1,627	2,623	5,143	2.1%	33.2%
OR	499,663	11,001	2,611	699	1,082	2,396	4,213	7,693	1.5%	38.3%
RI	101,990	2,927	806	206	298	555	1,062	1,917	1.9%	36.3%
SD	72,246	1,185	403	88	158	199	337	694	1.0%	28.4%
TN	521,724	12,961	4,031	1,049	1,520	2,492	3,869	7,890	1.5%	29.9%
TX	2,095,065	72,247	17,954	5,327	8,862	14,633	25,471	48,983	2.3%	35.3%
UT	410,712	7,002	2,240	507	782	1,378	2,095	4,259	1.0%	29.9%
VA	885,094	23,156	5,640	1,671	2,684	4,585	8,576	15,849	1.8%	37.0%
VT	61,036	1,435	395	100	148	289	503	940	1.5%	35.1%
WA	903,519	18,448	4,398	1,094	1,979	4,028	6,949	12,960	1.4%	37.7%
WV	85,781	3,008	1,112	268	290	518	820	1,630	1.9%	27.3%
WY	52,174	1,044	323	86	130	240	265	635	1.2%	25.4%
Total	**17,541,777**	**468,816**	**120,868**	**33,536**	**53,744**	**91,433**	**169,235**	**314,533**	**1.8%**	**36.1%**

Source: Fed. Hous. Fin. Agency, Foreclosure Prevention and Refinance Report – Second Quarter 2021, 36 available at https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/FPR_2Q2021.pdf

Fannie Mae Single-Family Book Profile - As of June 30, 2021

State	Total Loan Count	Delinquent Loans (DLQ) [1]								
		Total	30-59 Days DLQ	60-89 Days DLQ	90-179 Days DLQ	180-364 Days DLQ	365+ Days DLQ	Serious Delinquent (90+ FC In)	Serious Delinquent (90+ FC In) Rates	% of DLQ Loans >=365 Days DLQ
AK	29,593	851	188	64	105	174	320	599	2.0%	37.6%
AL	209,540	6,743	2,082	588	805	1,230	2,038	4,075	1.9%	30.2%
AR	111,422	3,028	956	243	363	593	873	1,829	1.6%	28.8%
AZ	493,759	11,188	2,910	741	1,289	2,423	3,825	7,547	1.5%	34.2%
CA	2,350,709	60,850	13,870	3,729	6,727	11,072	25,452	43,270	1.8%	41.8%
DC	42,219	1,898	294	96	207	378	923	1,508	3.6%	48.6%
GA	533,492	18,784	4,543	1,340	2,215	3,463	7,223	12,907	2.4%	38.5%
IA	182,743	3,486	1,173	347	416	622	928	1,967	1.1%	26.6%
ID	133,180	2,419	1,006	141	214	464	594	1,273	1.0%	24.6%
MA	400,808	11,303	2,886	812	1,267	2,077	4,261	7,612	1.9%	37.7%
MD	381,468	14,426	2,922	895	1,783	2,735	6,091	10,609	2.8%	42.2%
ME	55,245	1,613	428	91	127	212	755	1,095	2.0%	46.8%
MI	564,220	13,034	4,166	1,114	1,445	2,265	4,044	7,755	1.4%	31.0%
MN	417,789	8,411	2,222	605	905	1,875	2,804	5,588	1.3%	33.3%
MO	314,987	7,303	2,237	604	851	1,310	2,301	4,471	1.4%	31.5%
MS	94,078	3,863	1,224	319	461	726	1,133	2,320	2.5%	29.3%
MT	68,194	1,149	346	84	117	216	386	719	1.1%	33.6%
ND	33,077	648	170	30	73	132	243	448	1.4%	37.5%
NE	118,312	2,317	723	184	285	465	660	1,410	1.2%	28.5%
NH	82,135	1,933	552	152	233	335	661	1,230	1.5%	34.2%
NV	205,396	8,185	1,148	417	854	1,801	3,965	6,627	3.2%	48.4%
OK	147,058	4,945	1,337	362	519	996	1,731	3,249	2.2%	35.0%
OR	287,806	6,421	1,519	401	626	1,392	2,483	4,503	1.6%	38.7%
RI	58,531	1,738	456	106	160	349	667	1,178	2.0%	38.4%
SD	50,146	780	250	51	104	133	242	479	1.0%	31.0%
TN	301,579	7,701	2,338	606	863	1,484	2,410	4,766	1.6%	31.3%
TX	1,264,539	45,346	10,925	3,186	5,544	9,209	16,482	31,252	2.5%	36.3%
UT	237,468	4,074	1,281	274	446	785	1,288	2,523	1.1%	31.6%
VA	501,571	13,734	3,221	946	1,558	2,734	5,275	9,571	1.9%	38.4%
VT	28,425	798	199	56	82	173	288	543	1.9%	36.1%
WA	543,334	11,425	2,723	660	1,206	2,483	4,353	8,046	1.5%	38.1%
WV	47,052	1,683	607	155	171	289	461	923	2.0%	27.4%
WY	34,981	661	222	56	85	140	158	383	1.1%	23.9%
Total	**10,324,856**	**282,738**	**71,124**	**19,455**	**32,106**	**54,735**	**105,318**	**192,275**	**1.9%**	37.2%

Source: Fed. Hous. Fin. Agency, Foreclosure Prevention and Refinance Report – Second Quarter 2021, 37 available at https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/FPR_2Q2021.pdf

2 L. Distressed Real Est. Appendix 17A

Law of Distressed Real Estate | November 2021 Update
Baxter Dunaway

Part D. Foreclosure and Other Terminations of Mortgages

Chapter 17. Nonjudicial Foreclosure*

Appendices

References

APPENDIX 17A. State Statutes Sanctioning and Governing Nonjudicial Foreclosure

This appendix lists the statutes in jurisdictions in which nonjudicial foreclosure is the normal method of foreclosure for uncomplicated foreclosures. Pertinent references are also included. For more detail on jurisdictional foreclosure practices, see Appendix 19A in Ch 19.

Alabama: Ala. Code §§ 35-10-12 to 35-10-15.

Alaska: Alaska Stat. §§ 34.20.090 to 34.20.100.

Arizona: Ariz. Rev. Stat. Ann. §§ 33-807 to 33-814. See Arizona Practice Ch 63 in Part M.

Arkansas: Ark. Code Ann. § 18-50-108; 18-50-116.

California: Cal. Civ. Code §§ 2924 to 2924h. See California Practice Ch 64 in Part M.

D.C.: D.C. Code §§ 42-815 to 42-818.

Georgia: Ga. Code Ann. § 9-13-141; 44-14-162 to 162.4; 44-14-48; 44-14-180 to 187.

Idaho: Idaho Code § 6-101; 104; 45-1502 to 45-1506.

Iowa: Iowa Code Ann. § 654.18.

Maine: Me. Rev. Stat. Ann. tit. 14, § 6203-A; 6203-E.

Maryland: Md. Real Prop Code Ann. § 7-105; 7-202.

Massachusetts: Mass. Gen. Laws Ann. ch. 183, §§ 19, 21; ch. 244, §§ 11–15.

Michigan: Mich. Comp. Laws Ann. §§ 451.401 et seq.; 600.2431; 600.3170; 600.3201 et seq.. See Michigan Practice Ch 70 in Part M.

Minnesota: Minn. Stat. Ann. §§ 580.01 to 580.30; 582.01 et seq.

Mississippi: Miss. Code Ann. § 11-5-111; 15-1-23; 89-1-55.

Missouri: Mo. Ann. Stat. §§ 443.290 to 443.325.

Montana: Mont. Code Ann. § 25-13-802; 71-1-111; 71-1-223 to 232; 71-1-311 to 317.

Nebraska: Neb. Rev. Stat. §§ 76-1001 to 1018.

Nevada: Nev. Rev. Stat. § 107.020; 107.025; 107.080 to 107.100; 40.050; 40.453.

New Hampshire: N.H. Rev. Stat. Ann. §§ 479:22 to 479:27.

North Dakota: N.D. Cent. Code § 35-22-01.

Oklahoma: Okla. Stat. Ann. tit. 46, §§ 40 to 49.

Oregon: Or. Rev. Stat. §§ 86.705 to 86.815.

Rhode Island: R.I. Gen. Laws § 34-11-22; 34-20-4; 34-23-1; 34-27-1.

South Dakota: S.D. Codified Laws Ann. §§ 21-48-1 to 21-48-26; 21-48A-1 to 21-48A-5.

Tennessee: Tenn. Code Ann. §§ 35-5-101 to 35-5-112.

Texas: Tex. Prop. Code Ann. § 51.002; 51.003; 51.005.

Utah: Utah Code Ann. §§ 57-1-23 to 57-1-34.

Vermont: Vt. Stat. Ann. tit. 12, §§ 4961 to 4970.

Virginia: Va. Code Ann. §§ 55-59.1 to 55-59.4; 55-61 to 55-66.7.

Washington: Wash. Rev. Code Ann. §§ 61.24.010 to 61.24.130.

West Virginia: W. Va. Code §§ 38-1-3 to 38-1-12.

Wyoming: Wyo. Stat. §§ 34-4-101 to 34-4-113.