UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NERIS MONTILLA, on behalf of herself and all others so similarly situated; MICHAEL KYRIAKAKIS on behalf of himself and all others so similarly situated,	
Plaintiffs – Appellants,	
ROSELIA MONTUFAR, on behalf of herself and all others so similarly situated; RUBEN VELASQUEZ, on behalf of himself and all others so similarly situated,	
Plaintiffs,	
v.	
FEDERAL NATIONAL MORTGAGE ASSOCIATION; FEDERAL HOUSING FINANCE AGENCY,	**No. 20-1673**
Defendants – Appellees,	
MR. COOPER, f/k/a Nationstar Mortgage, LLC; SETERUS, INC.; C.I.T. BANK, N.A.,	
Defendants.	

APPELLANTS' PETITION FOR PANEL REHEARING OR REHEARING EN BANC

United States District Court for the
District of Rhode Island Appeal of CA# 18-632

Respectfully submitted

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STATEMENT

Appellants, Neris Montilla and Michael Kyriakakis, respectfully request this Honorable Court grant this petition for panel rehearing or rehearing en banc. As grounds set forth Appellants aver that merely fifteen days after the date of judgment in this Appeal the United States Supreme Court revised or rejected multiple assertions, analysis and conclusions of law set forth in this Court's three-judge panel opinion in the case of Collins v. Yellen, 141 S. Ct. 1761 (2021). The foundational premise of the Panel's opinion in this case upon which the Panel held that Appellee, the Federal Housing Finance Agency ("FHFA"), "stepped into the shoes of" Appellee, the Federal National Mortgage Association ("Fannie Mae"), as a private entity was explicitly rejected within the context of the specific "conservatorship" promulgated by the Housing and Economic Recovery Act of 2008 ("HERA"). Collins at 1791 n. 20. Rather, the United States Supreme Court's analysis as to the major differences between conservators as opposed to receivers and the conclusions of law reached in the Collins opinion verified and concurred with the Appellants' arguments in this case and were far more similar to Judge John J. McConnell's analysis and conclusions in the Boss/Sisti decision rejected by the Panel as opposed to the analysis and conclusions reached by Judge William Smith in the District Court as well as the Panel in this case.

The United States Supreme Court explained and clarified in the Collins opinion that the conservatorship of FHFA over Fannie Mae is a unique arrangement that goes well beyond the parameters of a typical common law conservatorship because, according to HERA, FHFA, as conservator, may act for the benefit of itself and by extension the general public of the United States and hence the government. Likewise, as argued by the Appellants, FHFA's affirmative decision to direct Fannie Mae to conduct the less-expensive method of non-judicial foreclosure, as opposed to judicial foreclosure, served the government purpose and function of increasing the

Treasury's bottom line via the "net worth sweep" of Fannie Mae's net profits into the Treasury when FHFA could have just as easily directed Fannie Mae to conduct judicial foreclosures in accordance with Rhode Island Statutory Law in order to respect the Due Process rights of the Appellants.

Appellants' aver that since the Supreme Court refused to apply O'Melveny's "stepping into the shoes of" reasoning to FHFA's conservatorship over FNMA, this Court must now consider the "entwinement analysis" set forth by the Supreme Court in Brentwood Academy v. Tennessee Secondary School Association, 531 U.S. 288 (2001). The Panel's opinion did not reach the Brentwood analysis because it determined that FHFA was not a government actor because of O'Melveny. Now that the Supreme Court has determined that O'Melveny is "far afield" from an application to this conservatorship Appellants respectfully request that this Court make a determination as to Brentwood's applicability to this case or in the alternative remand the questions presented in Brentwood to the District Court since neither this Court nor the District Court in Boss and Sisti reached an analysis of Brentwood.

TIMELINESS OF PETITION AND APPLICABLE LAW

The Appellants' Petition for Panel Rehearing or Rehearing En Banc is timely since the Appellee, Federal Housing Finance Agency, is a "United States agency" and this petition has been filed within 45 days after entry of judgment on June 8, 2021 in accordance with Rule 40(a)(1)(B) of the Federal Rules of Appellate Procedure. As the Panel stated in its' opinion, FHFA is "a federal agency", "it is undisputed that FHFA is a federal agency", and "FHFA is the only relevant government agency". See Opinion at p. 1, 9, and 22 at n. 10. On June 29, 2021, this Court issued what appears to be a premature Mandate without considering that one of the parties is a "United

States agency" in accordance with Rule 40(a)(1)(B). Appellants respectfully request that this Mandate be vacated.

A Petition for Panel Rehearing or Rehearing En Banc is appropriate when "the proceeding involves a question of exceptional importance". Fed R. App. Pro. 35(a)(1). A proceeding presents a question of exceptional importance if it involves an issue on which "the panel decision conflicts with a decision of the United States Supreme Court..". Fed. R. App. P. 35(b)(1)(A). Furthermore, Appellants aver that the opinion denying that FHFA and Fannie Mae are government actors in this case "overlooked or misapprehended" contrary decisions of the United States Supreme Court and rehearing under Rule 40(a)(2) is warranted. Based on the plain language of the aforementioned Rules, Appellants aver that en banc review is highly appropriate in this Appeal.

FACTUAL BACKGROUND, PROCEDURAL HISTORY & PANEL OPINION

The Housing and Economic Recovery Act of 2008 ("HERA"), created FHFA as an agency of the federal government to supervise and regulate Fannie Mae under a conservatorship designed to operate and control Fannie Mae. See 12 U.S.C. §§ 4502 (20), 4511(b)(2). Under the label of "conservator", FHFA controls all of the rights, titles, powers and privileges of the shareholders and board of directors of the Fannie Mae. The FHFA reconstituted the board of directors of Fannie Mae and appointed all of its' directors, while reserving certain powers to itself. The directors of the GSEs owe their duties only to the FHFA, not to the shareholders (79.9% of which are the federal government anyway), and operate Fannie Mae according to the FHFA's purposes rather than for the purposes of maximizing profits to the shareholders. The FHFA now directly controls the operations of Fannie Mae, owns title to all of the assets of Fannie Mae, and had broad powers over all business of Fannie Mae. Due to the unchecked language and power given to the United States Treasury and FHFA over Fannie Mae by HERA there is no end in sight to the

conservatorship since the decision to end the conservatorship is left entirely to the discretion of the government itself which could theoretically go on forever.[1]

This arrangement, where we have the government creating the entity, taking over the entity via conservatorship including having the power to appoint the Board of Directors, being a "dominant shareholder" of the entity's stock and making the final decision over whether or not to end the conservatorship and to foreclose on the Appellants' properties, essentially means that FHFA may direct foreclosures in perpetuity under the guise of "conservatorship" over Fannie Mae in violation of the Appellants' due process rights. See also Brentwood Acad v. Tenn. Secondary Sch. Ath. Ass'n, 531 U.S. 288, 296 (U.S. 2001) (holding that in Lebron "Amtrak was the Government for constitutional purposes, regardless of its congressional designation as private; it was organized under federal law to attain governmental objectives and was directed and controlled by federal appointees.")

This lawsuit now alleges that based on the relationship described above and as set out in the Complaint, Appellees, FHFA and Fannie Mae, are government actors that are depriving homeowners of due process by conducting non-judicial foreclosures without a hearing by a disinterested and neutral decision maker. Furthermore, Appellants set forth that the Rhode Island non-judicial Statutory Power of Sale as set forth in § 34-11-22 and 34-27-4, as well as the pre-foreclosure mediation statute as set forth in 34-27-3.2 did not afford or apprise the Appellants of

[1] Collins explains that the FHFA conservatorship differs from a typical conservatorship in that FHFA has the authority to "act in what it determines is 'in the best interests of the regulated entity **or the Agency**". Thus, the First Circuit's insistence that the conservatorship's temporary purpose in "reorganizing, rehabilitating, or winding up the[ir][affairs" is not entirely accurate since FHFA may act, and in fact did act, in its' own (and likewise the government's) best interests and making "certain that they would never be able to . . . exit the conservatorship" Collins at . Temporary has been defined as "that which is to last for a limited time only, as distinguished from that which is perpetual, or indefinite, in its duration". The Law Dictionary, Featuring Black's Law Dictionary 2nd Ed. https://thelawdictionary.org/temporary/.[1]

an opportunity to be heard in accordance with minimum standards of Due Process or notify them of any right to do so.

Although in the lower court Judge Smith found Judge McConnell's "analysis in Sisti to be well-reasoned and sensible", Judge Smith ultimately and incorrectly held that FHFA was not a government actor because it stepped into the shoes of FNMA as a private entity and that FNMA was not a government actor because the "conservatorship" label rather than the "practical analysis" required by Lebron dictated the lower court's decision. On June 8, 2021 the Panel affirmed Judge Smith's decision based on the O'Melveny stepping in the shoes of application to the conservatorship and consequently did not reach the state actor questions of entwinement in the Brentwood case.

THE *COLLINS* DECISION

On June 23, 2021, the Supreme Court decided *Collins v. Yellin,* 141 S. Ct. 1761 (2020) (hereafter, "*Collins*"). In *Collins*, a group of Fannie Mae's and Freddic Mac's (hereafter collectively referred to as "the GSE's") shareholders challenged an amendment to an agreement between FHFA and the U.S. Department of the Treasury (hereafter, "Treasury") that initially resulted in Treasury committing to infuse up to $100 billion in capital in return for senior preferred shares and quarterly fixed rate dividends. Four years later, the agreement was amended whereby the fixed rate dividend formula was replaced with a variable one that required the GSEs to make quarterly payments of their entire net worth minus a small capital reserve, resulting in the transfer of enormous sums of wealth to Treasury. *Collins*, 141 S. Ct., at 1770. One of the claims decided was a constitutional claim alleging that FHFA's structure violated the separation of powers because the Agency is led by a single Director who may be removed by the President only "for cause." The shareholders sought declaratory and injunctive relief, including an order requiring

Treasury either to return the variable dividend payments or to re-characterize those payments as a pay down on Treasury's investment. *Id.*

Before hearing the appeal, the Supreme Court appointed an attorney to brief and argue, as *amicus curiae*, that a provision of the Housing and Economic Recovery Act, 42 U.S.C. § 4501 *et seq.,* restricting the President's ability to remove FHFA's Director did not violate separation of powers and was, therefore, constitutional. *Collins*, 141 S. Ct., at 1775. One of the arguments advanced by *amicus* was that Congress had the power to restrict the President's ability to remove the FHFA Director because when the Agency, FHFA, steps into the shoes of a regulated entity, here the GSEs, as its conservator or receiver, it takes on the status of a private party and thus does not wield executive power. *Collins*, 141 S. Ct., at 1785. *Amicus'* argument was soundly rejected by the Supreme Court, as the following excerpt from the opinion makes clear.[2]

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[2] In the second paragraph of the quoted except, where the decision says "see *supra*" the relevant excerpt of the *Collins* decision reads as follows:

> The Recovery Act grants the FHFA expansive authority in its role as a conservator. As we have explained, the Agency is authorized to take control of a regulated entity's assets and operations, conduct business on its behalf, and transfer or sell any of its assets or liabilities. See §§ 4617(b)(2)(B)–(C), (G). When the FHFA exercises these powers, its actions must be "necessary to put the regulated entity in a sound and solvent condition" and must be "appropriate to carry on the business of the regulated entity and preserve and conserve [its] assets and property." § 4617(b)(2)(D). Thus, when the FHFA acts as a conservator, its mission is rehabilitation, and to that extent, an FHFA conservatorship is like any other. See, *e.g., Resolution Trust Corporation v. CedarMinn Bldg. Ltd. Partnership*, 956 F.2d 1446, 1454 (CA8 1992).[12]
>
> An FHFA conservatorship, however, differs from a typical conservatorship in a key respect. Instead of mandating that the FHFA always act in the best interests of the regulated entity, the Recovery Act authorizes the Agency to act in what it determines is "in the best interests of the regulated entity *or the Agency*." § 4617(b)(2)(J)(ii) (emphasis added). Thus, when the FHFA acts as a conservator, it may aim to rehabilitate the regulated entity in a way that, while not in the best interests of the regulated entity, is beneficial to the Agency and, by extension, the public it serves. This distinctive feature of an FHFA conservatorship is fatal to the shareholders' statutory claim.

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[12]By contrast, when the FHFA acts as a receiver, it is required to "place the regulated entity in liquidation and proceed to realize upon the assets of the regulated entity." § 4617(b)(2)(E). The roles of conservator and receiver are very different. See § 4617(a)(4)(D) ("The appointment of the Agency as receiver of a regulated entity under this section shall immediately terminate any conservatorship established for the regulated entity under this chapter").

Amicus next contends that Congress may restrict the removal of the FHFA Director because when the Agency steps into the shoes of a regulated entity as its conservator or receiver, it takes on the status of a private party and thus does not wield executive power. But the Agency does not always act in such a capacity, and even when it acts as conservator or receiver, its authority stems from a special statute, not the laws that generally govern conservators and receivers. In 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." *Bowsher*, 478 U.S. at 733, 106 S.Ct. 3181; see also *id.,* at 765, 106 S.Ct. 3181 (White, J., dissenting) ("[T]he powers exercised by the Comptroller under the Act may be characterized as 'executive' in that they involve the interpretation and carrying out of the Act's mandate").

Moreover, as we have already mentioned, see *supra*, at ——— – ———, the FHFA's powers under the Recovery Act differ critically from those of most conservators and receivers. It 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). For these reasons, the FHFA clearly exercises executive power.[20]

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[20]*Amicus* claims that *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994), supports his argument, but that decision is far afield. It held that state law, not federal common law, governed an attribute of the FDIC's status as receiver for an insolvent savings bank. *Id.,* at 81–82, 114 S.Ct. 2048. The 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 1785–86.

Collins v. Yellen, 141 S. Ct. 1761, 1776 (2020)

ARGUMENT

A. THE PANEL OPINION THAT FHFA IS NOT A GOVERNMENT ACTOR BECAUSE FHFA "STEPS INTO THE SHOES" OF FANNIE MAE CONFLICTS WITH THE UNITED STATES SUPREME COURT'S ANALYSIS AND CONCLUSIONS OF LAW IN COLLINS V. YELLEN.

In rejecting FHFA's status as a government actor, the Panel began its' analysis by stating that the Appellants, in adopting the reasoning of Judge McConnell in the Sisti case, the were over-generalizing that "because FHFA is a government agency, *any* action it takes as conservator, like directing the GSEs to nonjudicially foreclose on appellants' mortgages, is government action". Opinion at p. 9 (emphasis added). Appellants aver that this assumption is not true as the Appellants were specific in their assertions that they are only challenging the constitutionality of FHFA's decision to direct Fannie Mae to conduct nonjudicial foreclosures on their properties without due process. Contrary to the Panel's assertion that the Appellants were arguing that *any* action FHFA takes as conservator renders it a government action simply because FHFA is a government agency, the Panel seems to propound that *any* action FHFA takes as a conservator is automatically not a government action simply because the irrelevant O'Melveny opinion states that a receiver, not a conservator, "steps into the shoes" of its' private ward. Appellants set forth that neither general assumption is accurate and that the specific action must be examined in order to determine whether or not the action is a government action.

Contrary to the opinion in this case, the United States Supreme Court in Collins stated that the "stepping into the shoes" application to FHFA's conservatorship over Fannie Mae as established by HERA is "far afield" from the receivership in O'Melveny because the in O'Melveny "the 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 at 30 n. 20. Appellants aver that this language by the United States Supreme Court presents a solid and clear rejection of the

Panel's application of the O'Melveny "stepping into the shoes of" analysis and conclusions of law reached in the Panel's opinion as well as a rejection the Herron line of cases that incorrectly extended the O'Melveny "stepping into the shoes of" application to FHFA's conservatorship over Fannie Mae in other jurisdictions.

Consistent with the U.S. Supreme Court's contention that the O'Melveny "stepping into the shoes of" analysis is misapplied to FHFAs conservatorship over FNMA under HERA, is the US Supreme Court's agreement with the Appellants' and Judge McConnell's contentions that the major differences between receivers and conservators are fatal to the Appellees' and the Panel's analysis. Contrary to the Panel's conclusion that "there is no reason O'Melveny's textual logic does not apply to both conservators and receivers", the US Supreme Court in Collins stressed that "the roles of conservator and receiver are very different" and, as the Appellants attempted to argue, a conservator's "mission is rehabilitation" while "by contrast, when the FHFA acts as receiver, it is required 'to place the regulated entity in liquidation and proceed to realize upon the assets of the regulated entity". in P. 13 n. 12. These major differences between the purposes and functions of a conservator as opposed to a receiver are furthermore consistent with Judge McConnell's "well-reasoned and sensible" logic for rejecting O'Melveny and Herron's application to this case, to notably quote Judge Smith's characterization of Judge McConnell's analysis in his lower court decision which ironically dismissed Appellants' compliant based on an inopposite contention.

In addition, another key distinction outlined by the US Supreme Court in Collins is the FHFA conservatorship's authorization to "act in what it what it determines is 'the best interests of the regulated entity *or the Agency*.' 4617(b)(2)(J)(ii). (Emphasis added)" p.13-14. This extension of authority establishes the Appellants' assertion that the FHFAs decision to direct FNMA to conduct the less expensive mode of non-judicial foreclosure. while the option of conducting

judicial foreclosures under RI Statutory law was just as easily accessible, was a decision made for the benefit of the government since the Treasury rather FNMA was taking in the net profits anyway. The problem with the Panel's decision, however, is that while FHFA may not have exceeded its authority under HERA, FHFA's decision to direct FNMA to conduct non judicial foreclosures in Rhode Island was made at the expense of the Appellants' due process rights since the Appellants allege that the Rhode Island Statutory Power of Sale does not afford due process when directed by a government agency for the government's sole benefit and is hence a government action.

B. THE PANEL OPINION'S INCORRECT CONCLUSION THAT FHFA "STEPPED INTO THE SHOES OF" FANNIE MAE AND WAS NOT A GOVERNMENT ACTOR INCORRECTLY PRECLUDED OTHER STATE ACTION THEORIES PROMULGATED BY THE UNITED STATES SUPREME COURT IN BRENTWOOD V. TENN

The Panel's reliance on O'Melveny in determining that FHFA was not a government actor precluded the Panel from considering the "entwinement analysis" of government actor status promulgated by the United States Supreme Court in Brentwood Academy v. Tennessee Secondary School Association, 531 U.S. 288 (2001). The Appellants' aver that the Supreme Court's rejection of the application of O'Melveny's "stepping into the shoes of" analysis to the specific conservatorship Collins requires this Court to now consider Brentwood's "entwinement analysis" when considering the state actor status of both FHFA and FNMA. In Brentwood the Supreme Court considered whether a statewide association, incorporated to regulate interscholastic athletic competition among public and private schools, is regarded as engaging in state action when it enforces a rule against a member school. In ruling the association was a state actor Justice Souter wrote for the five-justice majority that "The nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its

composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it."531 U.S. at 295. Furthermore, because the association could essentially "coerce" the member schools to follow its rules and the state would back it up, it was using state police power. 531 U.S. at 297. Therefore, Souter concluded, the restrictions on denial of due process would apply to the association, and the lawsuit could proceed in the lower courts. Id. Likewise, it could very well be said that the same type of coercion and entwinement exists in this case especially since FHFA may act in its' own as well as the public's best interests when directing and controlling FNMA. A most recent example of this was the government's foreclosure and eviction moratorium for Fannie and Freddie mortgages during the Covid 19 pandemic. Although this direction was not in FNMA's best interests it certainly was in best interests of the public via FHFA as a government agency.

As Judge Smith stated in the lower court, "there is no question that (FHFA) is a government agency". But without O'Melveny's "stepping into the shoes of" application the courts must examine Brentwood's entwinement analysis in order properly consider the government actor question. Likewise, neither the Panel nor the District Court in this case as well as in Boss and Sisti reached the government actor question under a Brentwood analysis because in this case the Panel determined that FHFA is a private actor under O'Melveny and in Boss and Sisti Judge McConnell determined that O'Melveny does not apply to FHFA and that FNMA was a government actor under Lebron. Therefore, the Appellants respectfully suggest that if this Court determines that due to the Collins decision O'Melveny no longer applies to this case, the Panel or this Court remand this matter to the District Court for a determination of government actor status under the Brentwood entwinement analysis.

CONCLUSION

In light of the long-awaited guidance of the United States Supreme Court in Collins v. Yellen, this Court's decision in dismissing the Appellants' Appeal based on the grounds set forth in the opinion should be vacated and remanded to the District Court to consider the many questions presented by the Supreme Court's rejection of O'Melveny including Brentwood's application to this case. The Court should grant panel rehearing or rehearing en banc.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 40(b)(1) and Fed. R. App. P. 35(b)(2)(A).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 3895 words. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of Microsoft Word in preparing this certificate.
2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 365 in 12-point Times New Roman font.

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CERTIFICATE OF COUNSEL

I, Todd S. Dion, Esq., hereby certify that the foregoing document was filed with this Court on July 22nd, 2021 through the Court's ECF System and will be sent electronically to the registered participants as identified in the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on July 22nd, 2021.

/s/ Todd S. Dion

Todd S. Dion, Esq.