Jordan T. Smith, Esq., Bar No. 12097
JTS@pisanellibice.com
Brianna Smith, Esq., Bar No. 11795
BGS@pisanellibice.com
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
Telephone: 702.214.2100

*Attorneys for Plaintiffs and Proposed Classes*

**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

DAISEY TRUST, by and through its trustee, Eddie Haddad; CAPE JASMINE CT. TRUST, by and through its trustee, Eddie Haddad; and SATICOY BAY LLC, SERIES 10007 LIBERTY VIEW,

Plaintiffs,

v.

FEDERAL HOUSING FINANCE AGENCY; SANDRA L. THOMPSON, in her official capacity as the Director of the Federal Housing Finance Agency,

Defendants.

Case No.: 2:23-cv-00978-APG-EJY

**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS [ECF NO. 36]**

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

# TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii
I. INTRODUCTION ..... 1
II. STATEMENT OF FACTS ..... 2
A. The Federal Housing Finance Agency Is Unconstitutionally Structured. ..... 2
B. FHFA Unconstitutionally Controls and Participates in Home Foreclosures. ..... 4
C. Plaintiffs Lawfully Purchase Real Property and FHFA Directed and Controlled Unconstitutional Foreclosure on Plaintiffs' Properties. ..... 6
1. *Cape Jasmine Court Trust's Desert Pond Property.* ..... 6
2. *Daisey Trust's Newburg Property.* ..... 6
3. *Saticoy Bay's Liberty View Property.* ..... 7
III. LEGAL STANDARD ..... 7
IV. ARGUMENT ..... 8
A. Plaintiffs Have Standing. ..... 8
B. Plaintiffs' Constitutional Challenge is Not Claim Precluded. ..... 16
1. *Defendants' request for judicial notice of various documents should be denied.* ..... 16
2. *Plaintiffs' claims are not precluded.* ..... 18
C. This Court has Jurisdiction over Plaintiffs' Claims. ..... 20
1. *The federal foreclosure bar does not prevent the Court from awarding injunctive relief.* ..... 20
2. *The Court has jurisdiction to award damages.* ..... 22
a. Defendants waived sovereign immunity for Plaintiffs' damages claim ..... 22
b. FHFA is a government actor for purposes of Plaintiffs' constitutional claims ..... 24
c. Plaintiffs plausibly allege a wrongful foreclosure claim ..... 26
V. PLAINTIFFS ALLEGE PLAUSIBLE CLAIMS AGAINST DEFENDANTS ..... 28
A. Plaintiffs Plausibly Allege Appropriation Clause Violations. ..... 28
B. Plaintiffs Allege a Plausible Nondelegation Claim. ..... 36
C. Plaintiffs Have Stated a Plausible Wrongful Foreclosure Claim. ..... 39
D. Plaintiffs Have Stated Plausible *Bivens* and APA Claims. ..... 40
VI. ALTERNATIVELY, PLAINTIFFS SEEK LEAVE TO AMEND THE COMPLAINT ..... 43
VII. CONCLUSION ..... 44

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

## TABLE OF AUTHORITIES

**Cases**

*A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) ..... 38
*Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021) ..... 10
*Am. Fed'n of Gov't Emps., AFL-CIO, Local 1647 v. FLRA*, 388 F.3d 405 (3d Cir. 2004) ..... 31
*Bank of Am., N.A. v. Woodcrest Homeowners Ass'n*, 2016 WL 8732298 (D. Nev. Mar. 25, 2016) 9
*Benetti v. United States Marshal Service*, 2023 WL 5485995 ..... 24
*Bennett v. Fid. & Deposit Co. of Maryland*, 98 Nev. 449, 652 P.2d 1178 (1982) ..... 19
*Berezovsky v. Moniz*, 869 F.3d 923 (9th Cir. 2017) ..... 13
*Blixeth v. Internal Revenue Services*, 2021 WL 519885 (D. Nev. Feb. 11, 2021) ..... 27
*Boca Park Martketplace Syndications Group, LLC v. Higco, Inc.*, 133 Nev. 923, 407 P.3d 761, (2017) ..... 19
*Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d 886 (9th Cir. 1988) ..... 9
*Boss v. Fed. Hous. Fin. Agency*, 998 F.3d 532 (1st Cir. 2021) ..... 25
*Branch v. Tunnell*, 14 F.3d 449 (9th Cir. 1994) ..... 8
*Brownback v. King*, 141 S. Ct. 740 (2021) ..... 27
*Bullseye Glass Co. v. Brown*, 366 F. Supp. 3d 1190 (D. Or. 2019) ..... 18
*California v. Texas*, 141 S. Ct. 2104 (2021) ..... 15
*California v. Trump*, 963 F.3d 926 (9th Cir. 2020) ..... 9, 14
*CFPB v. All Am. Check Cashing, Inc.*, 33 F.4th 218 (5th Cir. 2022) ..... 36
*CFPB v. Law Offices of Crystal Moroney*, 63 F.4th 174 (2d Cir. 2023) ..... 34
*Clinton v. City of New York*, 524 U.S. 417 (1998) ..... 34
*Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 51 F. 4th 616 (5th Cir. 2022) ..... 28
*Collins v. Union Fed. Sav. & Loan*, 662 P.2d 610 (1983) ..... 40
*Collins v. Yellen*, 141 S. Ct. 1761 (2021) ..... passim
*Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43 (2015) ..... 37
*Egbert v. Boule*, 596 U.S. 482 (2022) ..... 24
*F.D.I.C. v. Meyer*, 510 U.S. 471 (1994) ..... 22, 23
*Faiella v. Green Tree Servicing LLC*, 2017 WL 589096 (D.N.H. Feb. 14, 2017) ..... 13
*Fairholme Funds, Inc. v. United States*, 26 F.4th 1274 (D.C. Cir. 2022) ..... 25
*Fed. Election Comm'n v. Cruz*, 142 S. Ct. 1638 (2022) ..... 8, 12
*Five Star Cap. Corp. v. Ruby*, 124 Nev. 1048, 194 P.3d 709 (2008) ..... 18, 19, 20
*Fones4All Corp. v. F.C.C.*, 550 F.3d 811 (9th Cir. 2008) ..... 27
*Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010) ..... 34, 36

*Freeman v. F.D.I.C.*, 56 F.3d 1394 (D.C. Cir. 1995) ..... 21
*Gill v. Whitford*, 138 S. Ct. 1916 (2018) ..... 15
*Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246 (9th Cir. 1997) ..... 7, 43
*Gundy v. United States*, 139 S. Ct. 2116 (2019) ..... 34, 37
*Hall v. Smosh Dot Com, Inc.*, 72 F.4th 983 (9th Cir. 2023) ..... 8
*Invs. v. Bank of Am., NA*, 585 F. App'x 742 (9th Cir. 2014) ..... 9
*J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928) ..... 37
*Jones v. Bock*, 549 U.S. 199 (2007) ..... 27
*Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988 (9th Cir. 2018) ..... 8, 17, 18
*Kizzire v. Baptist Health Sys., Inc.*, 441 F.3d 1306 (11th Cir. 2006) ..... 18
*Kwiatkowski v. Hartford Fire Ins. Co.*, 2009 WL 10679299 (D. Nev. Jan. 29, 2009) ..... 7, 43
*Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001) ..... 17
*Locksmith Fin. Corp. v. VOIP-Pal.com, Inc.*, 523 P.3d 1104 (Nev. App. 2023) ..... 19
*Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992) ..... 15
*Marbury v. Madison*, 5 U.S. 137 (1803) ..... 24
*McKnight Family, LLP v. Adept Mgmt.*, 310 P.3d 555 (2013) ..... 40
*Mecinas v. Hobbs*, 30 F.4th 890 (9th Cir. 2022) ..... 11
*Mendenhall v. Tassinari*, 133 Nev. 614, 621, 403 P.3d 364 (2017) ..... 19
*Montilla v. Fed. Nat'l Mortg. Ass'n*, 999 F.3d 751 (1st Cir. 2021) ..... 25
*NLRB v. Noel Canning*, 573 U.S. 513 (2014) ..... 34
*OPM v. Richmond*, 496 U.S. 414 (1990) ..... 28
*Orosco v. Specialized Loan Servicing, LLC*, 2020 WL 4898054 (E.D. Cal. Aug. 20, 2020) ..... 9
*Patterson v. Spearman*, 2019 WL 2577219 (E.D. Cal. June 24, 2019) ..... 17
*Perry Capital LLC v. Mnuchin*, 864 F.3d 591 (D.C. Cir. 2017) ..... 22, 23, 26
*PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) ..... 35
*Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296 (D.C. Cir. 2014) ..... 20
*Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892 (9th Cir. 2013) ..... 27
*Rock Springs Mesquite II Owners' Ass'n v. Raridan*, 136 Nev. 235, 464 P.3d 104 (2020) ..... 18
*Rollins v. Dignity Health*, 338 F.Supp.3d 1025 (N.D. Cal. 2018) ..... 18
*Salgado-Diaz v. Gonzales*, 395 F.3d 1158 (9th Cir. 2005) ..... 24
*SEC v. Equitybuild, Inc.*, 2022 WL 2257121 (N.D. Ill. June 22, 2022) ..... 21
*Segura v. Felker*, 2010 WL 5313770 (E.D. Cal. Dec. 20, 2010) ..... 17
*Segura v. McGuire*, 474 F. App'x 608 (9th Cir. 2012) ..... 17

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

*Seila L. LLC v. CFPB*, 140 S. Ct. 2183 (2020) ..... 10, 35
*Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019) ..... 9, 16, 21
*Silvestre v. MTC Fin., Inc.*, 2015 WL 5830818 (D. Nev. Oct. 5, 2015) ..... 39
*Sisti v. Fed. Hous. Fin. Agency*, 324 F. Supp. 3d 273 (D.R.I. 2018) ..... 25
*Sullivan v. Riviera Holdings Corp.*, 2014 WL 2960303 (D. Nev. June 30, 2014) ..... 7
*Sullivan v. Washington Mut. Bank, FA*, 2009 WL 3458300 (N.D. Cal. Oct. 23, 2009) ..... 9
*Sunshine Dev., Inc. v. F.D.I.C.*, 33 F.3d 106 (1st Cir. 1994)) ..... 21
*Swartz v. KPMG LLP*, 476 F.3d 756 (9th Cir. 2007) ..... 8
*Tate v. Univ. Med. Ctr. of S. Nevada*, 2016 WL 7045711 (D. Nev. Dec. 2, 2016) ..... 17
*Tillman v. Resol. Tr. Corp.*, 37 F.3d 1032 (4th Cir. 1994) ..... 21
*Tourgeman v. Collins Fin. Servs., Inc.*, 2009 WL 6527758 (S.D. Cal. Nov. 23, 2009) ..... 9
*U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339 (D.C. Cir. 2012) ..... 28
*United States v. Brown*, 2014 WL 657518 (E.D. Pa. Feb. 20, 2014) ..... 42
*United States v. Corinthian Colls.*, 655 F.3d 984 (9th Cir. 2011) ..... 43
*United States v. Golden Acres, Inc.*, 520 F. Supp. 1073 (D. Del. 1981) ..... 42
*United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016) ..... passim
*United States v. Paulson*, 68 F.4th 528 (9th Cir. 2023) ..... 24
*Webster v. Doe*, 486 U.S. 592 (1988) ..... 20, 21, 24
*Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001) ..... 37
*Wright v. United States Forestry Service*, 923 F. Supp. 1295 (D. Nev. Feb. 14, 1996) ..... 27

**Statutes**

106 Stat. 3945 § 1312 ..... 3
106 Stat. 3947 § 1316 ..... 3
106 Stat. 3949 § 1316. ..... 3
5 U.S.C. § 706 ..... 34, 41, 42
31 U.S.C. § 1301 ..... 31
12 U.S.C. § 1716 ..... 2
12 U.S.C. § 4511 ..... 3, 13, 25
12 U.S.C. § 4516 ..... 4, 12, 30, 34, 35, 38, 39
12 U.S.C. § 4617(b)(2)(A)(i) ..... 2, 5, 12, 20, 27, 35,
12 U.S.C. § 5220 ..... 5, 14
12 U.S.C. § 5497 ..... 34
Federal Home Loan Mortgage Corporation Act, 84 Stat. 451 ..... 2

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

Federal Housing Enterprises Financial Safety and Soundness Act of 1992, 106 Stat. 3944-3946 ..3
Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 103 Stat. 429-436 .....2
Housing and Urban Development Act of 1968, 82 Stat. 536 .....2
National Housing Act Amendments of 1938, 52 Stat. 23.....2
Post Office Act of 1792, 1 Stat. 232-34.....32

**Other Authorities**

1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES App. 362 (1803).....28
2 ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 348-49 (2d ed. 1891) (statement of Alexander Hamilton). .....29
7 ALEXANDER HAMILTON, THE WORKS OF ALEXANDER HAMILTON 532 (John C. Hamilton ed. 1851).....34
Charles Kruly, *Self-Funding and Agency Independence*, 81 GEO. WASH. L. REV. 1733, 1735-36 (2013).....31
E. JAMES FERGUSON, THE POWER OF THE PURSE; A HISTORY OF AMERICAN PUBLIC FINANCE, 1776-1790 111 (1961) .....31
*Explanation, Nov. 11, 1795, in* 8 A. HAMILTON, WORKS 122, 128 (H.C. Lodge ed., 1885).....31
FHFA News Release dated June 29, 2021 at https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Protects-Borrowers-After-COVID-19-Foreclosure-and-REO-Eviction-Moratoriums-End.aspx.....13
GAO, PRINCIPLES OF FEDERAL APPROPRIATION LAW, at 2-22 to 2-27 (4th ed. 2016) .....31
Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1354 (1988) .....31, 33
THE FEDERALIST NO. 48.....28
THE FEDERALIST NO. 58 .....28

**Rules**

Fed. R. Civ. P. 15.....43
Fed. R. Evid. 201(b).....16
Fed. R. Civ. P. 12(b)(6).....16, 18

**Constitutional Provisions**

NEV. CONST. art. I, § 1 .....9
U.S. CONST. art. I .....passim

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

## I. INTRODUCTION

FHFA's arguments should be troubling for all Americans. FHFA purports to position itself as an Executive Branch agency that is accountable to neither Congress nor the Judiciary. It is axiomatic that Congress solely possesses the power of the purse, and the Appropriations Clause requires that public funds be appropriated by Congress. Despite these constitutional maxims, FHFA sets its own budget and secures its own funding directly from the entities it regulates – all outside the normal appropriations process and without Congressional oversight or limit on its funding. FHFA claims the prerogative to generate and spend its own slush fund without congressional involvement. From this unaccountable fund, FHFA unlawfully authorizes and funds foreclosure sales, including the ones against the Representative Plaintiffs and their fellow class members. FHFA's structure violates the plain text, structure, and history of the Appropriations Clause and its underlying separation-of-powers principles that date back to the Founding.

Yet FHFA contends that its self-funding and self-spending structure is immune from constitutional scrutiny. But each obstacle Defendants try to erect to prevent constitutional review fails. First, Plaintiffs – and the classes they represent – each have standing to pursue an Appropriation Clause and separation of powers challenges just as the Ninth Circuit has found in other similar cases. Plaintiffs' respective injuries are the threatened or actual loss of their properties along with monetary harm. Those injuries are directly traceable to FHFA's unconstitutional spending of unappropriated funds to foreclose, and those injuries can be redressed through equitable relief and damages. Second, Defendants have not met their burden to show that the affirmative defense of claim preclusion applies here. The prior outside-the-pleadings state court actions involved an entirely separate set of facts and legal issues. The foreclosures had not occurred and the separation of powers challenges to the foreclosures could not have been raised.

There is also no jurisdictional or statutory bar to Plaintiffs' claims. As the Supreme Court held in *Collins*, the federal foreclosure bar does not apply where, as here, the FHFA exceeds its constitutional authority. Allowing a statute to shield an agency's unconstitutional acts would raise

other equally serious constitutional concerns. Similarly, FHFA cannot selectively characterize itself as a government or private actor to create a "heads, the government wins, and tails, the citizens lose" scenario. FHFA tries to cloak itself in sovereign immunity while, at the same time, disclaiming that it is a government actor to dodge constitutional claims. But Congress has waived FHFA's sovereign immunity for all of Plaintiffs' claims. When FHFA placed Fannie Mae and Freddie Mac into conservatorship, FHFA succeeded to those entities' "sue and be sued" waivers of immunity. Such waivers are construed broadly and cover both constitutional and state law claims. With all immunity waived, Plaintiffs have stated plausible monetary damages claims for constitutional violations and wrongful foreclosure. Plaintiffs have also stated plausible claims under the Administrative Procedure Act, Declaratory Judgments Act, and other equitable principles. Therefore, Defendants' Motion to Dismiss should be denied.

## II. STATEMENT OF FACTS

### A. The Federal Housing Finance Agency Is Unconstitutionally Structured.

Congress created the Federal National Mortgage Association (Fannie) and the Federal Home Loan Mortgage Corporation (Freddie) in 1938 and 1970, respectively. *Collins v. Yellen*, 141 S. Ct. 1761, 1770 (2021) (citing National Housing Act Amendments of 1938, 52 Stat. 23; Federal Home Loan Mortgage Corporation Act, 84 Stat. 451).

Both enterprises operate under congressional charters as for-profit corporations with private shareholders. *Id*. (citing Housing and Urban Development Act of 1968, § 801, 82 Stat. 536, 12 U.S.C. § 1716b; Financial Institutions Reform, Recovery, and Enforcement Act of 1989, § 731, 103 Stat. 429-436, note following 12 U.S.C. § 1452). Their mission is to support the Nation's home mortgage system, and they do so primarily through purchasing mortgages, pooling them, and selling them to investors. *Id*. Fannie Mae and Freddie Mac were – and still are – two of the largest financial institutions in the Nation with balance sheets in the billions and trillions.

From 1992 to 2008, Fannie and Freddie were regulated by the Office of Federal Housing Enterprise Oversight (OFHEO) within the Department of Housing and Urban Development. *Id*. at 1770 n.1 (citing Federal Housing Enterprises Financial Safety and Soundness Act of 1992, §§

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

1311–1313, 106 Stat. 3944-3946). OFHEO was not an independent agency. The President could remove its director for any reason. *See* 106 Stat. 3945 § 1312. And OFHEO was subject to congressional appropriations. The director could only levy assessments as Congress permitted. "The Director may, *to the extent provided in appropriations Acts*, establish and collect from [Fannie and Freddie] annual assessments in an amount not exceeding the amount sufficient to provide for reasonable costs and expenses of the Office . . . ." 106 Stat. 3947 § 1316 (emphasis added). The Director was required to submit forecasts to the Office of Management and Budget for inclusion in the President's budget submission to Congress. 106 Stat. 3949 § 1316(g).

In 2008, during the aftermath of the financial crisis, Congress passed, and President Bush signed, the Housing and Economic Recovery Act (HERA) to create FHFA. (ECF No. 34 (First Amended Complaint) ¶ 23.) The 2008 Congress structured FHFA as an "independent agency" charged with regulating the federal housing mortgage market, including Fannie and Freddie. *Collins*, 141 S. Ct. at 1770 (quoting 12 U.S.C. § 4511). In its effort to make FHFA an "independent agency," Congress gave FHFA sweeping powers and largely insulated FHFA from democratic accountability. (ECF No. 34 ¶ 25.) Congress attempted to achieve this goal in two ways. First, it insulated the FHFA Director from presidential removal. (*Id.*) And second, it granted FHFA budgetary independence. (*Id.*)

The Supreme Court recognized that the first aspect of the 2008 Congress' attempts to insulate FHFA from democratic accountability was unconstitutional. (*Id.* ¶ 26.) In *Collins*, the Supreme Court held that HERA's removal restrictions on the President's ability to fire the FHFA Director at will violates the separation of powers and is unconstitutional. (*Id.* citing *Collins*, 141 S. Ct. at 1783.)

Now, the second piece of the 2008 Congress' plan to insulate FHFA from democratic accountability – FHFA's budgetary independence – has come under constitutional scrutiny. (ECF No. 34 ¶ 27.) Article I of the Constitution states "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]" (*Id.* citing U.S. CONST. art. I, § 9, cl. 7.) But, as the Supreme Court recognized, "FHFA is not funded through the ordinary appropriations process." (*Id.* ¶ 27 citing *Collins*, 141 S. Ct. at 1772.) Rather, FHFA is free to raise

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

and spend its own budget with no oversight from Congress. (*Id.*) FHFA's own statements and reports admit the constitutional violation. (*Id.* ¶ 28.) For example, its FY2022 Performance and Accountability Report states "FHFA is financed through revenue form assessments and is considered a non-appropriated entity (FHFA does not receive any appropriated funds from Congress)." (*Id.*)

Not only that – FHFA may itself collect on the budget it determines to be appropriate for itself. (*Id.* ¶ 29.) Indeed, HERA grants the FHFA Director full control over FHFA's funding outside of the typical appropriations process. (*Id.* citing 12 U.S.C. § 4516.) Instead of funding through bicameral passage and presentment of appropriations bills as the Appropriations Clause requires, the FHFA Director may establish and collect assessments, in an amount to be determined by the Director, directly from the entities that FHFA regulates – Fannie, Freddie, and the Federal Home Loan Banks. (*Id.* citing 12 U.S.C. § 4516(a).)

The only restraint on FHFA's funding power is the Director's unbounded judgment of what is "reasonable." (*Id.* ¶ 30.) "Reasonable" here is a blank check for FHFA to collect *unlimited* funds. HERA also specifies that "[t]he amounts received by [FHFA] from any assessment under this section shall not be construed to be Government or public funds or appropriated money." (*Id.* citing § 4516(f)(2).)

In practical terms, that amounts to an unconstrained power to collect and spend money, for FHFA regulates entities that have *over $8 trillion* of assets from which it may freely draw. (*Id.* ¶ 31 (citing Statement of Sandra L. Thompson, FHFA Director, Before the House Comm. On Fin. Servs. (July 20, 2022), https://bit.ly/3AnDFVq (last visited January 17, 2024) [hereinafter Statement of Thompson].) The Director may use these funds not only for FHFA's expenses but also "to maintain a working capital fund." (*Id.* citing 12 U.S.C. § 4516(a)(3).) The Director alone determines the amount of those assessments. (*Id.*)

**B. FHFA Unconstitutionally Controls and Participates in Home Foreclosures.**

Using its bottomless pot of money without congressional approval, FHFA controls and authorizes foreclosures on homes. After HERA's passage, FHFA placed Fannie and Freddie into conservatorship in September 2008. (*Id.* ¶ 32.) Once placed in conservatorship, FHFA

immediately succeeded to "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." (*Id.* ¶ 33 citing 12 U.S.C. § 4617(b)(2)(A)(i).) FHFA may "take over the assets of and operate," "collect all money due [to]," "perform all function of," "preserve and conserve the assets and property of" and contract on behalf of Fannie and Freddie. (*Id.* citing 12 U.S.C. § 4617(b)(2)(B); *see id.* § 4617(b)(2)(C)-(E), (J).)

In other words, all of Fannie Mae's and Freddie Mac's assets – including mortgages – "succeeded" to FHFA and came under its control. FHFA "may 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." (*Id.* ¶ 34 citing 12 U.S.C. § 4617(b)(2)(G).) FHFA has the authority to foreclose on, and sell, mortgages in default. (*See id.*) FHFA admits it possesses these powers. (ECF No. 36 at pg. 7.)

As conservator for Fannie Mae and Freddie Mac, FHFA is a designated "Federal Property Manager." (ECF No. 34 ¶ 35 citing 12 U.S.C. § 5220(a)(1)(A).) As a federal property manager, FHFA must oversee foreclosures and the activities of mortgage servicers. (*See id.* citing § 5220(b)(1); *see also id.* § 5220(c).) FHFA has often wielded its authority over the foreclosure process. (*Id.* ¶¶ 36-38; *see also* ECF Nos. 2-3 and 2-4 (Exhibits 3 & 4).) FHFA must also submit periodic reports about the number of foreclosures that occur. (ECF No. 34 ¶ 35 citing 12 U.S.C. § 5220(b)(5).) For example, in just the first two months of 2023, through the entities it manages and regulates, FHFA oversaw and controlled more than 3,000 foreclosure sales and 13,000 foreclosure starts. (*Id.* ¶ 38.)

According to the Supreme Court, "there can be no question that the 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*, 141 S. Ct. at 1786 (emphasis added).

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

### C. Plaintiffs Lawfully Purchase Real Property and FHFA Directed and Controlled Unconstitutional Foreclosure on Plaintiffs' Properties.

#### *1. Cape Jasmine Court Trust's Desert Pond Property.*

In May 2005, a deed of trust between nonparty borrowers and KB Home Mortgage Company was recorded, granting the lender a security interest in the real property known as 167 Desert Pond Avenue, Henderson, Nevada 89015 ("Desert Pond Property") to secure the repayment of $235,000.00. (ECF No. 34 ¶ 42.) The deed of trust also listed Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary and FATCO as the trustee. (*Id.*) Upon information and belief, Fannie Mae or Freddie Mac purchased the loan in or around July 2005. (*Id.* ¶ 43.) On May 25, 2012, Representative Plaintiff Cape Jasmine Court Trust purchased the Desert Pond Property and a foreclosure deed was recorded reflecting the purchase on May 31, 2012. (*Id.* ¶ 44.)

As of the filing of this complaint, FHFA has not yet directed a foreclosure on the Desert Pond Property. (*Id.* ¶ 46.) However, given FHFA's recent foreclosure conduct (including against Plaintiff Daisey Trust *infra*), it is likely that FHFA will direct or indirectly direct, control, notice, and conduct a foreclosure sale without constitutionally appropriated funds in violation of the Constitution. (*Id.* ¶ 47.)

#### *2. Daisey Trust's Newburg Property.*

In January 2007, a deed of trust between nonparty borrowers and Countrywide Home Loans, Inc. was recorded, granting the Lender a security interest in the real property known as 33 Newburg Avenue, North Las Vegas, Nevada 89032 ("the Newburg Property") to secure repayment of $198,500.00. (*Id.* ¶ 50.) The deed of trust also listed MERS as the beneficiary and Reconstruct Company, N.A. as the trustee. (*Id.*)

Fannie Mae purchased the Loan in January 2007 and thereby acquired a property interest in the Deed of Trust. (*Id.* ¶ 51.) The HOA Trustee recorded a Notice of Foreclosure Sale on March 27, 2012. (*Id.* ¶ 52.) Representative Plaintiff Daisey Trust (Daisey Trust) purchased the Newburg Property at the foreclosure sale on August 24, 2012. (*Id.* ¶ 53.) Despite the filing of the current complaint and a preliminary injunction, FHFA directed and controlled a foreclosure of the

property which occurred in September 2023. (*Id.* ¶ 54.) As result of the unconstitutionally funded and conducted foreclosure, Daisey Trust was forced to re-purchase the Newburg Property at the foreclosure sale and incurred monetary damages from spending money to buy the same property back that could not be lawfully foreclosed upon in the first place. (*Id.* ¶ 55.)

***3. Saticoy Bay's Liberty View Property.***

Upon information and belief, a deed of trust between nonparty borrowers and Bravo Credit Corporation was recorded, granting the lender a security interest in the real property known as 10007 Liberty View Way, Las Vegas, Nevada 89148 ("Liberty View Property") to secure the repayment of $564,300.00. (*Id.* ¶ 59.) On May 25, 2023, Representative Plaintiff Saticoy Bay (Saticoy Bay) purchased the Liberty View Property. (*Id.* ¶ 61.) A foreclosure deed upon sale reflecting Saticoy Bay's purchase was recorded on May 30, 2023. (*Id.* ¶ 62.) Freddie Mac or Fannie Mae obtained an interest in the Liberty View Property in or around June 2022. (*Id.* ¶ 60.) On March 25, 2022, National Default Servicing Corp., at the direction and control of FHFA, noticed a foreclosure sale for the Liberty View Property. (*Id.* ¶ 63.) On or about March 25, 2022, the foreclosure sale occurred at the direction and control of FHFA. (*Id.* ¶ 64.) Subsequently, a third party purchased the Liberty View Property at the foreclosure sale. (*Id.* ¶ 65.) As a result of FHFA's unconstitutionally funded and conducted foreclosure, Saticoy Bay lost its property rights and the monetary value of its investment and expenditures related to the property. (*Id.* ¶ 66.)

## III. LEGAL STANDARD

Defendants moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF No. 36 at pg. 6.) To survive a motion to dismiss, a complaint need only "contain[ ] enough facts to state a claim to relief that is plausible on its face." *Sullivan v. Riviera Holdings Corp.*, No. 2:14-cv-00165-APG-VCF, 2014 WL 2960303, at *1 (D. Nev. June 30, 2014) (citations omitted). However, "[t]here is a strong presumption against dismissing an action for failure to state a claim." *Kwiatkowski v. Hartford Fire Ins. Co.*, No. 2:08-cv-730-BES-LRL, 2009 WL 10679299, *2 (D. Nev. Jan. 29, 2009) (citing *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997)). District courts apply a two-step analysis when considering motions to dismiss. *Sullivan*, 2014 WL 2960303, at *1. First, the court must accept as true all

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

well-pleaded factual allegations and draw all reasonable inferences from the complaint in the plaintiff's favor. *Id.* Second, the court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* A claim is facially plausible when the complaint alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* "Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the [district] court to draw on its judicial experience and common sense." *Id.*

"In ruling on a 12(b)(6) motion, a court may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court may consider documents not physically attached to the complaint only if (1) the documents' authenticity is not contested, and (2) either the allegations of the complaint "explicitly incorporate[ ]" the documents' contents, or the complaint "necessarily relies" on the documents, in that they are "crucial" or "essential" to the plaintiffs' claims. *Branch v. Tunnell,* 14 F.3d 449, 454 (9th Cir. 1994)). The Ninth Circuit has cautioned that "the unscrupulous use of extrinsic documents to resolve competing theories against the complaint risks premature dismissals of plausible claims that may turn out to be valid after discovery." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018).

## IV. ARGUMENT

### A. Plaintiffs Have Standing.

Defendants' first contention is that Plaintiffs lack standing. (ECF No. 36 at pgs. 6-8.) "When deciding standing at the pleading stage, and for purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Hall v. Smosh Dot Com, Inc.*, 72 F.4th 983, 987 (9th Cir. 2023). To satisfy Article III's standing requirements, "[a] plaintiff must show (1) an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, (3) that is likely to be redressed by the requested relief." *Fed. Election Comm'n v. Cruz*, 142 S. Ct. 1638, 1646 (2022). When conducting the standing analysis, the Court

accepts as valid the merits of Plaintiffs' legal claims *Id.* at 1647-48.

The Ninth Circuit has found that a variety of individuals and groups, like Plaintiffs, have standing to assert Appropriations Clause and separation of powers challenges. *See United States v. McIntosh*, 833 F.3d 1163, 1174-75 (9th Cir. 2016) (criminal defendants had standing to seek injunction of unfunded criminal prosecutions for marijuana related offenses as a violation of Appropriations Clause); *Sierra Club v. Trump*, 929 F.3d 670, 685–86, 697-704 (9th Cir. 2019) (environmental group had standing to seek injunction of Department of Defense's "reprogramming" of funds to build border wall as a violation of Appropriations Clause); *California v. Trump*, 963 F.3d 926, 934-40 (9th Cir. 2020) (same for States).

***Injury in fact.*** A plaintiff alleges an injury in fact when they plead the actual or threatened loss of money or property. *See Tourgeman v. Collins Fin. Servs., Inc.*, 2009 WL 6527758, at *7 (S.D. Cal. Nov. 23, 2009) "Whether a property right exists is determined by state law." *Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d 886, 893 (9th Cir. 1988). The Nevada Constitution provides even greater protection for property rights than the Federal Constitution. In the very first section of the very first article, the Nevada Constitution defines as "inalienable" the rights to "Acquir[e], Possess[ ], and Protect[ ] property." NEV. CONST. art. I, § 1. The Nevada Constitution does not differentiate between commercial and non-commercial real estate or between other types of property. "The Nevada Supreme Court has viewed the loss of real property as irreparable harm even where the real property's putative owner is a corporate entity, and where the real property is to be used for a commercial purpose." *Invs. v. Bank of Am., NA*, 585 F. App'x 742, 742-43 (9th Cir. 2014).

Thus, it is beyond debate that a plaintiff suffers injury in fact when its property or house is in foreclosure. *Orosco v. Specialized Loan Servicing, LLC*, 2020 WL 4898054, at *4 (E.D. Cal. Aug. 20, 2020); *Sullivan v. Washington Mut. Bank, FA*, 2009 WL 3458300, at *4 (N.D. Cal. Oct. 23, 2009) ("it is undisputed that foreclosure proceedings have been initiated which puts her interest in the property in jeopardy. The Court concludes that this fact is sufficient to establish standing."); *see also Bank of Am., N.A. v. Woodcrest Homeowners Ass'n*, 2016 WL 8732298, at *5 (D. Nev. Mar. 25, 2016) ("HOA's foreclosure purports to eliminate BANA's deed of trust;

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

this constitutes injury in fact."). The United States Supreme Court has also held that landlords suffer irreparable injury when they lose the full panoply of their property rights. *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (holding eviction moratorium put "millions of landlords across the country, at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery … [a]nd intrud[ing] on one of the most fundamental elements of property ownership").

Plaintiffs' respective injuries-in-fact are the imminent foreclosure on their real property (Class 1) and the loss of the money spent to re-purchase the property (Class 2) and, in some instances, the outright loss of the property and related expenditures (Class 3). (ECF No. 34 ¶¶ 47, 56, 66.) Despite these clear injuries, FHFA suggests that Plaintiffs have no injury in fact because the FHFA might be able to properly effectuate a foreclosure *if* the agency were property funded at some unknown point in the future. (ECF No. 36 at pg. 6-7.) But "a litigant challenging governmental action as void on the basis of the separation of powers is not required to prove that the Government's course of conduct would have been different in a 'counterfactual world' in which the Government had acted with constitutional authority." *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2196 (2020). Plaintiffs still suffer constitutional and legal injuries when an agency lacks a constitutional source of funds to carry out otherwise constitutional or lawful action.

For instance, the Ninth Circuit rebuffed the FHFA's argument in *U.S. v. McIntosh*. There, criminal defendants brought a successful Appropriations Clause challenge to federal marijuana law prosecutions "on the basis of a congressional appropriations rider that prohibits the United States Department of Justice from spending funds to prevent states' implementation of their own medical marijuana laws." 833 F.3d at 1168. The Court observed that even though "Congress could appropriate funds for such prosecutions tomorrow," *id.* at 1179, the plaintiffs "[had] standing to invoke separation-of-powers provisions of the Constitution to challenge their criminal prosecutions," *id.* at 1174. "Conversely, this temporary lack of funds could become a more permanent lack of funds if Congress continues to [neglect] future appropriations bills." *Id.* at 1179. In which case, the prosecutions might never become lawful. *See id.*

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

Therefore, like the prosecutions in *McIntosh*, Plaintiffs will suffer or have already suffered injuries in fact from FHFA's separation of powers and Appropriations Clause violations. FHFA has unconstitutionally raised and spent money to threaten or effectuate foreclosures unlawfully against the Plaintiff classes causing the loss of property rights and money.

***Traceability.*** Defendants also assert that Plaintiffs' injuries are not traceable to any unlawful conduct by FHFA. (ECF No. 34 at pg. 7.) Traceability requires a causal connection between the injury and the conduct. *Mecinas v. Hobbs*, 30 F.4th 890, 899 (9th Cir. 2022). In *Collins*, the Supreme Court explained, "for purposes of traceability, the relevant inquiry is whether the plaintiffs' injury can be traced to 'allegedly unlawful conduct' of the defendant, not to the provision of law that is challenged." 141 S. Ct. at 1779. Plaintiffs' injuries (the foreclosure of property and related loss of funds) are directly traceable to FHFA's conduct (unconstitutionally raising and spending unappropriated funds to control and direct the foreclosure). FHFA is unable to control or direct the foreclosure without spending unappropriated monies. FHFA is simply spending money that it constitutionally cannot have. *See McIntosh*, 833 F.3d at 1175 ("Thus, if DOJ were spending money in violation of [an appropriations rider], it would be drawing funds from the Treasury without authorization by statute and thus violating the Appropriations Clause. That Clause constitutes a separation-of-powers limitation that Appellants can invoke to challenge their prosecutions."). It is simply false that Plaintiffs "complaint about the way FHFA *raises* money rather than the way it *expends* money." (ECF No. 36 at pg. 8.)[1] Plaintiffs obviously contest the constitutionality of both. (ECF No. 34 ¶¶ 2-3, 18, 27-31, 36-39, 75-86, 97-102, 106.) There is a direct line running between Plaintiffs' loss of money and property rights to FHFA's accumulation and expenditure of funds to foreclose just as there was a direct line in *Collins* between the shareholders' loss of property rights and FHFA's third amendment "net sweep" arrangement with Treasury. 141 S. Ct. at 1779 ("Because the relevant action in this case is the

[1] FHFA correctly recognizes that its lack of a fixed dollar cap is constitutionally problematic. (ECF No. 36 at pg. 8 n.5) The lack of any cap on the amount FHFA can unilaterally raise and spend differentiates it from the funding mechanism that the United States Supreme Court is currently reviewing in *CFPB* and other federal agencies. The missing cap removes all doubt that FHFA's structure is unconstitutional no matter the outcome of *CFPB*.

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

third amendment, and because the shareholders' concrete injury flows directly from that amendment, the traceability requirement is satisfied.").

Plaintiffs are not merely attacking FHFA's self-funding statute (12 U.S.C. § 4516) for the statute's own sake. Rather, Plaintiffs are challenging the FHFA's *conduct*; *i.e.*, unconstitutionally foreclosing with unappropriated funds. Put differently, the challenge is to FHFA's unlawful expenditure of funds to control and direct the foreclosures. The nature of this challenge is no different than the challenge to the Presidential removal restriction in *Collins* when the shareholders protested the third amendment's lawfulness. 141 S. Ct. at 1779. It is fundamental that a plaintiff may raise a constitutional challenge to a statute during a lawsuit against the government when the government's conduct stems from, or implicates, the statute. *See id.*; *see also Cruz*, 142 S. Ct. at 1650 ("[A]ppellees seek to challenge the *one* Government action that causes their harm: The FEC's threatened enforcement of the loan-repayment limitation, through its implementing regulation. In doing so, they may raise constitutional claims against Section 304, the statutory provision that, through the agency's regulation, is being enforced.") (citing *Collins*, 141 S. Ct., at 1779-80).

Trying to disrupt the straightforward connection between its conduct and Plaintiffs' injuries, Defendants disingenuously argue that FHFA is not "involved in that day-to-day management" of foreclosures. (*See* ECF No. 36 at pg. 8.) This factual assertion is legally and factually wrong. HERA's succession clause provides that, after the conservatorship, FHFA succeeded to "all rights, titles, powers, and privileges of the regulated entity … and the assets of the regulated entity." (ECF No. 34 ¶ 33 citing 12 U.S.C. § 4617(b)(2)(A)(i).) In other words, all mortgages and foreclosure rights that previously resided in Fannie Mae or Freddie Mac now belong to FHFA. It has the power to "take over the assets of and operate," "perform all function of," and "preserve and conserve the assets and property of" Fannie Mae and Freddie Mac. (*Id.* citing 12 U.S.C. § 4617(b)(2)(B); *see id.* § 4617(b)(2)(C)-(E), (J).) FHFA also has the power to "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." (*Id.* ¶ 34 citing 12 U.S.C. § 4617(b)(2)(G).) These statutes unquestionably confer FHFA with the ultimate power

over foreclosures in Fannie Mae's and Freddie Mac's respective portfolios.

Indeed, in other litigation, Fannie Mae cited FHFA's general regulatory power over Fannie Mae (12 U.S.C. § 4511) to successfully contend "the Federal Housing Finance Agency *regulates its mortgage and foreclosure activities*." *Faiella v. Green Tree Servicing LLC*, No. 16-CV-088-JD, 2017 WL 589096, at *6 (D.N.H. Feb. 14, 2017) (emphasis added). This is consistent with Nevada law "because the note owner can direct the beneficiary to foreclose on its behalf." *Berezovsky v. Moniz*, 869 F.3d 923, 932 (9th Cir. 2017). During the COVID pandemic, FHFA flexed its ability to control foreclosures when it "announc[ed] that Fannie Mae and Freddie Mac (the Enterprises) servicers will not be permitted to make a first notice or filing for foreclosure." *See* FHFA News Release dated June 29, 2021 at https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Protects-Borrowers-After-COVID-19-Foreclosure-and-REO-Eviction-Moratoriums-End.aspx (last accessed Sept. 12, 2023). The Supreme Court rightly observed in *Collins* "***that the 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.***" 141 S. Ct. at 1786 (emphasis added). The same control that the Supreme Court recognized in *Collins* is directly tied to Plaintiffs' respective injuries.

Plaintiffs also allege that FHFA is directly and/or indirectly (through Fannie Mae, services, and otherwise), controlling, supervising, managing, funding, and/or participating in the foreclosure on Plaintiffs' property without a constitutional appropriation from Congress. (ECF No. 34 ¶¶ 55, 86.) And, Plaintiffs have previously presented evidence that, in practice, FHFA does, in fact, exercise its statutory power to decide whether and when to foreclose. (*See* ECF No. 2 at Ex. 1 at 52 and Exs. 2-3.)

For example, in December 2010, Acting Director Edward J. DeMarco spoke to the House of Representatives Committee on the Judiciary and said, among other things, "I have a team of managers and staff from the Federal Housing Finance Agency (FHFA) working closely with Fannie Mae and Freddie Mac (the Enterprises) to gauge the full scope of the foreclosure processing problem and ***to move forward on foreclosures where appropriate."*** (ECF No. 2, Ex. 19) (emphasis added). "While FHFA remains committed to ensuring borrowers are presented

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

with foreclosure alternatives," Acting Director DeMarco continued, "it is important to remember that FHFA has a legal obligation as Conservator to preserve and conserve the Enterprises' assets…when alternatives do not work, timely and accurate foreclosure processing is critical . . . ." (*Id.* at 4.) He detailed how FHFA works to improve foreclosure timelines and how FHFA applies penalties when the process moves too slow. (*Id.* at 5.) "Our focus should be on … moving forward expeditiously with foreclosure proceedings where foreclosure alternatives have been exhausted…." (*Id.*); (*see also* ECF No. 2 at Ex. 20 at 2, 5 (Statement from Alfred M. Pollard, FHFA General Counsel about "Servicing Alignment Initiative crafted by Fannie Mae and Freddie Mac under FHFA direction" where servicers are directed to provide an opportunity to cure during foreclosure process but "if not, then foreclosure is appropriate."); (ECF No. 2 at Ex. 21 at 5 (FHFA's Conservator Approval Process for Fannie Mae and Freddie Mac Business Decision stating FHFA "retains the right to review and reverse" "individual mortgages, property sales, or foreclosures").)

The presence of mortgage servicers and Fannie Mae does not interrupt the causal chain leading from Plaintiffs' injury to FHFA. A causal chain may contain several links as long as "those links are not hypothetical or tenuous' and remain 'plausib[le]." *California*, 963 F.3d at 940 (quotations omitted). FHFA possesses the final say and authority about whether Fannie, Freddie, or any servicer proceeds with a foreclosure. Afterall, each mortgage is an asset of FHFA. And, as a Federal Property Manager, FHFA must oversee the actions of mortgage servicers, including foreclosure activities. (ECF No. 34 at ¶ 35 citing 12 U.S.C. § 5220(b)(1) (discussing federal property managers authority over servicers and foreclosures); ECF No. 18 at pg. 9 (conceding that FHFA "*oversees*" mortgage and foreclosure activity).) But FHFA does more than just oversee foreclosures. FHFA does, in fact, control and direct the foreclosure process but lacks constitutionally-appropriated funds to carry out the tasks. (ECF No. 34 ¶ 36.) And FHFA admits that the mortgage servicers perform duties for FHFA and qualify as FHFA's privies. (ECF No. 36 at pg. 10.)[2] Without a constitutional funding source, FHFA cannot directly or indirectly exercise

[2] FHFA tries to minimize this admission by suggesting without evidence or a citation that "servicers expend their own funds." (ECF No. 36 at pg. 10 n.6.) Even if true, the servicers take

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

its foreclosure authority. (*Id.*) Yet FHFA is exercising its unfunded foreclosure power to direct a foreclosure on Plaintiffs' property. (*Id.*) Thus, Plaintiffs' injuries are directly traceable to FHFA.

To the extent the Court has any doubts about the FHFA's control over foreclosures, or the traceability of Plaintiffs' injuries, the Court should allow discovery and an evidentiary hearing before ruling on Plaintiffs' standing. *McIntosh*, 833 F.3d at 1179 (ordering evidentiary hearings to see if challengers' conduct was the kind that was without appropriation to prosecute).[3]

***Redressability*.** To establish redressability, a plaintiff must show that its injuries are capable of being remedied by a favorable decision on the relief sought. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Courts consider the relationship between the relief requested and the injury suffered. *California v. Texas*, 141 S. Ct. 2104, 2115 (2021). Here, Plaintiffs seek various forms of injunctive and declaratory relief as well as "set aside" orders under the Administrative Procedure Act (APA) to prevent the unconstitutionally funded foreclosures. (ECF No. 34 ¶¶ 70, 100.) This relief will prevent FHFA from taking any direct or indirect action to foreclose until those actions are properly funded through an appropriation from Congress. Given FHFA's involvement in, and power over, foreclosures as shown above, this narrowly tailored relief will remedy the irreparable injury. Plaintiffs seek no more or greater relief. *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) ("remedy must be tailored to redress the plaintiff's particular injury."). Classes 2 and 3 seek monetary damages which will redress the injuries of those Classes.

Defendants contend "that the relief here would consist of excising or reforming the offending funding provision, not disempowering the agency from exercising its lawful powers or deeming its prior exercise of those powers wrongful." (ECF No. 36 at pg. 9.) But the punch behind Congress's power of the purse is that an agency can only carry out "its lawful powers" through the expenditure of lawfully appropriated funds. Congress can constrain executive action by withholding appropriations and refusing to fund programs. Once more, *McIntosh* exposes the

---

direction, and are controlled by, FHFA which, in turn, does not have a constitutional source of funding to do the directing and controlling.

[3] For instance, FHFA has repeatedly argued to this Court that servicers spend their own funds in conducting foreclosures. (E.g., ECF No. 36 at pg. 10 n.6.) The servicers are FHFA's agents and certainly do not work for free. There is no legitimate debate that the servicers are directly and indirectly spending FHFA's ill-gotten funds without congressional approval.

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

flaw in FHFA's position. The Ninth Circuit did not doubt DOJ's general power to prosecute marijuana crimes, but the DOJ's power to prosecute was restricted by the lack of funds. "[I]f DOJ were spending money in violation of § 542, it would be drawing funds from the Treasury without authorization by statute and thus violating the Appropriations Clause. That Clause constitutes a separation-of-powers limitation that Appellants can invoke to challenge their prosecutions." *See McIntosh*, 833 F.3d at 1175. There was no excising or reforming option. FHFA is subject to the same constitutional constraint. Unless Congress appropriates funds for FHFA's foreclosure activities, the agency cannot lawfully execute them. *See also Sierra Club*, 929 F.3d at 686.

The relief Plaintiffs seek will redress their injuries. Injunctive and declaratory relief will protect Class 1 until Congress fixes the FHFA's unconstitutional structure while Classes 2 and 3 seek monetary relief to remedy their past injuries. (ECF No. 34 ¶¶ 87, 103, 108.) In sum, the threatened and actual loss of Plaintiffs' properties and money are real injuries that are directly traceable to FHFA's unconstitutional structure – raising and spending unappropriated funds to foreclose.

**B. Plaintiffs' Constitutional Challenge is Not Claim Precluded.**

***1. Defendants' request for judicial notice of various documents should be denied.***

Relying on documents entirely outside the amended complaint, Defendants argue that Plaintiffs' claims are barred by claim preclusion because they contend that the Plaintiffs could have raised the claims in earlier state court quiet title actions. (ECF No. 36 at pgs. 9-11.) With little explanation, Defendants ask the Court to take judicial notice of 20 documents filed in various state court cases. (*Id.* at 3 n.3.) But the Court may only take judicial notice of facts "not subject to reasonable dispute" because they are either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). While this Court can generally take judicial notice of its *own* docket entries, "[o]n a Rule 12(b)(6) motion to dismiss, when a court takes judicial notice *of another court's opinion*, it may do so 'not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

reasonable dispute over its authenticity.'" *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001) (quotations omitted; emphasis added). Moreover, "[j]ust because the document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth." *Khoja*, 899 F.3d at 999.

Plaintiffs do not at this time have any basis to challenge the documents based on authenticity.[4] However, it is does not appear that Defendants attached the entirety of the pleadings for each case, or any of the transcripts to properly support a request for judicial notice specifically for the purpose of claim preclusion. Instead, Defendants have cherry-picked various documents from several cases and ask the Court to improperly take notice of the documents wholesale. (*See* ECF No. 36 at pg. 3, n.3 "FHFA requests that the Court take judicial notice of Exhibits 1-20.) It is generally impermissible to take judicial notice of entire pleadings. "[A] proper request for judicial notice includes identification of specific facts the court is requested to notice as true." *Tate v. Univ. Med. Ctr. of S. Nevada*, 2016 WL 7045711, at *8 (D. Nev. Dec. 2, 2016), aff'd sub nom. *Tate v. Univ. Med. Ctr.*, 773 F. App'x 405 (9th Cir. 2019) (denying plaintiff's request for judicial notice where the plaintiff requested the court take judicial notice of a document, but failed to identify what fact or facts in that document that he wanted the court to take judicial notice of); *Segura v. Felker*, 2010 WL 5313770, at *1 n.1 (E.D. Cal. Dec. 20, 2010), aff'd sub nom. *Segura v. McGuire*, 474 F. App'x 608 (9th Cir. 2012); *see also Patterson v. Spearman*, 2019 WL 2577219, at *1 (E.D. Cal. June 24, 2019) (denying request for judicial notice because "the Court does not judicially notice documents, the Court judicially notices facts and Plaintiff has not identified facts which he thinks should be judicially noticed let alone facts which can be judicially noticed pursuant to Federal Rule of Evidence 201."). Here, Defendants ask the Court to take judicial notice of 20 documents but neglected to follow established procedure for its request. The Court should decline to take judicial notice of these documents.

In addition to the failure to follow the steps required to seek judicial notice of these documents, Defendants also improperly seek to use these documents to rebut factual assertions

[4] Though the Nevada Court of Appeals in the matter *Eivazi v. Eivazi*, No. 23-32631, 139 Nev. Adv. Op. 44 (2023) recently cautioned practitioners and the state courts about signing litigant- drafted orders that are not "factually accurate and legally adequate."

made in the amended complaint or create new purported facts not contained in the complaint at all. In other words, Defendants' want to do what *Khoja* forbids – and ask the Court to take judicial notice of documents that they then use as a basis to challenge the factual averments in the complaint. It would also improperly convert Defendants' motion to dismiss into one for summary judgment. *Rollins v. Dignity Health*, 338 F.Supp.3d 1025 (N.D. Cal. 2018) (held that where a party is seeking judicial notice to factually rebut the allegations in the complaint, granting judicial notice would "improperly convert [the] Rule 12(b)(6) motion into a motion for summary judgment under Rule 56."). In these circumstances, taking judicial notice of the documents requested by Defendants at the pleading stage is precisely what the Ninth Circuit cautioned against in *Khoja*. Thus, Plaintiffs respectfully request Defendants' short footnote requesting judicial notice of 20 documents be denied or stricken.

***2. Plaintiffs' claims are not precluded.***

Nevertheless, Plaintiffs' claims are not barred by claim preclusion. "When litigants ask a federal court exercising federal question jurisdiction to give preclusive effect to a state judgment, the federal court must apply 'the res judicata principles of the law of the state whose decision' would bar further litigation." *Bullseye Glass Co. v. Brown*, 366 F. Supp. 3d 1190, 1203 (D. Or. 2019) (citing *Kizzire v. Baptist Health Sys., Inc.*, 441 F.3d 1306, 1308 (11th Cir. 2006)). Thus, the Court must apply Nevada's state law of preclusion.

In Nevada, claim preclusion is a policy driven doctrine; it is not an issue of subject matter jurisdiction. *See Rock Springs Mesquite II Owners' Ass'n v. Raridan*, 136 Nev. 235, 238, 464 P.3d 104, 107 (2020). Nevada courts employ a three-part test to determine if claim preclusions applies: (1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case. *Five Star Cap. Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008). Claim preclusion only applies if the "*entire second suit … is based on the same set of facts and circumstances as the first suit*." *Id.* at 1055, 194 P.3d at 713-14 (emphasis added).

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

And "[t]he party raising the doctrine of res judicata has the burden of proving that the subject matter in the former suit *was identical* with that now before the court." *Bennett v. Fid. & Deposit Co. of Maryland*, 98 Nev. 449, 452, 652 P.2d 1178, 1180 (1982); *Locksmith Fin. Corp. v. VOIP-Pal.com, Inc.*, 523 P.3d 1104 (Nev. App. 2023) (unpublished disposition) ("The party asserting an affirmative defense, such as claim preclusion, bears the burden of proof as to that defense."). Defendants do not meet their burden to show that claim preclusion applies.

The facts and circumstances of this lawsuit are drastically different from the facts of the state court proceedings as characterized by the FHFA. Plaintiffs' state court actions involve circumstances surrounding the homeowners association (HOA) sales and the validity and priority of liens. (*See* ECF Nos. 36-1, 36-4, 36-5 (Desert Pond Property); ECF Nos. 36-6, 36-8, 36-9 (Newburg Property); ECF Nos. 36-11, 36-13 (Liberty View Property).) The filings Defendants submit outside of the pleadings show that the state court rulings adjudicated a matter of state law about whether liens against the properties remained valid. The issue of whether Defendants could have foreclosed or had the lawful authority to foreclose was not at issue. It is certainly beyond dispute that Defendants did not even raise the specter of foreclosure of any of these properties in those proceedings (something FHFA would not get around to doing for nearly a decade or more in some instances). Accordingly, Plaintiffs could not have asserted their Appropriations Clause or non-delegation challenges to the *foreclosures* in the prior cases because the foreclosures were not threatened or had not happened yet. *Five Star Cap. Corp.* 124 Nev. at 1055, 194 P.3d at 713-14. Likewise, Classes 2 and 3 could not have asserted claims for damages because they had not yet incurred them. Any challenges to FHFA's *foreclosure spending* and related damages were not ripe in the state court actions. *See Mendenhall v. Tassinari*, 133 Nev. 614, 621, 403 P.3d 364, 371 (2017) (claim preclusion does not apply to unripe claims).

Moreover, for sound public policy reasons, Nevada recognizes an exception to claim preclusion for constitutional arguments. In *Boca Park Martketplace Syndications Group, LLC v. Higco, Inc.*, 133 Nev. 923, 925, 407 P.3d 761, 763 (2017), the Nevada Supreme Court identified exceptions to claim preclusion that "have been created to address situations in which barring a later-filed claim does not advance the doctrine's underlying policies or ***conflicts with …***

***constitutional rights***." (emphasis added). So, even if Plaintiffs' claims could have been raised in state court (they could not have been), there are good public policy reasons to allow Plaintiffs to raise their constitutional arguments here.[5] The Court should not allow FHFA to violate Plaintiffs' constitutional or property rights. At minimum, the Classes should be allowed to substitute new representatives to the extent any current representative has potential claim preclusion issues.

**C. This Court has Jurisdiction over Plaintiffs' Claims.**

***1. The federal foreclosure bar does not prevent the Court from awarding injunctive relief.***

Defendants argue that this Court is without power to award injunctive relief to ensure that FHFA is acting within constitutional bounds because the claim is barred by 12 U.S.C. § 4617(f), the "federal foreclosure bar." (ECF No. 36 at pgs. 11-13.) To the contrary, Section 4617(f) is not a barrier to Plaintiffs' claim for injunctive relief. Section 4617(f) generally provides that "no court may take any action to restrain or affect the exercise of [the] powers or functions of the Agency as a conservator." 12 U.S.C. § 4617(f). This provision "prohibits relief where the FHFA action at issue fell within the scope of the Agency's authority as a conservator," but *permits* relief "if the FHFA *exceeded* that authority." *Collins*, 141 S. Ct. at 1776 (emphasis added). "Where the FHFA does not exercise but instead exceeds those powers or functions, the anti-injunction clause imposes no restrictions." *Id.*

FHFA exceeds its authority when it raises and expends funds without any valid congressional appropriation in violation of the Appropriations Clause and non-delegation doctrine. Therefore, Section 4617(f) plainly does not apply. Furthermore, Section 4617(f) does not apply to Plaintiffs' constitutional claim because the statute lacks the clear statement required to bar all remedies for a constitutional claim. *See Webster v. Doe*, 486 U.S. 592, 603 (1988). "The Supreme Court has long held that a statutory bar to judicial review precludes review of constitutional claims only if there is 'clear and convincing' evidence that Congress so intended." *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 308 (D.C. Cir. 2014) (citation

[5] The Appropriations Clause was not actually and necessarily litigated in state court. *Five Star Cap.,* 124 Nev. at 1055, 194 P.3d at 713.



PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

omitted). "[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster*, 486 U.S. at 603.

There is no such evidence of clear intent here. The Supreme Court has already implicitly recognized that Section 4617(f) contains no such clear statement. In *Collins*, the Supreme Court applied Section 4617(f) to bar the shareholders' *statutory* claim yet made no mention of the provision with respect to their *constitutional* claim despite extensive analysis of that claim. The entire second half of the Supreme Court's opinion would have been superfluous if the simple answer was that Section 4617(f) barred the constitutional claim entirely.

Indeed, if Section 4617(f) in fact barred all remedies for a proven constitutional claim, the statute would raise serious constitutional questions. As the Supreme Court explained in *Webster*, "[w]e require this heightened showing in part to avoid the serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." 486 U.S. at 603 (internal quotation marks omitted). Similarly, here, the Court need not raise a "serious constitutional question" as to Section 4617(f), because Defendants cannot make the required "heightened showing" of Congress's clear intent to bar all relief for Plaintiffs' constitutional claim. *Id.*

While FHFA spills much ink arguing that Section 4617(f) is jurisdictional, (ECF No. 36 at pg. 12), FHFA is wrong. *See SEC v. Equitybuild, Inc.*, 2022 WL 2257121, at *3 (N.D. Ill. June 22, 2022) (noting division of authority on this issue and concluding that Section 4617(f) is not jurisdictional). The only question is whether Section 4617(f) bars the constitutional claim that Plaintiffs' allege, and it does not.[6] The Constitution neither grants Congress the last word on whether the Executive Branch has violated the Appropriations Clause nor leaves it the Executive Branch to police itself. *Sierra Club*, 929 F.3d at 687. "Rather, the judiciary appropriately exercises its constitutional function where the question is whether Congress or the Executive is 'aggrandizing its power at the expense of another branch." *Id*. (quotations omitted).

[6] FHFA's cherry picked authority does not involve a constitutional challenge of the sort advanced here. (*See* ECF No. 36 at pg. 12 (citing *Freeman v. F.D.I.C.*, 56 F.3d 1394 (D.C. Cir. 1995); *Tillman v. Resol. Tr. Corp.*, 37 F.3d 1032 (4th Cir. 1994); *Sunshine Dev., Inc. v. F.D.I.C.*, 33 F.3d 106, 116 (1st Cir. 1994)).

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

Accordingly, this Court has jurisdiction over Plaintiffs' claims against FHFA based on its unconstitutional actions as conservator.

***2. The Court has jurisdiction to award damages.***

a. Defendants waived sovereign immunity for Plaintiffs' damages claims.

Defendants' next series of arguments are odd ones. On the one hand, Defendants argue the Court lacks jurisdiction to award damages because FHFA is protected by sovereign immunity. But on the other hand, FHFA claims it is a "private" actor stepping into the shoes of Freddie Mac and Frannie Mae so it cannot be sued for constitutional (or FTCA) violations at all. (ECF No. 36 at pgs. 13-15.) FHFA is wrong on both points. Congress has waived FHFA's sovereign immunity, including for constitutional and state law claims for monetary damages. The D.C. Circuit recently explained FHFA's waiver in another class action, *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 622 (D.C. Cir. 2017):

> The Congress has granted Freddie Mac "power ... to sue and be sued ... in any State, Federal, or other court," 12 U.S.C. § 1452(c)(7),[7] and has granted Fannie Mae the same "power ... to sue and to be sued ... in any court of competent jurisdiction, State or Federal," *id.* § 1723a(a).[8] The FHFA "by operation of law[ ] immediately succeed[ed] to ... all ... powers" of the Companies upon its appointment as conservator—including the Companies' power to sue and be sued—under the so-called Succession Clause of the Recovery Act. *Id.* § 4617(b)(2)(A)(i). ***Such a statutory grant of power to "sue and be sued" constitutes an "unequivocally expressed" waiver of sovereign immunity.***

(Emphasis added). To support this proposition, *Perry* cited the Supreme Court's decision *F.D.I.C. v. Meyer*, 510 U.S. 471, 474 (1994) – FHFA cites *Meyer* too. (ECF No. 36 at pg. 14.)

In *Meyer*, the Supreme Court held that the FDIC's "sue and be sued" waiver of sovereign immunity encompassed both constitutional and state law claims. 510 U.S. at 480. The High Court rejected the same argument FHFA offers here. Like the FHFA, the FDIC asserted that a constitutional tort claim would fall outside the sue-and-be-sued waiver because the agency should be subject to liability only to the same extent as a private entity. *Id.* The Court disagreed. It reasoned that "sued and be sued" waivers are liberally construed and there must be "clear"

---

[7] "The Corporation shall have power…(7) to sue and be sued, complain and defend, in any State, Federal, or other court."

[8] "Each of the bodies…shall have power to…sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal."

language limiting the scope. *Id*. at 480-81. And the liability of a private enterprise is not the "*outer boundary* of the sue-and-be-sued waiver." *Id*. at 482 (emphasis in original). As a result, a "sue-and-be-sued clause waives the agency's sovereign immunity for [the plaintiff's] constitutional tort claim." *Id*. at 483.

Here, as the *Perry* court found, the FHFA succeeded to Fannie's and Freddie's "sue and be sued" waivers of sovereign immunity. Those waivers are just as broad as the FDIC's waiver in *Meyer*, if not broader. Under Supreme Court precedent, the FHFA's waiver is broadly construed and there is no clear language from Congress limiting its scope. As a result, the waiver covers both constitutional claims and direct state law claims like wrongful foreclosure. *See Meyer*, 510 U.S. at 483; *Perry Cap. LLC*, 864 F.3d at 625-26.

Implicitly recognizing that there has been a sovereign immunity waiver even for constitutional claims, Defendants argue in two short paragraphs that Plaintiffs have not stated a *Bivens* claim to enforce their constitutional rights. (ECF No. 36 at pg. 14:20-23.) However, to state a *Bivens* claim, a plaintiff need only allege that the defendant acted under the authority of the federal government and the action deprived a plaintiff of an individual right under the federal constitution. *Bivens*, 403 U.S. at 397. Defendants posit that Plaintiffs did not properly name Defendant Thompson for their *Bivens* claims. (ECF No. 36 at pg. 15.) But Plaintiffs alleged that "Defendant Thompson is a federal official **for purposes of *Bivens***." (ECF No. 34 ¶¶ 74, 94) (emphasis added). From these allegations, Defendants intended to name Defendant Thompson as *Bivens* requires – in her individual capacity for her unconstitutional acts. To the extent there is any ambiguity, Defendants should be granted leave to clarify and to correct the caption.[9] Furthermore, Plaintiffs expressly preserve their arguments for a change or overruling of existing law that *Bivens* claims should be permitted directly against the agency itself notwithstanding the Supreme Court's contrary finding in *Meyer*, 510 U.S. at 486.

Finally, Plaintiffs also allege in detail how the Defendants' unconstitutional actions have deprived Plaintiffs of their property rights and money. *Bivens* authorizes the recovery of damages

[9] Defendants will also seek leave to name and/or substitute any involved lower-level officials once their identities are learned during discovery.



PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

for such constitutional violations. *Bivens,* 403 U.S. at 397 (holding that the recovery of money damages for any injuries suffered as a result of the constitutional violation). Thus, the requisite factual predicate necessary to plead a *Bivens* claim has been met here. Plaintiffs acknowledge that recognizing a *Bivens* here might be a "new context." *Egbert v. Boule*, 596 U.S. 482, 492 (2022).[10] Yet there are no factors or reasons to think that the Judiciary is less equipped than Congress to weigh the costs and benefits of a *Bivens* damages action for Appropriation Clause and non-delegation, and other separation of powers causes of action. *See id.* Congress has not provided any substitute remedy available for these types of constitutional harms. Although they cite *Egbert*, Defendants do not suggest otherwise and cannot do so now in reply. (ECF No. 36 at pg. 14.) As noted above, it would itself raise "serious constitutional" problems if there is *no* remedial mechanism for the violation of constitutional rights. *See Webster*, 486 U.S. at 603. "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

If all this were not enough, FHFA's counsel also conceded at oral argument on Daisey Trust's Motion for Preliminary Injunction that monetary damages were available so as to defeat Daisey Trust's assertion of irreparable injury. Based on its affirmative representation that monetary damages would be available later, FHFA was able to successfully avoid injunctive relief. As a consequence, FHFA must be judicially and equitably estopped from denying that monetary damages are available. *See United States v. Paulson,* 68 F.4th 528, 547 (9th Cir. 2023); *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1166 (9th Cir. 2005). Allowing FHFA to recant its affirmative representation and take inconsistent positions now would cause a serious injustice to Plaintiffs and damage the integrity of the judicial process.

b. <u>FHFA is a government actor for purposes of Plaintiffs' constitutional claims.</u>

After enlisting the *federal* foreclosure bar and advancing an entitlement to *sovereign* immunity, Defendants contend that FHFA is not a governmental actor after all. (ECF No. 36 at

[10] However, "[t]here is a split of authority whether the *Bivens* doctrine permits a plaintiff to seek injunctive relief against a federal agency." *Benetti v. United States Marshal Service*, No. 5:22-cv-05038-KES, 2023 WL 5485995 *3 (citing cases).

pg. 15.) Defendants fence-sitting is a transparent effort to put any potential plaintiff in a catch-22. But, Defendants' attempt to speak out of both sides of their mouth fails.

Relying on a 2021 First Circuit opinion, *Montilla v. Fed. Nat'l Mortg. Ass'n,* 999 F.3d 751, 757 (1st Cir. 2021), Defendants argue FHFA stepped into the shoes of Fannie Mae and Freddie Mac (and, thus, sheds its governmental character[11]) when acting as conservator and foreclosing on Plaintiffs' properties. (ECF No. 36 at pg. 15:22-25.) However, the issue of when FHFA is supposedly wearing its government hat, or its alleged "private" hat, is context specific. *See Sisti v. Fed. Hous. Fin. Agency,* 324 F. Supp. 3d 273, 282 n.8 (D.R.I. 2018), rev'd sub nom. *Boss v. Fed. Hous. Fin. Agency*, 998 F.3d 532 (1st Cir. 2021) (citing cases where FHFA acts in its government capacity). After *Montilla*, however, the Supreme Court issued its decision in *Collins,* 141 S. Ct. 1761. *Collins* held that, in the context of a separation-of-powers claim, the FHFA retained its governmental character:

> [E]ven when [the FHFA] 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 [HERA], and "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."

*Id.* at 1785–86. Ultimately, the Court held that "the FHFA clearly exercises executive power" when acting as a conservator. *Id.* at 1786.

Plaintiffs' constitutional claims are distinguishable from those alleged in *Montilla*, and other circuit precedent where FHFA was found to be "private" while performing "quintessential conservatorship tasks." That is not at the nature of *this* dispute. As explained in Section II(A)-(B), *infra*, FHFA's funding structure violates the plain text, structure, and history of the Appropriations Clause and its underlying separation-of-powers principles like the non-delegation doctrine. For these types of claims, "courts look to all the functions and powers exercised." *Fairholme Funds, Inc. v. United States,* 26 F.4th 1274 (D.C. Cir. 2022). By contrast, "outside the

[11] FHFA is indisputably an executive federal agency of the United States charged with implementing HERA. 12 U.S.C. § 4511(a) (establishing FHFA as an "independent agency of the Federal Government"); *Collins*, 938 F.3d at 590 ("FHFA is a federal agency, empowered by a federal statute, enriching the federal government. It adopted the Third Amendment with federal governmental power. And that power was executive in nature.").



PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

separation-of-powers context, courts focus on whether the agency's specific actions are governmental in nature or are, instead, commercial activities typically performed by private entities." *Id.*

Contrary to FHFA's claims, the actions being challenged here inherently involve FHFA's "functions and powers" of a governmental character – both unconstitutionally legislative and executive. As with *Collins*, FHFA's funding and spending authority comes from a special statute, and it must interpret its purported statutory authority when it acts. FHFA appropriates money like a legislature and then spends it like an executive when it directs and oversees foreclosure activities. The actions attacked here are hardly "pure" conservator tasks – they are governmental.

c. Plaintiffs plausibly allege a wrongful foreclosure claim.

Next, Defendants confusingly argue that Plaintiffs cannot obtain damages on their wrongful foreclosure claim because it must "plausibly allege some government action" and exhaust administrative remedies under the FTCA. (ECF No. 36 at pg. 16.) But Plaintiffs do not need to resort to the FTCA and, once more, *Perry* is fatal to Defendants' assertions. As described above, *Perry* explains that FHFA succeeded to Fannie's and Freddie's power to sue and be sued. 864 F.3d at 622. Consequently, the FTCA does not withdraw or limit FHFA's ability to be sued for the wrongful foreclosure claim advanced here. *See id.*

28 U.S.C. § 2679 states:

> The authority of any federal agency to sue and be sued *in its own name* shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(Emphasis added).

But "Congress has not, however, authorized the FHFA to be sued 'in its own name' by enacting a 'sue and be sued' clause specifically for the agency." *Perry Cap. LLC*, 864 F.3d at 622. "Instead, the Congress has granted the FHFA the power to be sued just as the Companies would be absent a conservatorship insofar as the agency steps into the shoes of the Companies and acts on their behalf to defend alleged breaches of their obligations." *Id.* at 623. In other words, because Plaintiffs do not need to invoke the FTCA to sue Fannie and Freddie, they do not need to invoke

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

it here to sue the FHFA. FHFA has succeeded to the sovereign immunity waivers of Fannie and Freddie and it can be sued for wrongful foreclosure just as they can be. The FTCA is wholly inapplicable. *See id*. at 622 (quoting 12 U.S.C. § 4617(b)(2)(A)(i)).[12]

The long and short of it is that FHFA cannot wholly insulate itself from judicial scrutiny as it has insulted itself from Congressional appropriations oversight. The positions FHFA advances here – that there is no check and balance on it by any other branch – is anathema to our system of government. Condoning an Executive Branch department that can unilaterally raise and spend as much as it wants while being immune from judicial review for any constitutional or legal rights violations would set a dangerous precedent and beget a constitutional crisis.

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

[12] Because one of FHFA's many positions in its pleadings is that all of the complained of actions were taken in its capacity as "conservator" and therefore it is a "private" actor, it cannot simultaneously raise administrative exhaustion –a defense reserved to the federal government. Moreover, the failure to exhaust non-judicial remedies is generally treated as an affirmative defense. *Blixeth v. Internal Revenue Services*, 2021 WL 519885 (D. Nev. Feb. 11, 2021) (citing *Jones v. Bock*, 549 U.S. 199, 212 (2007)). "The court should not dismiss a case based on an affirmative defense unless the elements of the defense appear on the face of the pleading to be dismissed." *Id.* (citing *Rivera v. Peri & Sons Farms, Inc.,* 735 F.3d 892, 902 (9th Cir. 2013)).

Moreover, to the extent necessary, Plaintiffs have alleged the necessary elements of an FTCA claim. *See Brownback v. King*, 141 S. Ct. 740, 746 (2021) ("[1] against the United States, [2] for money damages, ... [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.").

And even if FHFA can assert government defenses and immunities despite also claiming it is a "private" "independent agency," courts have long recognized that administration exhaustion is not required when doing so would be futile or involves constitutional claims. *See Fones4All Corp. v. F.C.C.,* 550 F.3d 811 (9th Cir. 2008) ("Courts have not insisted on exhaustion where it clearly be of no avail."). As the Ninth Circuit has noted: "[W]here the agency's position on the question at issue appears already set, and it is very likely what the result of recourse to administrative remedies would be, such recourse would be futile and is not required." *Wright v. United States Forestry Service,* No. CV-N-94-482-HDM, 923 F. Supp. 1295 (D. Nev. Feb. 14, 1996) (finding that exhaustion was futile in APA action though required under federal regulations). Here, it cannot be genuinely disputed that FHFA will not suspend foreclosures to wait for an appropriation from Congress. Indeed, during the pendency of Plaintiff Daisey Trust's motion for preliminary injunction, Defendants' counsel asked FHFA counsel to suspend the foreclosure against the Newburg Property and wait for the Court to rule and FHFA "decline[d]." In these circumstances, the agency's position is "already set" and exhaustion is not required.

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

## V. PLAINTIFFS ALLEGE PLAUSIBLE CLAIMS AGAINST DEFENDANTS.

### A. Plaintiffs Plausibly Allege Appropriation Clause Violations.

Article I of the Constitution grants Congress the power over the purse through the appropriations power. U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]"). The Appropriations Clause is "a bulwark of the Constitution's separation of powers" that gives Congress "exclusive power over the federal purse" as "a restraint on Executive Branch officers." *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1346-47 (D.C. Cir. 2012) (Kavanaugh, J.). The Clause is broad. It covers all "public money," including "all the taxes raised from the people[ ] as well as revenues arising from other sources." *OPM v. Richmond*, 496 U.S. 414, 427 (1990) (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1348 (3d ed. 1858)). And the Appropriations Clause not only empowers Congress. It also restricts the Executive by limiting "the disbursing authority of the Executive department," *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937), "to secure regularity, punctuality, and fidelity[ ] in the disbursements of the public money," *Richmond*, 496 U.S. at 427 (quoting STORY, *supra*, § 1348).

The Appropriations Clause is a cornerstone of the Constitution's separation of powers. As the Fifth Circuit recognized, the Constitution vested "Congress with control over fiscal matters," as the "best means of ensuring transparency and accountability to the people." *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 51 F. 4th 616, 636 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 978 (2023). This structure ensures that "the legislative department alone has access to the pockets of the people." THE FEDERALIST NO. 48 (James Madison). The Framers gave the "power over the purse" to the people's "immediate representatives" – those elected to Congress. *See* THE FEDERALIST NO. 58, at 394 (James Madison). The Constitution makes Congress "the guardian" of "the common fund of all." STORY, *supra*, § 1348. This reservation of power to Congress in turn protects "the right of the people" to be "consulted upon the disposal of the money" that the government has taken from them to pay "[a]ll [its] expenses," 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES App. 362 (1803). Thus, the appropriations power does not belong solely to Congress, but ultimately, to the people.

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

For this reason, agencies with a self-funding structure like FHFA's have recently come under constitutional scrutiny. In *CFSA*, the Fifth Circuit held that the self-funding structure of another agency, the CFPB, violates the Appropriations Clause. The Fifth Circuit drew on the text, history, and structure of the Appropriations Clause to conclude that: "The Appropriations Clause's straightforward and explicit command ensures Congress's *exclusive* power over the federal purse." 51 F.4th at 637 (internal quotation marks omitted) (emphasis in original).

The Appropriations Power is a critical part of the Constitution's separation of powers not only because it empowers the people's representatives in Congress, but it also provides a *limitation* on the Executive Branch. The Framers understood that vesting the powers of "the sword and the purse" to a single Branch "would furnish one body with all the means of tyranny." 2 ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 348-49 (2d ed. 1891) (statement of Alexander Hamilton). To avoid that result, the Constitution granted *Congress* "the power over the purse," so that Congress – and ultimately, the people – could exert "a controlling influence over the executive power." STORY, *supra*, § 530. It was Congress that could "unnerve the power of the sword by striking down the arm which wields it." *Id.* In this way, Congress can deny the Executive "the supplies requisite for the support of government," which the Framers recognized as Congress's "most complete and effectual weapon" for defeating "the overgrown prerogatives of the other branches." THE FEDERALIST NO. 58, at 394.

FHFA's self-funding structure cannot be reconciled with the text, structure, and history of the Appropriations Clause or Supreme Court separation-of-powers precedent. And this constitutional violation brings real-world consequences for the structure of American government, generally, and for the Plaintiffs, specifically.

***Text***. FHFA's structure is plainly at odds with the Constitution's clear command that Congress shall have the power over all appropriations of public funds. U.S. CONST. art. I, § 9, cl. 7. Again, the command of the Appropriations Clause is clear: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]" *Id.* Yet FHFA is funded not "through the ordinary appropriations process," *Collins*, 141 S. Ct. at 1772, but through a special

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

system, distinctive even among federal agencies, by which FHFA sets its *own* budget and seeks out its *own* funds without democratic oversight or cap. Like the removal restriction already held unconstitutional by the Supreme Court in *Collins*, Congress's attempt to place FHFA outside the constraints of the separation of powers cannot be squared with the Constitution's clear commands.

It makes no difference that the FHFA's funding scheme is itself enacted by law. FHFA's "position means that no federal statute could ever violate the Appropriations Clause because Congress, by definition, enacts them." *CFSA*, 51 F.4th at 640. Yet the Appropriations Clause does not say that "all funding systems must be enacted by law." The Clause says that "*[n]o Money shall be drawn from the Treasury*, but in Consequence of *Appropriations* made by Law[.]" U.S. CONST. art. I, § 9, cl. 7 (emphasis added). The text uses the word "appropriations." This means periodic payments disbursed from the Treasury, generally for a specific purpose and for a specific time period. Defendants cannot deny that HERA places FHFA's funding system squarely outside of the appropriations process: "The amounts received by [FHFA] from any assessment under this section *shall not be construed* to be Government or public funds or appropriated money." 12 U.S.C. § 4516(f)(2) (emphasis added); *see also Collins*, 141 S. Ct. at 1772 ("[T]he FHFA is not funded through the ordinary appropriations process."). HERA's text makes clear that "Congress expressly renounced its check 'as a restriction upon the disbursing authority of the Executive department.'" *CFSA*, 51 F.4th at 636 (quoting *Cincinnati Soap*, 301 U.S. at 321). FHFA's funding system is thus inherently at odds with the Constitution's clear mandate that Congress have plenary control of public funds. *See* U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law."). Accordingly, Plaintiffs have properly stated an Appropriations Clause challenge.

***History***. FHFA's funding structure is a historical anomaly. In HERA, Congress expressly disavowed responsibility for how this agency raises and spends money: "***The amounts received by [FHFA] from any assessment under this section shall not be construed to be Government or public funds or appropriated money***." 12 U.S.C. § 4516(f)(2) (emphasis added). Such congressional disclaimers of any exercise of authority under the Appropriations Clause are

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

extraordinarily unusual. *See* Charles Kruly, *Self-Funding and Agency Independence*, 81 GEO. WASH. L. REV. 1733, 1735-36 (2013). Absent express statutory language to the contrary, courts do not "lightly presume that Congress meant to surrender its control over public expenditures by authorizing an entity to be entirely self-sufficient and outside the appropriations process." *Am. Fed'n of Gov't Emps., AFL-CIO, Local 1647 v. FLRA*, 388 F.3d 405, 410 (3d Cir. 2004); *see generally* GAO, PRINCIPLES OF FEDERAL APPROPRIATION LAW, at 2-22 to 2-27 (4th ed. 2016). Few propositions of political philosophy were more widely accepted at the time of the Founding than the notion that the appropriations power should be exercised exclusively by the legislature – the branch of government closest to the people. *See* E. JAMES FERGUSON, THE POWER OF THE PURSE; A HISTORY OF AMERICAN PUBLIC FINANCE, 1776-1790 111 (1961) ("No maxim of political philosophy was so widely accepted in Revolutionary times as that the 'power which holds the purse-strings absolutely, must rule.'"'); *see also* STORY, supra, § 1348 (warning that if Congress failed to decide how and when money should be used, "the executive would possess an unbounded power over the public purse of the nation; and might apply its moneyed resources at his pleasure").

History also supports the ordinary understanding of the word "appropriations" as a regular, time-limited, purpose-specific disbursement by Congress. "As Alexander Hamilton explained, no money can be expended, but for an *object*, to an *extent*, and *out of a fund*, which the laws have prescribed. The extent or amount of funding modifies and shapes the object funded." Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1354 (1988) (cleaned up) (emphasis in original) (citing *Explanation, Nov. 11, 1795, in* 8 A. HAMILTON, WORKS 122, 128 (H.C. Lodge ed., 1885)). Plus, elsewhere in the U.S. Code, the law presumes that an appropriation is a time-limited disbursement of funds for a specific purpose. *See, e.g.*, 31 U.S.C. § 1301(a) ("Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."); 31 U.S.C. § 1502(a) ("The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period[.]").

Indeed, "the general concept of some time limitation is implicit in the concept of

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

'Appropriations,' in order to make the specification of object and amount meaningful." Stith, *supra*, at 1354 n.53. This has been true throughout American history. "From the First Congress, operating funds have usually been appropriated annually." *Id.* Thus, it makes no difference that Congress's abdication of the appropriations power was enacted by law through HERA's passage. As demonstrated by the only reasonable understanding of the constitutional text, an abdication of the appropriations power is not itself an appropriation.

Defendants scour the statute books looking for a historical analogue. (ECF No. 36 at pg. 18-19.) But their sole exemplar, the Post Office Act of 1792, is markedly different. Section 4 required the Postmaster General to "render to the secretary of the treasury, a quarterly account of all the receipts and expenditures in the said department, *to be adjusted and settled as other public accounts, and shall pay, quarterly, into the treasury of the United States, the balance in his hands*." 1 Stat. 232, 234 (emphasis added). FHFA's accounts and expenditures are not "adjusted and settled as other public accounts" and FHFA's Director does not have to pay "the balance in [her] hands" to the treasury *ever*. Constitutional history supports Plaintiffs.

***Structure***. The Constitution's separation of powers structure establishes that the 2008 Congress cannot give away the constitutionally mandated appropriations oversight in perpetuity. For one, this infringes on the right of *future* Congresses to exercise oversight over the agency. For another, this infringes on the right of the people to oversee public spending. After all, the Appropriations Clause not only empowers Congress. It also places a *limitation* on Congress by requiring that all appropriations be made through the arduous process of law, that is, bicameralism and presentment. "While section 8 of article I enumerates the powers of the legislative branch, the appropriations clause in section 9 is not a grant of power. Rather, the appropriations clause affirmatively obligates Congress to exercise a power already in its possession." Stith, *supra*, at 1348.

The Appropriations Clause is found in Article I, Section 9. Every other provision of that section of the Constitution is an express *denial* of powers to Congress. The Framers saw fit to place the Appropriations Clause alongside other vital limitations on Congress's powers – including, among other things, the prohibitions on ex post facto laws and peacetime suspensions

of the writ of habeas corpus. True, the Appropriations Clause gives Congress the power of the purse. But it also places an important limitation on *how* Congress can exercise that power. "Since legislative appropriations power is rooted in article I, section 8, we may infer that a primary significance of the appropriations clause in section 9 lies in what it takes away from Congress: the option *not* to require legislative appropriations prior to expenditure." Stith, *supra*, at 1349 (emphasis in original). "If the Constitution thus strictly forbids 'executive appropriation' of public funds, the exercise by Congress of its power of the purse is a structural imperative." *Id.* In other words, Congress can neither freely appropriate money at will nor simply cede the power to appropriate money entirely.

While FHFA contends that only military appropriations are time-limited, (ECF No. 36 at pg. 20), other nearby constitutional provisions further prove that "appropriations" cannot simply mean any one-time passage of law. In the very same provision as the Appropriations Clause, the Constitution states: "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." U.S. CONST. art. I, § 9, cl. 7. The requirement envisions an ongoing, periodic accounting of public funds by Congress, not a complete abdication of appropriations oversight. Likewise, the Constitution's other use of the word "appropriations" requires the same conclusion. Article I provides that Congress may use funds to "raise and support Armies," but that "no Appropriation of Money to that Use shall be for a longer Term than two Years." U.S. CONST. art. I, § 8, cl. 12. Here again, the Constitution uses the word "Appropriation" to mean a periodic disbursement of funds by Congress for a specific purpose—not a freewheeling, perpetual grant of authority to levy fees of any amount and spend the proceeds without oversight. Congress cannot set it and forget it.

If Congress were able to simply "appropriate" complete budgetary independence to the Executive Branch, as the 2008 Congress attempted to do with FHFA, these constitutional requirements would be illogical and meaningless. Taking the FHFA's arguments to its logical conclusion, Congress could pass one bill allowing all Executive Branch departments to raise and spend their own funds and extricate Congress entirely from the appropriations process. FHFA fails to identify any limiting principle that might prevent that obviously unconstitutional outcome.

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

***Precedent***. Supreme Court precedent further supports Plaintiffs' position. The Supreme Court has repeatedly emphasized that "the separation of powers does not depend . . . on whether the encroached-upon branch approves the encroachment." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497 (2010) (cleaned up). For this reason, "one Congress cannot yield up its own powers, much less those of other Congresses to follow," *NLRB v. Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in the judgment) (cleaned up); *accord Clinton v. City of New York*, 524 U.S. 417, 446-47 (1998). Even through the passage of law, Congress "may not transfer to another branch powers which are strictly and exclusively legislative." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality op.) (cleaned up). This is also why injured parties have an equitable right of action to redress separation of power constitutional violations. *See Free Enter. Fund*, 561 U.S. at 491 n.2; *see also* 5 U.S.C. § 706(2)(A)-(B). The Fifth Circuit's opinion in *CFSA* – now at the Supreme Court on certiorari – is consistent with precedent.

Defendants cling to the Second Circuit's conflicting decision in *CFPB v. Law Offices of Crystal Moroney*, 63 F.4th 174 (2d Cir. 2023). (ECF No. 36 at pgs. 7, 20-22.) But *Moroney* confirms only that FHFA's funding system is, if anything, more problematic than that of the CFPB. In that case, the Second Circuit considered a challenge to the CFPB's funding system but declined to follow the Fifth Circuit's persuasive opinion in *CFSA*. The Second Circuit instead concluded that Congress adequately "prescribed the *purpose*…, *limit*, and *fund*" of CFPB's appropriation as required by Founding-era text. *Moroney*, 63 F.4th at 183 (quoting 7 ALEXANDER HAMILTON, THE WORKS OF ALEXANDER HAMILTON 532 (John C. Hamilton ed. 1851)). The Second Circuit did not consider 12 U.S.C. § 5497(c)(2) which, like 12 U.S.C. § 4516(f)(2), states "[f]unds obtained by or transferred to the Bureau Fund *shall not be construed* to be Government funds or appropriated monies." (emphasis added); *compare CFSA*, 51 F.4th at 639 (discussing 12 U.S.C. § 5497(c) and distinguishing CFPB from the Federal Reserve).

Indeed, with respect to the *limit* of the appropriation, the Second Circuit stressed CFPB's funding cap of twelve percent of the Federal Reserve's revenue per annum as evidence that Congress did not "abdicate its appropriation obligation entirely." *Moroney*, 63 F.4th at 183; *see*

12 U.S.C. § 5497(a)(2)(A). By contrast, the sole limitation on FHFA's funding power is its Director's unbounded judgment of what is a "reasonable" amount to siphon from the *$8 trillion* in assets it oversees. *See* 12 U.S.C.A. § 4516(a). This stands in stark contrast to CFPB, which has at least *some* ceiling on its expenditures. Thus, even by the standard evinced in *Moroney*, FHFA's uncapped self-funding system runs afoul of the Appropriations Clause.

Defendants' reliance on similar cases affirming CFPB's structure is equally unavailing. (ECF No. 36 at pgs. 19-20.) To start, the D.C. Circuit has only considered and rejected a "for cause" removal challenge to CFPB's single Director structure, never fully reaching the Appropriations Clause question. *See PHH Corp. v. CFPB*, 881 F.3d 75, 79 (D.C. Cir. 2018) (en banc) ("The ultimate purpose of our constitutional inquiry is to determine whether the . . . agency in question, impedes the President's ability under Article II of the Constitution . . . ."), *abrogated by Seila L. LLC*, 140 S. Ct. at 2183. And that opinion's approach to separation of powers issues is at odds with subsequent Supreme Court precedent. *See Seila L. LLC*, 140 S. Ct. at 2183. As a result, there is no significance to dicta from *PHH Corp.*'s analysis of whether CFPB's funding system had any "salient effect on the President's power." *PHH Corp.*, 881 F.3d at 96.

FHFA's unprecedented conservatorship of Fannie Mae and Freddie Mac also makes FHFA different from other financial regulators with similar funding mechanisms. Through the conservatorship, FHFA assumed plenary control of Fannie Mae and Freddie Mac's "rights, titles, powers, and privileges" and those "of any stockholder, officer, or director" with respect to the companies and their assets. *See* 12 U.S.C. § 4617(b)(2)(A)(i). In effect, FHFA can use its funding privilege to levy unlimited assessments on Fannie Mae and Freddie Mac, and then write itself checks from the companies' bottomless pit of money. And if either company develops a grievance as to FHFA's conduct, the conservatorship precludes them from making it known. None of the other financial regulators referenced by Defendants enjoy such outright control of the regulated entities from which they draw their funding. And none may self-fund through unlimited assessments on those entity's *$8 trillion* in assets. Defendants' proffered comparisons are inapposite.

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

"This novel cession by Congress of its appropriations power" effectively reverses the baseline democratic process the Founders sought to protect. *CFSA*, 51 F.4th at 639. Though the Constitution makes Congress "the guardian" of "the common fund of all", STORY, *supra*, § 1348, FHFA's current structure shields the agency from the productive friction of petitioning for funding through bicameralism and presentment.

***Consequences***. FHFA tries to frighten Court away from its constitutional duty to review and declare unconstitutional acts unconstitutional. The Supreme Court rejected similar scare tactics in *Collins*. There, amicus threatened that if the Court held that FHFA's removal restriction was unconstitutional, then "the decision will 'call into question many other aspects of the Federal Government.'" *Collins*, 141 S. Ct. at 1787 n.21. The Court was unmoved. It held the removal restriction unconstitutional and stated, "[n]one of these agencies is before us, and we do not comment on the constitutionality of any removal restriction that applies to their officers." *Id.* The sky has not fallen since *Collins*. This Court should follow the Supreme Court's lead. The FHFA's non-foreclosure activities are not at issue let alone the activities or funding of other agencies. Allowing this litigation to proceed will not crash the mortgage market or the government.

But the consequences of doing nothing are not academic. If FHFA's "funding structure is constitutionally ignored, this will not be the last federal agency to assume a level of fiscal independence that shields it from any effective public accountability." *CFPB v. All Am. Check Cashing, Inc.*, 33 F.4th 218, 237 (5th Cir. 2022) (Jones, J., concurring). "Other powerful agencies are already champing at the bit for such budgetary independence," *id.*, and FHFA's funding scheme "provides a blueprint" for undermining the "system of checks and balances," *Free Enter. Fund*, 561 U.S. at 500. Leviathan federal agencies like FHFA exercise significant power over individuals and businesses like Plaintiffs, as is evident from the facts of this case. The Constitution's careful system of separation of powers is key to providing accountability and limiting that otherwise unchecked authority.

**B. Plaintiffs Allege a Plausible Nondelegation Claim.**

Defendants contend that Plaintiffs have not alleged a violation of the non-delegation doctrine. (ECF No. 36 at pgs. 21-22.) The Constitution provides that "[a]ll legislative Powers

herein granted shall be vested in a Congress of the United States." U.S. Const., art. I, § 1. This provision vests all legislative power in Congress. The text does not permit any delegation of those powers. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). The grant of power is exclusive to Congress and absolute. *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 69 (2015) (Thomas, J., concurring). Even so, the Supreme Court has held that Congress may delegate some of its legislative power if "Congress 'lay[s] down by legislative act and intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)).

Defendants assert that 12 U.S.C. § 4516(a) does not violate the non-delegation doctrine because Congress generically directed the FHFA to only spend "sufficient" and "reasonable" amounts. (*See* ECF No. 36 at pgs. 21-22.) The statute provides "[t]he Director shall establish and collect from the regulated entities annual assessments in an amount not exceeding the amount *sufficient* to provide for *reasonable* costs (including administrative costs) and expenses of the Agency." 12 U.S.C. § 4516(a) (emphasis added). Under the statute, the Director has complete and unbounded discretion to determine what is "sufficient" and what is "reasonable." Nowhere does the statute provide any intelligible principles or guidelines to constrain the Director's ability to deem an amount sufficient or reasonable. There is no standard against which Congress or the courts can gage whether the amount extorted from the entities and spent is "sufficient" or "reasonable."

FHFA argues that the intelligible principle is that "FHFA is to collect no more than necessary to provide for the costs of the Agency." (ECF No. 36 at pg. 21.) But this is a circular principle at best. It is no more than saying "the reasonable amount is the amount the Director determines, and it is reasonable only because the Director has determined it." The statutory categories of some allowable expenses do not avoid the constitutional infirmity. (ECF No. 36 at pg. 22.) Those expenses are not exclusive and there is no standard to evaluate when enough is enough for those items. The broad statutory language allows the Director to spend as much as she wants on whatever she wants.

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

12 U.S.C. § 4516 more closely resembles one of the few cases where the Supreme Court has found a delegation problem. (*Cf.* ECF No. 36 at pg. 22.) In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 521-22 (1935), Congress enacted the National Industrial Recovery Act which authorized the President to approve "codes of fair competition." Among other things, the act permitted the President to implement a code that "will tend to effectuate the policy" of the act and allowed the President to impose conditions or grant exceptions "for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest….As the President in his discretion deems necessary to effectuate the policy herein declared." Under that wide grant of authority, the President issued a "Live Poultry Code" through executive order. *Id*. at 525. Certain defendants challenged the code as an unlawful delegation of legislative authority.

The Supreme Court examined "whether Congress in authorizing 'codes of fair competition' has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others." *Id*. at 530. The Court found that Congress did not impose sufficient constraints on the President. The Court explained that "the President in approving a code may impose his own conditions, adding to or taking from what is proposed, as 'in his discretion' *he thinks necessary 'to effectuate the policy' declared by the act*." *Id*. at 538-39 (emphasis added). The President could add, subtract, or modify conditions as he pleased and there was no limit on the conditions. *Id*. at 539. The President had limitless discretion on a wide variety of activities. *Id*.

The Court held "[s]uch a sweeping delegation of legislative power finds no support in the decisions upon which the government especially relies." *Id*. The act was "without precedent." *Id.* at 541. It supplied "no standards, aside from the statement of the general aims." *Id*. Because of the "virtually unfettered" discretion imparted on the President, the Court held that the law was "an unconstitutional delegation of legislative power." *Id*. at 542.

The same is true with 12 U.S.C. § 4516. The Director has unfettered discretion to collect whatever amounts she thinks are needed. The statute merely instructs the Director to "collect from the regulated entities…an amount sufficient to provide for reasonable costs...and expenses of the Agency." 12 U.S.C. § 4516(a). But the words "sufficient" and "reasonable" are not intelligible

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

principles in and of themselves. The statute specifies some functions to spend money on but the Director can add or subtract to those activities and increase FHFA's budgets as she wishes. No one but the Director decides what the FHFA *cannot do*. And if the Director overshoots the amount of actual expenses, the agency holds the funds over. 12 U.S.C. § 4516(a)(3). The Director can also increase the amounts collected on a whim. 12 U.S.C. § 4516(c)(3). Thus, the Director has an incentive to reap more than needed and no incentive to accurately project. There are no guideposts, factors, or legal considerations so the Director and the public know when too much is too much. Unlike other agencies (like the CFPB) where there is some ceiling on the amounts accumulated, the FHFA has no cap or limit on the amount generated or spent. Without limiting principles from Congress, FHFA can amass and waste limitless funds. The Director is accountable to no one. The Supreme Court has never approved a broad, unrestricted delegation to raise and spend money in circumstances like these. The FHFA's novelty in the Nation's history is a strong indicator of its unconstitutionality.

**C. Plaintiffs Have Stated a Plausible Wrongful Foreclosure Claim.**

Plaintiffs' amended complaint alleges a cause of action for wrongful foreclosure as to the second and third plaintiff-member classes. (ECF No. 34 ¶¶ 104-108.) Class 2 includes property owners who were forced to repurchase their already lawfully owned property at a foreclosure sale, while Class 3 includes those property owners who were unable to repurchase their property after FHFA foreclosed. (*Id.* ¶ 16(b)-(c).)

Defendants generically argue "Plaintiffs have not alleged the necessary facts of a common-law wrongful-foreclosure claim." (ECF No. 36 at pg. 23.) Relying on district court opinions arising from HOA disputes, which only challenged the validity of liens against the subject properties, Defendants argue that Plaintiffs were required to plead whether the debtor was in default in order for a wrongful foreclosure claim to survive. (*See id.*) However, Defendants construe these HOA-specific cases too narrowly. "Wrongful foreclosure claims do not require particular elements, since a party may challenge a foreclosure sale in various ways." (ECF No. 34 ¶ 105 citing *Silvestre v. MTC Fin., Inc.*, No. 2:14-cv-01385-RFB-NJK, 2015 WL 5830818, at *4 (D. Nev. Oct. 5, 2015).)

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

Here, these two Classes' "wrongful foreclosure claim challenges the authority behind the foreclosure." *McKnight Family, LLP v. Adept Mgmt.*, 129 Nev. 610, 616, 310 P.3d 555, 559 (2013) (citing *Collins v. Union Fed. Sav. & Loan,* 99 Nev. 284, 304, 662 P.2d 610, 623 (1983), *abrogated on other grounds*). As with the potential marijuana prosecutions in *McIntosh* discussed *supra*, it is immaterial whether the original note holder was or was not in default. Regardless of any default and ability to foreclose under another hypothetical set of facts, FHFA lacked a constitutional source of funds to direct or oversee the foreclosure when they occurred. Even though Congress might appropriate funds for the foreclosures in the future, Congress had not done so at the time of the injuries to Classes 2 and 3 and threatened injury to Class 1. As a result, Defendants had no lawful authority to foreclose when they did. *See McIntosh*, 833 F.3d at 1168-79. Therefore, Plaintiffs allege all the required elements.

Plaintiffs allege that a wrongful foreclosure occurred when Defendants directed and controlled the foreclosures without constitutional authority. (ECF No. 34 ¶ 105, ¶ 16(b)-(c).) The amended complaint avers that "FHFA's efforts to control, manage, supervise, direct, and/or fund the foreclosure on Representative Plaintiffs' Properties and their similarly situated class members are unconstitutionally funded and violate the Appropriations Clause, Separation of Powers and Nondelegation Doctrines [and] [a]s such, the foreclosure actions constitute a wrongful foreclosure as they lack authority to carry out those actions." (*Id.* ¶ 106.) Defendants cannot avoid liability by hiding behind the agents they control. The amended complaint also alleges that "Members of proposed Classes 2 and 3 are entitled to compensatory damages for the amounts they were forced to spend to keep their properties in the face of FHFA's unconstitutional and wrongful foreclosures and/or the value of the properties (and associated investments) that they lost as a result of the FHFA's unconstitutional and wrongful foreclosures." (*Id.* ¶ 108.) Accordingly, Plaintiffs have plausibly alleged a wrongful foreclosure claim at this stage.

**D. Plaintiffs Have Stated Plausible *Bivens* and APA Claims.**

With little analysis, Defendants argue that Plaintiffs' claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971) ("*Bivens*") and the APA are insufficiently plead. (ECF No. 36 at pgs. 23-24.)

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

As discussed above, Plaintiffs have plausibly pled a *Bivens* claim. To state a *Bivens* claim, a plaintiff need only allege that the defendant acted under the authority of the federal government and the action deprived a plaintiff of an individual right under the federal constitution. *Bivens*, 403 U.S. at 397. Plaintiffs allege that Defendant Thompson is a federal official for purposes of *Bivens* and that she is "responsible for implementing and overseeing its operations." (ECF No. 34 ¶¶ 13, 74, 94; *see, supra,* notes 9 & 10 and accompanying text.) Plaintiffs allege in detail all of FHFA's unconstitutional actions, directed and overseen by Thompson, which deprived Plaintiffs of their property and caused compensatory damages for Class Members 2 and 3. (*Id.* ¶¶ 13, 108.) *Bivens* authorizes the recovery of damages for constitutional violations and Defendants have waived any immunity that might apply. *Bivens,* 403 U.S. at 397 (holding that the recovery of money damages for any injuries suffered as a result of the constitutional violation). *Bivens* also provides another avenue for injunctive relief. (*See supra*, note 10.) Thus, the requisite factual predicate necessary to plausibly plead a *Bivens* claim is met.

As a parting afterthought, Defendants contend in about one sentence that "Plaintiffs do not plead an APA claim…because no specific agency action is alleged and FHFA's statutory funding mechanism is constitutional." (ECF No. 36 at pg. 24.) But Plaintiffs have alleged all the required elements of an APA claim. The APA authorizes this Court to review agency action and determine whether Defendants' conduct is "contrary to constitutional right, power, privilege, or immunity" or "in excess of statutory jurisdiction, authority, or limitations." *See* 5 U.S.C. § 706(2)(B)(C). The Court is authorized and required to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. The Court must then "hold unlawful and set aside agency action, findings, and conclusions found to be":

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706(2).

The amended complaint seeks review of "FHFA's self-funding and spending mechanisms, which are outside of the congressional appropriations process" for a determination of "whether they violate the Constitution's Appropriations Clause of Article I, Section 9, Clause 7, as well as the non-delegation doctrine and other separation-of-powers principles." (ECF No. 34 ¶ 17.) As stated in the amended complaint, "these legal issues will, in turn, determine whether FHFA may either foreclose on the class members (Class 1) or otherwise owe compensation to the class members for constitutional violations and wrongful foreclosures (Classes 2 and 3)." (*Id.*) Paragraphs 23-40 of the amended complaint detail, as analyzed above, how Defendants' actions have been (and continue to be) unlawful as they operate and direct foreclosures without an appropriation or other guidance from Congress. The agency action is the expenditure of unappropriated funds to threaten, direct, supervise, control, manage, participate, and complete the foreclosures against the Representative Plaintiffs. (ECF No. 34 ¶¶ 84-86, 100-102.)

Courts have held that "[t]he Administrative Procedures Act (APA) applies to the decision to foreclose, as foreclosure by a federal agency under the National Housing Act is typically treated as an administrative decision." *United States v. Brown,* No. CIV.A. 13-4530, 2014 WL 657518, at *1 (E.D. Pa. Feb. 20, 2014) (citing cases); *United States v. Golden Acres, Inc.,* 520 F. Supp. 1073, 1077 (D. Del. 1981) (concluding that a foreclosure decision is not immune from judicial review finding a court may review a decision committed to agency when there are "charges that the agency lacked jurisdiction, that the agency's decision was occasioned by impermissible influences, such as fraud or bribery, or that the decision violates a constitutional, statutory or regulatory command."). Likewise, Plaintiffs are challenging agency actions that are unconstitutional and in excess of the FHFA's lawful authority. Plaintiffs ask the Court to enjoin those actions, hold and declare them unlawful, and set them aside. 5 U.S.C. § 706(2). These allegations and prayers for relief plausibly state claims for relief under the APA.

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

## VI. ALTERNATIVELY, PLAINTIFFS SEEK LEAVE TO AMEND THE COMPLAINT

In the alternative, should the Court determine that the amended complaint is deficiently pled, Plaintiffs seek leave to amend pursuant to Federal Rule of Civil Procedure 15. "There is a strong presumption against dismissing an action for failure to state a claim." *Kwiatkowski v. Hartford Fire Ins. Co.*, No. 2:08-cv-730-BES-LRL, 2009 WL 10679299 (D. Nev. Jan. 29, 2009) (citing *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted). Generally, a party may amend its pleading once "as a matter of course" within 21 days after service or within 21 days after service of a responsive pleading or motion under Rule 12(b), (e), or (f). Fed. R. Civ. P. 15(a)(1). Otherwise, "a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). "The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). "The court considers five factors [under Rule 15] in assessing the propriety of leave to amend – bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint." *United States v. Corinthian Colls.,* 655 F.3d 984, 995 (9th Cir. 2011).

If necessary, Plaintiffs seek leave to amend their complaint to cure any deficiencies the Court may determine exists after ruling on Defendants' Motion to Dismiss. While Plaintiffs dispute any amendment is necessary, Plaintiffs respectfully request another opportunity to amend since additional claims and parties have been added to this Amended Complaint. Plaintiffs should – particularly be granted any necessary leave after the Supreme Court issues its opinion in *CFPB v. CFSA*, No. 22-448 (cert. granted Feb. 27, 2023). Any amendment is sought in good faith and there has been no delay since the case has only recently commenced and there have been no prior amendments to the complaint with respect to certain Plaintiff class representatives. Amendment is also not futile because none of Defendants' proffered defenses bar Plaintiffs' amended complaint. Therefore, Plaintiffs respectfully request the opportunity to amend its complaint, if necessary, and that dismissal, if any, be made without prejudice.

## VII. CONCLUSION

For these reasons, Plaintiffs respectfully request the Court deny Defendants' Motion to Dismiss and allow discovery to proceed or, in the alternative, grant leave to amend.

Dated this 17th day of January, 2024.

PISANELLI BICE PLLC

By: */s/ Jordan T. Smith*
Jordan T. Smith, Esq., #12097
Brianna Smith, Esq., #11795
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

*Attorneys for Plaintiffs and Proposed Classes*

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101