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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; and SANDRA L. THOMPSON, in her official capacity as Director of the Federal Housing Finance Agency,

Defendants.

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

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

The Federal Housing Finance Agency ("FHFA"), an independent agency of the United States, and its Director Sandra L. Thompson, in her official capacity, respectfully reply in support of their motion to dismiss this action with prejudice ("Motion").

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INTRODUCTION

The Court has already held that Plaintiffs' core theory—that FHFA's statutory funding mechanism violates the Appropriations Clause and that as a result, all foreclosures on Fannie Mae or Freddie Mac loans must cease—is unlikely to succeed on the merits. That was an understatement; Plaintiffs' theory lacks any material support in precedent, history, or practical reality. The Court should take the next logical step and dismiss this action with prejudice.

Defendants' Motion established that Plaintiffs' sweeping challenge to a federal agency and its Director fails as a matter of law. Several threshold issues bar this action—namely, that Plaintiffs lack standing, their claims are precluded, and the Court lacks jurisdiction to award the requested relief. Plaintiffs' 44-page opposition does not cure these fatal flaws, and instead only demonstrates that Plaintiffs cannot plead a viable claim.

As an initial matter, Plaintiffs fail to overcome the insurmountable threshold hurdles facing their lawsuit. For example, Plaintiffs' efforts to contort their way around claim-preclusion doctrine—feints and leaps befitting of a Cirque du Soleil performance—are doomed to fail. Plaintiffs' suggestion that the Prior Quiet-Title Actions had nothing to do with foreclosure is fanciful. Those actions all turned on Plaintiffs' futile attempts to attack the validity of federally protected deeds of trust—an obvious tactic to block non-judicial foreclosures on properties that embodied the collateral securing defaulted mortgage loans owned by the Enterprises. More specifically, the cases turned on whether the deeds of trust had been extinguished based on state law or were preserved because FHFA's placement of the Enterprises into conservatorships activated HERA's preemptive protections. Plaintiffs' contention that they could not have raised their Appropriations Clause challenge in those cases is therefore equally implausible: If Plaintiffs were correct that FHFA could not validly take any action that required an expenditure of funds, the deeds of trust would not have been protected from extinguishment because FHFA could never have put the Enterprises into conservatorships and HERA would not apply. Plaintiffs could have raised their Appropriations Clause argument then but did not; preclusion bars them from doing so now.

But even if Plaintiffs' claims could properly be asserted, they would fail on the merits. As demonstrated in FHFA's Motion, the Agency's funding mechanism conforms with precedent and practice since this nation's founding, and reflects a structure that has become only more common since that time, particularly for financial-institution regulators. The most conclusive evidence that Plaintiffs' theory lacks merit comes from the founding era itself. The second Congress—populated by many of the Constitution's Framers—enacted a statute that funds a federal agency using a mechanism nearly identical to the one Plaintiffs claim is unconstitutional. Specifically, the Post Office Act of 1792 authorized the Postmaster General to collect funds directly—rather than through tax receipts paid into the Treasury—and to spend funds on such matters within the agency's broad ambit as he saw fit, and in such amounts as he deemed reasonable—"expedient," in the language of the day—precluding only the retention of any surplus beyond the amounts deemed reasonable for fulfilling the Office's statutory responsibilities. Plaintiffs' position seems to be that those very same attributes make FHFA's funding mechanism unconstitutional.

In the end, Plaintiffs ask this Court to disregard history and raze an entire federal agency, all to forestall lawful and long-overdue foreclosures, despite Plaintiffs having paid nothing—not a penny—toward hundreds of thousands of dollars of judicially validated liens that have encumbered the properties continuously over the years since Plaintiffs acquired them for pennies on the dollar relative to fair-market value.

This Court should decline Plaintiffs' request and dismiss this action with prejudice.

ARGUMENT

I. INSURMOUNTABLE THRESHOLD ISSUES BAR PLAINTIFFS' CLAIMS.

A. Plaintiffs lack standing to bring this action.

The parties do not dispute that, in order to establish standing, Plaintiffs must show an "injury in fact" that is "fairly traceable" to Defendants' conduct and would likely be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). But as demonstrated in Defendants' Motion, these requirements are not met here. Plaintiffs lack standing because they have not pleaded a cognizable injury. *See* Mot. at 7. That is because the only alleged harm is self-inflicted—i.e., the result of Plaintiffs' own decision to buy investment properties encumbered by federally protected liens under HERA and not to pay off the underlying defaulted loans. This sort of self-inflicted injury is insufficient to establish standing. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976).

Plaintiffs do not even address this point in their Opposition, let alone refute it. Rather than address the argument Defendants actually made, Plaintiffs attack a straw argument that Defendants do not assert: "Plaintiffs have no injury in fact because the FHFA might be able to properly effectuate a foreclosure if the agency were properly funded at some unknown point in the future." Opp. at 10. But nowhere do Defendants make this argument—not at the pages to which Plaintiffs cite or anywhere else in the Motion. By failing to oppose Defendants' actual argument that Plaintiffs' only alleged injury is self-inflicted, Plaintiffs effectively concede that they lack Article III standing. *See Moore v. Ditech Fin.*, No. 2:16-cv-1602-APG-GWF, 2017 WL 2464437, at *2 (D. Nev. June 7, 2017). Plaintiffs lack standing on this basis alone.[1]

Even if the alleged injury were not self-inflicted, Plaintiffs have failed to establish that it is traceable to FHFA's funding. Indeed, as established in Defendants' Motion, courts have held that, in order to obtain relief for an alleged separation-of-powers violation, the *alleged violation itself* must have caused the supposed injury. *See* Mot. at 7-8 (discussing *CFPB v. Law Offs. of Crystal Moroney, P.C.*, 63 F.4th 174 (2d Cir. 2023); *CFSA v. CFPB*, 51 F.4th 616 (5th Cir. 2022)). In other words, Plaintiffs here must demonstrate that their alleged injury would not have happened "*but for*" FHFA's funding mechanism. *Crystal Moroney*, 63 F.4th at 180 (emphasis in original). Plaintiffs make no attempt whatsoever to establish this requirement in their Opposition. That is because there is no causal link between the alleged constitutional defect (assessment-based funding) and the complained-of activity (lawful foreclosures performed by the Enterprises or their servicers to collect on defaulted mortgage loans). *See* Mot. at 7-8. Foreclosure by the Enterprises or their servicers would be warranted and lawful even if FHFA's funding went to zero, or if FHFA simply took an indefinite hiatus, tomorrow. Plaintiffs' theory fails on this basis alone.

In response, Plaintiffs rely on *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016).

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[1] Plaintiffs' failure to establish injury is even more glaring for Plaintiff Daisey Trust, the putative representative of a class that purchased their own properties out of foreclosure. *See* Opp. at 10. Daisey Trust was not injured by this foreclosure, it benefitted: The foreclosure allowed Daisey Trust to acquire clean title by paying *substantially less* than the amount of the lien.

But not only is *McIntosh* inapposite, it illustrates the lack of causal connection here. There, a group of criminal defendants sought to dismiss indictments and enjoin federal prosecution of certain marijuana-related offenses because Congress passed an appropriations rider *explicitly* mandating that DOJ funds cannot be used to interfere with States' own marijuana laws. *Id.* at 1172. The court sided with the defendants and held that an agency cannot take an action that Congress expressly forbids it from taking. In doing so, the court ruled that the defendants had standing to seek the requested relief "because their potential convictions constitute concrete, particularized, and imminent injuries, which are caused by their prosecutions and redressable by injunction or dismissal of such prosecutions." *Id.* at 1174. The causal link supporting standing in *McIntosh* was clear: The action complained of (DOJ prosecution) was directly linked to the harm (possible conviction). No third parties were involved, and no federal prosecutions would take place without funding from the government. Here, unlike *McIntosh*, Congress provided FHFA with a mechanism for funding and with ample authority to do everything Plaintiffs accuse it of doing. And the alleged harm at issue in the present lawsuit (completed or threatened foreclosures) is done by third parties (the Enterprises and their servicers), and those foreclosures undoubtedly would take place even if FHFA did not exist.

Plaintiffs also rely on "HERA's succession clause" to suggest that all Enterprise foreclosures can be attributed to FHFA because FHFA "has the power to 'take over the assets of and operate,' 'perform all function[s] of,' and 'preserve and conserve the assets and property of' Fannie Mae and Freddie Mac.'" Opp. at 12 (citing 12 U.S.C. § 4617(b)(2)(B)). But Plaintiffs cannot point to a single FHFA action that is causally linked to the specific foreclosures complained of; that is, Plaintiffs have not identified and cannot identify a single dollar FHFA must raise and spend before a foreclosure could proceed, because there is none. Without doing so, Plaintiffs cannot satisfy the traceability requirement of standing.

Plaintiffs cite several statements by Fannie Mae and FHFA from other, unrelated litigation, press releases, and congressional testimony to urge that FHFA must have taken *some* action "directly tied to Plaintiffs' respective injuries" here. Opp. at 13-15. But the statements are no more than descriptions of the agency's general regulatory authority. *See, e.g.*, Opp. at 13 (quoting Fannie Mae as having "contend[ed that] 'the Federal Housing Finance Agency regulates [Fannie Mae's] mortgage and foreclosure activities.'" (citation and emphasis omitted)). If FHFA's mere regulatory *authority* were a sufficient causal nexus, a defect in the Agency's funding mechanism could paralyze the entire U.S. housing finance system, rendering invalid all actions by all entities regulated by FHFA—Fannie Mae, Freddie Mac, and the entirety of the Federal Home Loan Bank System—whether in conservatorship or not, regardless of FHFA's level of actual involvement, and regardless of what the entities have authority to do of their own accord to carry on in their normal course of business. Plaintiffs promise the Court that "FHFA's non-foreclosure activities are not at issue," and that "[a]llowing this litigation to proceed will not crash the mortgage market or the government," Opp. at 36, but offer no limitation to their theory that would prevent such an outcome. Plaintiffs say they are "not trying to burn down the FHFA," Tr. of Sept. 13, 2023, Hr'g, at 24:7, but their argument lights the match.

The absence of a limiting principle in Plaintiffs' theory means that they also cannot establish standing's redressability requirement. The Supreme Court has held that separation-of-powers violations call for surgically limited remedies. *See* Mot. at 9 (citing *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010)). But following Plaintiffs' theory leads to a remedy that is anything but surgical; it would paralyze an entire federal agency. Because the Court cannot, consistent with precedent, order the sweeping relief Plaintiffs' theory demands, their injuries are not redressable here.

In any event, Plaintiffs fail to establish redressability because the Enterprises and servicers would still be able to conduct foreclosures if FHFA's funding went to zero. Plaintiffs claim that no foreclosures can happen until Congress properly appropriates funds to FHFA. *See* Opp. at 16. That is incorrect. Even if Plaintiffs' theory is followed to its logical conclusion and FHFA's funding is eliminated, that would not take any money away from the Enterprises and servicers, who would remain free to proceed with foreclosures on properties securing defaulted mortgage loans in accordance with contractual loan documents and under applicable state laws.[2] And they unquestionably would do so, as no entity in the business of purchasing and securitizing mortgage loans could survive if it does not foreclose on defaulted loans. Removing the ability to collect on defaulted loans by way of foreclosures would result in a seismic change in the nation's housing market: Borrowers would have no incentive to pay off their loans, leading lenders to increase costs or incur increased losses.

Only a mandatory injunction requiring FHFA to instruct the Enterprises and their servicers to cease all foreclosure activity—which Plaintiffs purport to disclaim but in substance demand—would redress Plaintiffs' alleged injury. Plaintiffs' counsel even conceded that an affirmative communication from FHFA to third parties would be required to stop all foreclosure activity. Tr. of Sept. 13, 2023, Hr'g, at 10:10-13. But mandatory relief requiring FHFA to act affirmatively to prevent foreclosures is fundamentally inconsistent with Plaintiffs' overall theory that the alleged Appropriations Clause violation renders FHFA unable to act. In other words, if FHFA cannot take any lawful action as the result of its purportedly unconstitutional funding mechanism, then it necessarily follows that the Agency cannot instruct the Enterprises to cease foreclosure activity. And even if it could, a sweeping remedy of this nature also would contradict the Supreme Court's instruction to "use a scalpel rather than a bulldozer in curing [a] constitutional defect." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2210-11 (2020) (cleaned up).

B. Preclusion doctrine bars Plaintiffs' claims.

Defendants established that because Plaintiffs chose not to bring this challenge in the Prior Quiet-Title Actions, preclusion doctrine bars them from doing so now. Mot. at 9-11. In response, Plaintiffs first argue that they cannot be claim precluded because Defendants' request for judicial notice is somehow procedurally deficient. Specifically, Plaintiffs argue that the Court cannot take judicial notice of the judgments in the Prior Quiet-Title Actions "for the truth of the facts recited

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[2] Plaintiffs argue that the servicers are somehow paid by FHFA. Opp. at 15 n.3. Their only evidence for this proposition is that the servicers "do not work for free." *Id.* But as already explained in the Motion, servicers expend their own funds in conducting foreclosures; they receive nothing from FHFA. *See* Mot. at 10 n.6. Plaintiffs' baseless assertions to the contrary should be ignored.

therein, but [rather] for the existence of the opinion." Opp. at 16. But the existence of the opinion is precisely the purpose for which Defendants seek to introduce the documents at issue. Indeed, Defendants do not allege that Plaintiffs are claim precluded because of the underlying facts recounted in those documents. Rather, those documents show that FHFA's powers under HERA were at issue in the previous actions and that those actions concluded in a valid, final judgment, as is required for claim preclusion. *See* Mot. at 10.

Courts routinely take judicial notice of filings in other cases when determining whether claim preclusion bars a plaintiff's suit, including when considering Rule 12(b)(6) motions. *See, e.g.*, *Stacey v. Nationstar Mortg., LLC*, Case No. 2:19-cv-00274, 2019 WL 2375125, at *2 (D. Nev. June 5, 2019) (granting the defendant's Rule 12(b)(6) motion on grounds of preclusion and finding that "because Defendants raise issue and claim preclusion in this case, judicial notice is appropriate to evaluate whether the prior state-court litigation bars Plaintiff from pursuing her quiet title claim."). The necessary logical implication of Plaintiffs' argument is that a party could never assert preclusion in a Rule 12 motion because, without taking judicial notice of matters asserted in the pleadings in other cases, a court could never assess the scope of a previous action. But courts plainly have this ability. This Court itself has held, based on a review of the prior judgment, that claim preclusion supported dismissal of an action at the pleading stage. *See, e.g.*, *Clark v. New Century Mortg. Co.*, 2019 WL 4280590 (D. Nev., Sept. 10, 2019). The Ninth Circuit has similarly "take[n] judicial notice" of the prior "opinion and the briefs filed in that case" in assessing whether preclusion applied. *See Holder v. Holder*, 305 F.3d 854, 866 (9th Cir. 2002). Thus, it is well within the power of this Court to consider these judicially noticeable documents from the Prior Quiet-Title Actions when determining whether claim preclusion applies.

Plaintiffs also attempt to avoid the preclusive effect of the Prior Quiet-Title Actions by claiming that their current Appropriations Clause challenge could not have been raised in the prior actions. *See* Opp. at 19. But as explained in Defendants' Motion, Plaintiffs had every opportunity—and incentive—to challenge FHFA's funding in the previous litigation. *See* Mot. at 10-11. The validity of the liens at issue in those cases turned on the applicability of the Federal Foreclosure Bar, which exists as part of FHFA's powers and protections as Conservator. If FHFA had not expended the same assessment-based funding Plaintiffs now challenge to place the Enterprises into conservatorships, the Federal Foreclosure Bar would not have applied. Therefore, the type of Appropriations Clause claim Plaintiffs assert here could have been, but was not, brought in the prior cases. That is all that is required to satisfy claim preclusion.

Indeed, contrary to Plaintiffs' suggestion, *see* Opp. at 19, claim preclusion "does not require an identity of factual backgrounds." *Mendenhall v. Tassinari*, 403 P.3d 364, 370 (Nev. 2017). The prior actions centered on HERA's effect on Enterprise liens—the validity of which the Enterprises sought to establish so that they could be enforced through foreclosure. Because Plaintiffs chose not to assert their challenge then, they are precluded from doing so now.

It makes no difference whether foreclosures were pending or threatened in the prior actions. Plaintiffs attempt to distinguish the circumstances of the Prior Quiet-Title Actions on this basis, claiming that "[a]ny challenges to FHFA's *foreclosure spending* and related damages were not ripe in the state court actions." Opp. at 19 (emphasis in original). But Plaintiffs cannot plausibly claim that the Prior Quiet-Title Actions were entirely unrelated to foreclosure. For example, shortly before both the Newburg and Liberty View prior actions began, a notice of default—the first step Nevada's non-judicial foreclosure statute requires in order for a foreclosure to proceed—was recorded. Mot., Ex. 8 at ¶ 8; **Exh. A**. And it stands to reason that the purpose behind Plaintiff Cape Jasmine Ct. Trust's initiation of an action that contested the validity of the deed of trust encumbering its title was to avoid the possibility of foreclosure.

In any event, whether the Prior Quiet-Title Actions involved formal claims about authority to foreclose is entirely beside the point, because Plaintiffs' Appropriations Clause challenge is not limited to FHFA's foreclosure-related spending. Instead, under Plaintiffs' theory, *any* spending by FHFA on *any* activity comes from an unconstitutional source, i.e., unappropriated funds. *See* ECF No. 34 at ¶ 1. In other words, the logical conclusion of Plaintiffs' argument is that every dollar FHFA spends is tainted, and as a result, FHFA cannot take *any* valid action. Indeed, the broad nature of Plaintiffs' argument—which is necessary for their theory of relief in this case—dooms them on this point. They cannot have it both ways. If their theory is broad enough to provide relief in this case, it also would have been broad enough to provide relief in the prior case, and therefore is barred by claim preclusion. Whether the Prior Quiet Title Action involved foreclosures is irrelevant to the question whether Plaintiffs could have raised their Appropriations Clause challenge at that time.

Finally, Plaintiffs suggest that their claim should be exempted from ordinary claim preclusion principles "for sound public policy reasons." Opp. at 19. Plaintiffs do not identify what policy considerations support an exception to claim preclusion under these circumstances. That is because there are none. Indeed, public policy supports applying claim preclusion here because a contrary ruling would open the door for hundreds of HOA investors like Plaintiffs who, as this Court well knows, have already litigated issues surrounding the FHFA's powers and protections as Conservator. Like Plaintiffs, these investors were on notice of Enterprise and conservatorship interests in the properties that were the subject of the first wave of HOA litigation, but they nevertheless chose not to challenge FHFA's funding. Further, Plaintiffs' only apparent basis for asking the Court to ignore claim preclusion is that their claims involve constitutional rights. But this alone is insufficient to overcome claim preclusion. *See Olson v. Morris*, 188 F.3d 1083, 1086 (9th Cir. 1999) (applying claim preclusion to bar constitutional claims that could have been raised in a previous action). At bottom, public policy supports applying, not ignoring, the principles of claim preclusion.

C. This Court lacks jurisdiction to enter any of the requested relief.

In the Motion, Defendants explained how various jurisdictional bars beyond standing apply to various elements of Plaintiffs' claims. Because some of the doctrines apply to monetary claims while others bar equitable relief, and some of the doctrines apply to claims against governmental defendants while others apply to claims against private actors, Defendants discussed them in the context of FHFA's separate roles as a governmental regulatory agency and as the non-governmental successor to the private Enterprises.

Plaintiffs characterize Defendants' explanation of FHFA's dual public-private role as "fence-sitting" and an "attempt to speak out of both sides of [Defendants'] mouth." Opp. at 24-25. But it is not Defendants who devised FHFA's dual role—Congress did. Courts consistently conclude that FHFA's nature as public or private actor shifts depending on the capacity in which it is operating: as a federal regulatory agency, or as Conservator of the private enterprises Fannie Mae and Freddie Mac. Plaintiffs themselves admit that FHFA's nature as government or private actor is "context specific." Opp. at 25. In any event, Plaintiffs' response does not overcome the operative jurisdictional bars.

FHFA and its officers act (and so may be sued) in any of three capacities: (1) the Agency as Conservator of the Enterprises; (2) the Agency as federal regulator, and its officers as federal officials; and (3) the Agency's officers in their individual capacities. Plaintiffs here seek both injunctive and monetary relief. A claim for injunctive relief may not be brought against FHFA or its officers in their official capacities if it would interfere with the Agency's functioning "as a conservator or a receiver." 12 U.S.C. § 4617(f). Consequently Section 4617(f) precludes any such claim. The relief Plaintiffs request would commit exactly that interference, since foreclosure necessarily implicates the Conservator's statutory powers to "preserve and conserve the assets and property of" and "collect all obligations and money due [to]" the Enterprises. 12 U.S.C. § 4617(b)(2)(B)(ii), (iv); *see* Mot. at 12. With respect to damages, Plaintiffs have not pleaded a claim against FHFA in its conservatorship capacity because all of Plaintiffs' claims arise out of the Constitution and thus require a governmental defendant. As for damages claims against the Agency and its officers in their respective federal regulatory and official capacities, such defendants would be entitled to sovereign immunity, which has not been waived here. And a damages claim against an Agency officer in her or his individual capacity would be a *Bivens* claim, which Plaintiffs have not properly pleaded.

Because every combination of FHFA's capacity and the relief Plaintiffs seek is subject to a jurisdictional bar, this Court lacks jurisdiction to enter any of the relief Plaintiffs seek, leaving the claims subject to dismissal with prejudice.

1. HERA precludes injunctive relief.

Section 4617(f) bars any action by a court that would interfere with FHFA's exercise of its statutory powers as Conservator. *See* Mot. at 11-13. Enjoining Enterprise foreclosures would unavoidably restrain and affect the Conservator's powers to collect money due to Fannie Mae and to conserve Fannie Mae's assets and property; it would place one of the Enterprises' primary tools for doing so off limits. *See id.* Section 4617(f) therefore bars the nationwide injunction Plaintiffs seek.[3]

Plaintiffs contend that Section 4617(f) does not apply here for two reasons: first, because it protects only those actions by FHFA that are statutorily permitted, and the alleged actions here purportedly exceed the Agency's statutory authority, Opp. at 20; and second, because it is trumped by an alleged constitutional claim, *id.* at 20-21. Neither of those theories holds water.

First, if Plaintiffs' theory were correct—that a structural or funding defect renders the Agency's *every act* outside its statutory powers—then Section 4617(f) would be hardly any protection at all. Rather, in *Collins*, the Supreme Court concluded that Section 4617(f) may be overcome only when "*the FHFA action at issue*" is outside the scope of the Agency's authority. *Collins v. Yellen*, 141 S. Ct. 1761, 1776 (2021) (emphasis added). It is "[s]ettled precedent" that "the unlawfulness of [one] provision does not strip the Director of the power to undertake the other responsibilities of his office." *Collins*, 141 S. Ct. at 1788.

Just so here, where the "action at issue," i.e., the event that Plaintiffs seek to enjoin, is the anticipated foreclosure. What Plaintiffs allege as purportedly exceeding FHFA's authority is a different "action" entirely—namely, the Agency's alleged "rais[ing] and expend[ing of] funds without any valid congressional appropriation." Opp. at 20. Plaintiffs do not allege that oversight of foreclosures falls outside FHFA's express statutory powers. Nor could they. Thus, as in *Collins*, any purported funding-related defect would not strip the Agency of its power to undertake its other, statutorily imposed and authorized responsibilities.[4] And in any event, the Enterprises have the contractual and legal right, as well as the resources, to foreclose on defaulted loans independent of FHFA's involvement. And even if FHFA were involved in day-to-day

[3] Plaintiffs erroneously refer to Section 4617(f), which bars injunctive relief, as the Federal Foreclosure Bar. *See, e.g.*, Opp. at 20. That designation refers to a different part of HERA, Section 4617(j)(3). *See, e.g.*, *Berezovsky v. Moniz*, 869 F.3d 923, 927 n.1 (9th Cir. 2017) ("Nevada district courts consistently refer to the statutory bar in 12 U.S.C. § 4617(j)(3) as the 'Federal Foreclosure Bar,' a shorthand this opinion adopts.").

[4] *See Montilla v. Fed. Nat'l Mortg. Ass'n*, 999 F.3d 751, 756 (1st Cir. 2021) ("[A]ppellants argue that because FHFA is a government agency, any action it takes as conservator, like directing the GSEs to nonjudicially foreclose on appellants' mortgages, is government action subjecting it to appellants' constitutional claims. That analysis is simply wrong and contrary to law.").

foreclosures, under Section 4617(f), "[i]ts business decisions are protected from judicial review." *Collins*, 141 S. Ct. at 1785.

Second, Plaintiffs' argument that their constitutional claim overcomes Section 4617(f) is not credible. Plaintiffs misapply case law requiring "clear intent" from Congress to "preclude judicial review of constitutional claims." Opp. at 20-21 (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)). Section 4617(f) does *not* preclude judicial review of a constitutional claim; it precludes a particular remedy. *See* Mot. at 12. At least one court has rejected Plaintiffs' exact argument and citations on this point. *See Bhatti v. Fed. Hous. Fin. Agency*, 646 F. Supp. 3d 1003, 1017 (D. Minn. 2022) ("[Section] 4617(f) does not bar judicial review of constitutional claims; it simply bars certain types of relief. The cases on which plaintiffs rely [including *Webster*] are therefore inapposite…."), *appeal pending*, No. 23-1051 (8th Cir. argued Feb. 14, 2024).

Even if a "clear statement" were needed to give effect to Section 4617(f), it is hard to imagine clearer language than forbidding "any [court] action to restrain or affect the exercise of [the] powers or functions of the Agency as a conservator." That is nothing like the statute in *Webster*, which authorized discretionary termination of CIA employees and said nothing about court action or judicial review, and which the Supreme Court declined to construe as precluding employees' constitutional claims by implication. *See* 486 U.S. at 603-04.

Third, *Collins* did not "implicitly" reject Section 4617(f)'s application to constitutional claims by not discussing the provision in its "extensive" constitutional analysis, as Plaintiffs contend, Opp. at 21. *Collins* did not restrain or affect the Conservator's exercise of its powers or functions in any way, and no party had argued that Section 4617(f) prevented the Court from determining HERA's constitutionality. *See Bartlett v. Bowen*, 816 F.2d 695, 703 (D.C. Cir. 1987) (Congress may not "preclude the judiciary from hearing challenges to the constitutionality of [its] legislation"). And the Court had no occasion to address whether Section 4617(f) barred the relief the *Collins* plaintiffs sought on their constitutional claim because it found the requested relief unavailable for other reasons. *Collins*, 141 S. Ct. at 1779-80, 1787-89. The Court made clear that whether other possible relief was available or precluded was a question for the lower courts in the first instance. *Id.* at 1789 n.26.

Routine foreclosures on defaulted Fannie Mae loans do not exceed FHFA's statutory authority, if indeed the foreclosures involve action by FHFA at all. And Plaintiffs' constitutional claim does not overcome Section 4617(f). This Court therefore does not have jurisdiction to enjoin the planned foreclosure as Plaintiffs request.[5]

2. This Court lacks jurisdiction to award the requested damages.

The Court does not have jurisdiction to award the monetary damages Plaintiffs request for their constitutional and wrongful-foreclosure claims, or for their supposed *Bivens* claim to the extent they pleaded one. The constitutional claims necessarily lie against FHFA in its capacity as federal regulatory agency, rather than as conservator of the Enterprises. And because the wrongful-foreclosure claim arises out of the alleged constitutional violation, it too lies against FHFA as federal actor, and the United States has not waived its sovereign immunity here. Moreover, Plaintiffs have neither pleaded a *Bivens* claim against FHFA's Director in her individual capacity, as required, nor alleged a single action taken by the Director. As a result, all of Plaintiffs' claims for damages fail.[6]

a. The United States has not waived sovereign immunity as to Plaintiffs' damages claims.

Because constitutional claims can be brought only against government actors, *see* Mot. at 15-16, Plaintiffs' constitutional claims for damages lie against FHFA in its governmental (i.e.,

[5] Plaintiffs reiterate their contention that Section 4617(f) is not jurisdictional, Opp. at 21, relying once again on an order in *SEC v. Equitybuild, Inc.*, 2022 WL 2257121, at *3 (N.D. Ill. June 22, 2022). But as Defendants pointed out in their first motion to dismiss, ECF No. 18 at 11 n.2, the order Plaintiffs cite was entered by a magistrate judge, and on FHFA's objection, the district court reconsidered the issue and squarely held that Section 4617(f) *is* jurisdictional. *See* Tr. of Hearing at 28-29, *SEC v. Equitybuild, Inc.*, No. 18-C-5587 (N.D. Ill. Oct. 17, 2022) (filed in this case at ECF No. 18-1). Plaintiffs seemingly have no response and instead ignore the fact that they are not relying on good law.

[6] Plaintiffs ask that FHFA be "estopped from denying that monetary damages are available" given its purported "affirmative representation" at argument "that monetary damages would be available later." Opp. at 24. FHFA made no such representation; it stated that a hypothetical damages claim would not be barred by Section 4617(f) but that it "can't say that the damages claim would succeed.…we don't know what the claim would be, obviously, and it would be hotly contested, and we would reserve all our rights, of course." Tr. of Sept. 13, 2023, Hr'g at 50:4-7. Further, courts have held that only certain, limited categories of damages are available under HERA, such as breach-of-contract claims. *See Perry Cap.*, 864 F.3d at 614.

regulatory) capacity, rather than in its capacity as conservator of Fannie Mae and Freddie Mac. *See* Mot. at 15 (citing *Montilla v. Fed. Nat'l Mortg. Ass'n*, 999 F.3d 751, 759 (1st Cir. 2021)).[7] As a federal regulator, FHFA is entitled to the presumption of sovereign immunity, *see* Mot. at 13-14, and any statutory waiver of immunity is construed narrowly and "strictly in favor of the sovereign," *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 34 (1992). For this Court to have jurisdiction to hear Plaintiffs' claims for damages against FHFA as regulator, Plaintiffs must show that the United States has "unequivocal[ly] waive[d]," rather than merely "implied," its sovereign immunity here. *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983) (citation omitted). They have not done so. *See* Mot. at 14.

Plaintiffs attempt to overcome FHFA's immunity from their constitutional claims through sprawling reads of *Perry Capital LLC v. Mnuchin* and *F.D.I.C. v. Meyer*, contending that FHFA's immunity is waived *in full* by Fannie Mae's and Freddie Mac's sue-and-be-sued clauses as interpreted through HERA's "succession clause." Opp. at 22. But unlike this combination of provisions, the sue-or-be-sued clause in *Meyer* was a single direct and explicit waiver. The FDIC statute provided that the agency itself, which otherwise benefited from sovereign immunity, "shall have power … [t]o sue and be sued, complain and defend, in any court of competent jurisdiction in the United States." *F.D.I.C. v. Meyer*, 510 U.S. 471, 480 (1994). HERA, on the other hand, provides that FHFA as Conservator "succeed[s] to … all … powers" *of Fannie Mae*, 12 U.S.C. § 4617(b)(2)(A)(i), a private entity with the power to sue and be sued, *see id.* § 1723a(a). At most, this combination of clauses enables FHFA to be sued "as the Companies would," solely in its role as Conservator. *Perry Cap. LLC v. Mnuchin*, 864 F.3d 591, 622 (D.C. Cir. 2017). As Plaintiffs point out, unlike in *Meyer*, Congress here "has not … enact[ed] a 'sue and be sued'

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[7] Plaintiffs attempt to distinguish *Montilla* by suggesting it was superseded by the Supreme Court's decision 15 days later in *Collins*. Opp. at 25-26. But the *Montilla* court rejected that very contention when it summarily denied the appellants' petition for rehearing, evidently finding no conflict between its earlier decision and *Collins*. *See* Order, *Montilla v. Fed. Nat'l Mortg. Ass'n*, No. 20-1673 (1st Cir. Aug. 9, 2021) (denying Appellants' Pet. for Panel Reh'g or Reh'g En Banc (July 22, 2021)). And, in fact, the analysis Plaintiffs cite from *Collins* did not concern immunity at all. Rather, *Collins* determined whether the agency as a general matter "wield[ed] executive power" such that its director could be considered an "executive officer[]" removable at will by the President. 141 S. Ct. at 1784-86.

clause specifically for the agency." Opp. at 26 (quoting *Perry Cap. LLC*, 864 F.3d at 622). And so here, unlike in *Meyer*, HERA's succession clause cannot waive FHFA's immunity as regulator because the Enterprises do not have immunity to which FHFA could succeed. Plaintiffs cannot cobble together the "unequivocal" waiver they need through a combination of two statutes enacted more than fifty years apart, neither of which mentions immunity. *See Holloman*, 708 F.2d at 1401.

Plaintiffs omit that both *Perry Capital* and *Meyer* discussed waivers of agency immunity *in the respective agency's capacity as conservator or receiver*. *See Perry Cap. LLC*, 864 F.3d at 622 (discussion limited to "when FHFA acts on behalf of the [Enterprises] as conservator"); *Meyer*, 510 U.S. at 473. Indeed, *Perry Capital* did not even involve constitutional claims. Neither *Perry Capital* nor *Meyer* addresses sovereign immunity in an agency's capacity as *regulator*.

Plaintiffs also attempt to circumvent FHFA's sovereign immunity from their damages claims by cloaking their constitutional theory in a cause of action for the tort of wrongful foreclosure under Nevada law, arguing that FHFA "can be sued for wrongful foreclosure just as [Fannie Mae] can be" because of Fannie Mae's sue-and-be-sued clause as interpreted through HERA's "succession clause." Opp. at 26-27. But as discussed further *infra* Section II.C, Plaintiffs' claim is not properly one for wrongful foreclosure. Plaintiffs do not assert that foreclosures occurred on loans that were not in default; rather, what they allege is "wrongful" is the purported constitutional defect in FHFA's funding mechanism that somehow twists and turns into a state law tort of wrongful foreclosure on a property that acted as the sole secured collateral for a defaulted loan. Because any allegation of unconstitutionality presumes a government defendant, this tort claim too can only lie against FHFA in its federal regulatory capacity. As a result, FHFA is protected by the sovereign immunity of the United States, except as narrowly waived in the Federal Tort Claims Act (FTCA). *See* Mot. at 16-17.

Plaintiffs contend in a three-paragraph footnote that, "to the extent necessary," they have "alleged the necessary elements" of a claim under the Federal Tort Claims Act, and also that the FTCA's exhaustion prerequisite should not apply here. *See* Opp. at 27 n.12. As a preliminary matter, a basis for jurisdiction raised in a footnote halfway through an opposition to a motion to dismiss is not well pleaded. *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) ("In determining the propriety of a Rule 12(b)(6) dismissal, a court *may not* look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss."). But Plaintiffs cannot support a FTCA claim in any event because, as the Supreme Court has held, their failure to satisfy the statute's exhaustion requirement deprives this Court of jurisdiction. No tort claim can stand.

Plaintiffs say the FTCA's exhaustion requirement does not apply here because pursuing an administrative remedy would be futile, citing *Fones4All Corp. v. F.C.C.*, 550 F.3d 811 (9th Cir. 2008). But that very case held that where "the requirement of exhaustion is statutory," as in the FTCA, *see* 28 U.S.C. § 2675(a), "*the futility doctrine is not applicable*": "Where a statute specifically requires exhaustion, the requirement is not excused based merely [on] a judicial conclusion of futility." *Fones4All Corp.*, 550 F.3d at 818 (citing *Sun v. Ashcroft*, 370 F.3d 932, 941 (9th Cir. 2004); *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001)). *Fones4All* refused to "rely on a judicially created futility exception to evade the statutory exhaustion requirement" and declined to consider the petitioner's argument on exhaustion grounds. *Id.* at 818-19.

Plaintiffs also cannot evade the FTCA's exhaustion requirement by suggesting it is properly raised in an answer rather than a motion to dismiss. Whether failure to exhaust is "generally treated as an affirmative defense," Opp. at 27 n.12, is irrelevant here, because the exhaustion requirement in the FTCA is jurisdictional. *D.L. ex rel. Junio v. Vassilev*, 858 F.3d 1242, 1244 (9th Cir. 2017). The Supreme Court has squarely held that "[w]hen a plaintiff fails to exhaust administrative remedies against the United States, as required by the FTCA, the proper route is dismissal." *Wilson v. Horton's Towing*, 906 F.3d 773, 783 (9th Cir. 2018) (citing *McNeil v. United States*, 508 U.S. 106, 113 (1993)).

Because Plaintiffs have not shown that the United States has unequivocally waived its immunity to Plaintiffs' constitutional and wrongful-foreclosure claims, this Court does not have jurisdiction to hear them, and they must be dismissed.

b. Plaintiffs have not properly pleaded a *Bivens* claim.

Defendants' Motion established that Plaintiffs' attempt to chart a course around sovereign immunity by asserting a *Bivens* claim founders on the shoals of a threshold pleading requirement—naming a federal official in his or her individual capacity. *See* Mot. at 14-15. The amended complaint refers repeatedly to "Sandra L. Thompson, in her official capacity" but *never* mentions her individual capacity. ECF No. 34 (caption & ¶ 13) (emphasis added). Plaintiffs now claim that their own, crystal-clear allegations contain some "ambiguity" about the capacity in which Director Thompson is named. Opp. at 23. Plaintiffs even purport that they "intended to name Defendant Thompson as *Bivens* requires—in her individual capacity." *Id*. Plaintiffs' allegations could not have been more clear, nor could the law be more clear that a *Bivens* claim can "be maintained against a defendant in his or her *individual capacity only, and not in his or her official capacity*." *See Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1987) (emphasis added).[8]

Even if Plaintiffs could correct their mistake and name Director Thompson in her individual capacity, their claim would still fail. As an initial matter, Plaintiffs have not alleged a single individual action taken by Director Thompson in this case, let alone one that is unconstitutional. This failure is fatal. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (holding that a plaintiff asserting a *Bivens* action "must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution").

Further, Plaintiffs acknowledge that recognizing a *Bivens* claim here would represent an entirely "new context" to assert *Bivens*. Opp. at 24. But as the Supreme Court has held, "expanding the *Bivens* action is now considered a 'disfavored' judicial activity." *Ziglar v. Abbasi*, 582 U.S. 120, 121 (2017) (quoting *Iqbal*, 556 U.S. at 675). Indeed, never before has the Supreme Court recognized that *Bivens* applies to anything other than violations of the Bill of Rights. *See Egbert v. Boule*, 596 U.S. 482, 490-91 (2022). That is because the *Bivens* court "recognized that the *Bill of Rights* is particularly intended to vindicate the interests of the individual." *Bivens*, 403

[8] Plaintiffs alternatively request that they be given leave to amend their complaint to correct their mistake. As an initial matter, Plaintiffs already had the benefit of amending their pleadings and did not change the capacity in which Director Thompson was named. Regardless, for the reasons discussed here, any such request should be denied because amendment would be futile. *See Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 574 (9th Cir. 2020) (noting that leave to amend should be denied where amendment would be futile).

U.S. at 407 (Harlan, J., concurring). There is no basis to expand *Bivens* to apply to a structural, separation-of-powers claim against a federal agency.

Nevertheless, Plaintiffs ask the Court to "weigh the costs and benefits of a *Bivens* damages action" and suggest that "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 nondelegation, and other separation of powers causes of action." Opp. at 24. But Plaintiffs are the ones proposing to extend *Bivens* to an entirely new context. And to support that, they must demonstrate that the Judiciary is *better* equipped than Congress to make the determination. But case law shows that the strong presumption is that Congress is better equipped than the judiciary to do so. *See, e.g.*, *Egbert*, 596 U.S. at 491 ("At bottom, creating a cause of action is a legislative endeavor."); *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) (Congress is "far more competent than the Judiciary" to weigh such policy considerations).

Finally, policy considerations support declining to find a *Bivens* cause of action here. Extending *Bivens* to apply to every federal agency official for alleged separation of powers issues would be unprecedented and unreasonable. These officials would have to worry about being *personally* named in litigation based on a purported defect in *Congress's* drafting of a statute. Applying *Bivens* to Director Thompson for simply carrying out her normal, everyday obligations (none of which deals with foreclosures raised by Plaintiffs) under a statute enacted by Congress is contrary to *Bivens*' purpose, which "is to deter individual federal officers, not the agency, from committing constitutional violations." *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 62 (2001). Therefore, as a matter of law and common sense, this Court should decline to recognize a *Bivens* claim in this new context.

II. PLAINTIFFS' CLAIMS FAIL AS A MATTER OF SUBSTANTIVE LAW.

A. Plaintiffs' Appropriations Clause claim fails.

HERA empowers FHFA's Director to "establish and collect from the [Enterprises] 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). Congress has approved such assessment-based funding mechanisms time and again for various other agencies, and especially for financial regulators. *See* Mot. at 19. In particular, it is analogous to the funding structure that was enacted in 1792 for one of the oldest agencies in the country's history, contemporaneously with the Constitution itself. Plaintiffs find no support for their argument that FHFA's funding mechanism violates the Appropriations Clause in the text, history, or structure of the Clause or in case law. Indeed, this Court already decided that it "d[id]n't find a likelihood of success on the merits of [Plaintiffs'] claims." Tr. of Sept. 13, 2023, Hr'g, at 92:3-4. The Court was correct. Plaintiffs' claims cannot succeed on the merits and must be dismissed.

1. Historical precedent forecloses the Appropriations Clause claim.

Plaintiffs contend that FHFA's funding structure is fundamentally at odds with the historical understanding of the concept of "appropriations" and that the Founders would have roundly decried it. Opp. at 29-30, 34-36. Plaintiffs insist there is no "limiting principle" stopping legislation such as HERA from snowballing to the "logical conclusion" of a "complete abdication of appropriations oversight" wherein Congress is "extricate[d] … entirely from the appropriations process." Opp. at 33. That concern is simply not borne out by more than 200 years of the country's history, not to mention that it ignores that Congress is subject to the ultimate limiting principle of political accountability. Besides, the best evidence of what the Founders would have permitted is what they themselves did, which included establishing an agency with an assessment-based funding mechanism similar to FHFA's. *See* Post Office Act of 1792, 1 Stat. 232-34 (providing for funding through collection of postage fees rather than appropriations). The Post Office Act became law just three years after the Constitution went into effect—enacted by a Congress comprising many of the same statemen who drafted and executed the Constitution, and signed into law by George Washington himself. *See* 16 Am. Jur. 2d Constitutional Law § 10. Any suggestion that the Post Office Act violated the Constitution would be untenable.

The text of the Post Office Act parallels the FHFA-funding provision in HERA. The Act established that the Postmaster General "shall provide for carrying the mail of the United States … and defray the expense thereof, with all other expenses arising on the collection and management of the revenue of the post office." 1 Stat. 234. The Act deferred to the Postmaster General's discretion in "carrying the mail … as he may judge most expedient; and as often as he

… shall think proper," and in "prescrib[ing] such regulations to the deputy postmasters … as may be found necessary." *Id.* The Act did not impose any limitation other than reasonableness on the amount of funds the agency could collect, and it required that any surplus—funds remaining after the expenditures deemed reasonable and expedient—would be paid over to the Treasury each quarter. 1 Stat. 234. Whatever practices the Postmaster General believed would be "expedient," "proper," and "necessary," the agency was entitled to recoup its expenses in carrying them out. That broad grant of discretion followed more than a page of precise specifications for the paths of "post roads"—"from Fredericksburg, by Port Royal and Tappahanock, to Urbanna; and from thence, crossing Rappahanock, and proceeding by Northumberland Court House, to Kinsale on the river Yeocomico," etc. 1 Stat. 233. The contrast highlights that the broad discretion Congress granted the Postmaster General as to expenditures was no accident—the Act's drafters knew how to provide detailed instructions and constraints when they thought them necessary or appropriate.

HERA's funding provision follows the same lines as the Post Office Act: Each provides funding outside the ordinary tax-and-spend process, each accords great deference to the agency head's judgment on the level of expenditures that will reasonably advance the agency's statutorily specified mission, and each precludes the agency from retaining funds beyond the amount deemed reasonably necessary. Plaintiffs suggest that the Post Office Act is "markedly different" from HERA, Opp. at 32, but assert only that the 1792 legislation required the Postmaster General (i) to quarterly report the agency's collections and expenditures of funds, and (ii) to transfer any balance to the Treasury, *see* 1 Stat. 234. But Plaintiffs identify no distinction at all, as FHFA, too, is obligated to issue regular reports and is precluded from accumulating funds beyond those reasonably necessary to advance its statutory mission.

Specifically, similar to the requirement imposed on the Postmaster General, FHFA is required to issue regular oversight reports to Congress and the Executive Branch, including setting forth its budget and operating plan. *See* 12 U.S.C. § 4516(g) (annual and quarterly financial reports to Office of Management and Budget); 12 U.S.C. § 4521(a) (annual reports to House and Senate Committees including as to "operations, resources, and performance of the Agency"). Congress can step in at any time. Accordingly, there is nothing "markedly different" between the

Post Office Act and HERA with respect to required reporting.

As for the other part of Plaintiffs' purported distinction, although FHFA does not remit surplus funds to Treasury, that is because it instead must apply any surplus from a given year to reduce the following year's assessments. *See* 12 U.S.C. § 4516(d). Plaintiffs' contention that FHFA can "levy unlimited assessments on Fannie Mae and Freddie Mac, and then write itself checks from the companies' bottomless pit" of $8 trillion, Opp. at 35, is thus foreclosed by the statute itself. Just like the Post Office Act did, HERA limits FHFA's annual assessments not with a specific dollar cap but in terms of what funds FHFA determines are necessary for it to carry out its responsibilities: The Agency may collect "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). Contrary to Plaintiffs' pejorative rhetoric, each statute affirmatively prevents the creation of an unlimited "slush fund," *see* Opp. at 1, or an "unconstrained power to collect and spend money," *id*. at 4. Indeed, if anything, HERA is the more constraining: The Post Office Act anticipates collecting funds *beyond* what was reasonably necessary to the agency's mission (with the surplus remitted to Treasury), while FHFA's statute authorizes assessments only *in the amount expected* to be reasonably necessary (subject to an annual year-over-year truing-up).

Plaintiffs' insistence that FHFA's funding system is "distinctive even among federal agencies" in purportedly empowering the Agency to "set[] its own budget and seek[] out its own funds without democratic oversight or cap," Opp. at 29-30, is divorced from the facts. In addition to the Post Office Act, Congress has enacted numerous other statutes requiring agencies to collect funding through assessments that leave the method and amount of collections up to the agencies, often capping assessments only at what the agencies determine is "reasonable" or "sufficient" rather than at specific dollar amounts. Indeed, this kind of funding scheme has become particularly common for financial-institution regulators. *See* Henry B. Hogue et al., Cong. Research Serv., R43391, *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues* at 25-27 (2017). For example, Congress has mandated assessment-based funding for the Federal Reserve, 12 U.S.C. § 243; the Office of the Comptroller of the Currency, 12 U.S.C. § 16; the National Credit Union Administration, 12 U.S.C. § 1755; the FDIC, 12 U.S.C. § 1817;

the Farm Credit Administration, 12 U.S.C. § 2250; and the Public Company Accounting Oversight Board, 15 U.S.C. § 7219. Over the decades these statutes have been on the books, none has ever been adjudged deficient or even suspect under the Appropriations Clause.

And for each of those agencies, Congress chose to leave determinations of what funding is "necessary" or "reasonable" up to the agency rather than closely monitor or "cap" collections. Assessments by the Board of Governors of the Federal Reserve are limited in amount to what is "sufficient to pay" estimated expenses, salaries, and deficits and to what the Board "in its judgment alone" determines may "be necessary" for certain other purposes. 12 U.S.C. § 243. The Comptroller of the Currency "determines [what funding] is necessary or appropriate." 12 U.S.C. § 16. Assessments by the National Credit Union Administration Board "shall be determined" by a method "determined by the Board to be appropriate" and shall "give[] due consideration to the expenses of the Administration." 12 U.S.C. § 1755(b). The FDIC is required to collect assessments "in such amounts as the Board of Directors may determine to be necessary or appropriate." 12 U.S.C. § 1817(2)(A). The Farm Credit Administration "shall determine … the amount of assessments that will be required" to pay its costs and expenses and shall collect the funds "from time to time … as [it] determine[s] necessary." 12 U.S.C. § 2250(a)(1), (2)(B). Similar to FHFA's assessments, *see* 12 U.S.C. § 4516(f)(2), the funds collected by the Farm Credit Administration "shall not be construed to be Federal Government funds or appropriated moneys." 12 U.S.C. § 2250(a)(1), (2)(B). And the Public Company Accounting Oversight Board "shall" for each year "establish a budget" and an assessment to collect from each entity it oversees "as may be necessary or appropriate to establish and maintain the Board," "subject to approval by the [SEC]." 15 U.S.C. § 7219(b), (d)(1)-(2), (f).

FHFA's funding mechanism is of a kind with these other agencies': It directs FHFA to collect from its regulated entities "assessments in an amount not exceeding the amount sufficient to provide for reasonable costs … and expenses of the Agency, including … such amounts … deemed necessary by the Director to maintain a working capital fund." 12 U.S.C. § 4516(a). Furthermore, FHFA *is* subject to oversight, in the form of annual financial audits by the Comptroller General that are then submitted to Congress. 12 U.S.C. § 4516(h). Thus, Plaintiffs' assertion that FHFA operates "without democratic oversight" and according to a mechanism "distinctive even among federal agencies" is untethered from reality.

Plaintiffs also suggest that FHFA is alone among these financial regulators in its "unprecedented" scope of authority and "plenary control" of Fannie Mae's and Freddie Mac's "rights, titles, powers, and privileges," such that any purported unconstitutionality in its funding carries greater weight. Opp. at 35. Not so. The FDIC has equivalent powers when it acts as conservator or receiver. Like FHFA, it "succeed[s] to … all rights, titles, powers, and privileges of" the institution in receivership "and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution." 12 U.S.C. § 1821(d)(2)(A). The Supreme Court has also acknowledged another assessment-funded agency with authority that, if not equivalent to FHFA's, is even greater: The CFPB "acts as a mini legislature, prosecutor, and court, responsible for creating substantive rules for a wide swath of industries, prosecuting violations, and levying knee-buckling penalties against private citizens." *Seila Law*, 140 S. Ct. at 2202 n.8. It "promulgate[s] binding rules … in a major segment of the [U.S.] economy," and "may unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications" and "seek daunting monetary penalties against private parties on behalf of the United States in federal court." *Id.* at 2200. "[T]he CFPB administers 19 statutes while the FHFA administers only 1; [and] the CFPB regulates millions of individuals and businesses whereas the FHFA regulates a small number of Government-sponsored enterprises." *Collins*, 141 S. Ct. at 1784.[9]

Plaintiffs cannot isolate FHFA from the historical context refuting their theory.

2. Judicial precedent forecloses the Appropriations Clause claim.

Plaintiffs double down on the outlier case *CFSA v. CFPB* from the Fifth Circuit as their sole judicial authority for assessment-based funding being purportedly unconstitutional, undeterred by the great weight of cases finding exactly the opposite. *See* Opp. at 29-30, 34 (citing

[9] The Supreme Court recently heard argument in appeal of the Fifth Circuit's unique, outlier decision that the CFPB's funding mechanism violates the Appropriations Clause. *See CFPB v. CFSA*, No. 22-448 (argued Oct. 3, 2023). The Supreme Court could issue its decision any day.

CFSA v. CFPB). They identify no other case that analyzed the text, history, and structure of the Appropriations Clause and reached Plaintiffs' conclusions. That is because every court to analyze the issue other than the Fifth Circuit in *CFSA* has decided that Congress is well within its power to, "*consistent with the Appropriations Clause*, create governmental institutions reliant on fees, assessments, or investments rather than the ordinary appropriations process," and that this is particularly common with respect to "financial regulators." *PHH Corp. v. CFPB*, 881 F.3d 75, 95 (D.C. Cir. 2018) (en banc) (emphasis added), *abrogated in part on other grounds by Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020).[10]

The overwhelming weight of precedent is squarely against Plaintiffs; the Fifth Circuit itself acknowledged that "every [other] court to consider [CFPB's] funding structure has deemed it constitutionally sound." *CFSA v. CFPB*, 51 F.4th at 641. *See also* Mot. at 20-21 (citing cases). The Solicitor General confirmed this in the CFPB's merits brief to the Supreme Court in *CFSA*: "[The Supreme] Court has decided only one case involving a claim that a statute violated the Appropriations Clause, and it rejected that claim[,] … conclud[ing] that the plaintiffs' constitutional challenge under the Appropriations Clause was 'without merit' because the Clause 'means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" Br. for Pet'rs at 24, *CFPB v. CFSA*, No. 22-448, 2023 WL 3385418, at *24 (May 8, 2023) (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937)). "Indeed, other than the Fifth Circuit below, *no court has ever held that an Act of Congress violated the Appropriations Clause*." *Id.* (emphasis added).

Even the litigants challenging the CFPB in *CFSA* concede that funding through assessments *is constitutional*—specifically citing FHFA as an example. *See* Br. for Resp'ts, *CFSA v. CFPB*, No. 22-448, 2023 WL 4400760, at *34-36 (July 3, 2023) (citing FHFA as an "assessment-funded agenc[y]" with a "historical pedigree" and a "practice [that] is long settled and established" (cleaned up)); Resp'ts' Br. in Opp'n to Writ of Cert., *CFSA v. CFPB*, No. 22-

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[10] In the Motion, Defendants identified six cases concluding that CFPB's and FHFA's assessment-based funding is constitutional. *See* Mot. at 20-21 (citing cases). In their first motion to dismiss, they cited five more. *See* ECF No. 18 at 20.

448, 2023 WL 317680, at *22-24 (Jan. 13, 2023) (similar).

B. Plaintiffs' nondelegation claim fails.

Plaintiffs' nondelegation theory fares no better. Plaintiffs brush aside Supreme Court precedent that has "over and over upheld even very broad delegations." *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (plurality op.); *see also* Mot. at 21. In response, Plaintiffs claim that this case "more closely resembles one of the few cases where the Supreme Court has found a delegation problem." Opp. at 38. Plaintiffs fail to squarely address how rare it is for courts to find the nondelegation doctrine violated. Indeed, "[o]nly twice in this country's history (and that in a single year) [has the Supreme Court] found a delegation excessive." *Gundy*, 139 S. Ct. at 2129. Both cases were decided in 1935. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Pan. Refin. Co. v. Ryan*, 293 U.S. 388 (1935). And in both cases, the Supreme Court found that "Congress had failed to articulate *any* policy or standard" to confine discretion. *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (emphasis added). In contrast, Congress articulated a clear standard in 12 U.S.C. § 4516(a): FHFA is to collect from the regulated entities no more than necessary to provide for the costs of the Agency.

Nevertheless, Plaintiffs ignore the many examples Defendants cited of broad delegations that were upheld, *see* Mot. at 22, and instead contend that this case resembles *Schechter Poultry*. *See* Opp. at 38. But *Schechter Poultry* is plainly inapposite. There, Congress delegated the power to formulate industry "codes of fair competition" to *private individuals*. *See Schechter Poultry*, 295 U.S. at 537-38. Indeed, the "function of formulating the codes was delegated, not to a public official responsible to Congress or the Executive, but to private individuals engaged in the industries to be regulated." *Yakus v. United States*, 321 U.S. 414, 424 (1944). No such delegation to a private individual exists here. Again, Congress can—and does—oversee FHFA's spending through annual financial audits by the Comptroller General that are submitted to Congress. 12 U.S.C. § 4516(h).

Further, the delegation in *Schechter Poultry* was "without precedent." 295 U.S. at 541. Here, by contrast, delegations like the one in Section 4516(a) are commonplace. As discussed above, the Federal Reserve assesses an amount "sufficient to pay its estimated expenses," 12

U.S.C. § 243; the FDIC assesses "such amounts as the Board of Directors may determine to be necessary or appropriate," 12 U.S.C. § 1817(b)(2)(A); and the Comptroller of the Currency "determines [what funding] is necessary or appropriate." 12 U.S.C. § 16. Congress can ascertain the amount FHFA deems "sufficient" by examining FHFA's operating costs. This Court should decline Plaintiffs' invitation to depart from longstanding Supreme Court precedent that has upheld broader delegations than the one at issue here.

C. Plaintiffs' wrongful-foreclosure claim fails.

Plaintiffs cannot sustain their common-law claim for wrongful foreclosure as to the Newburg and Liberty View Properties because they have not alleged the necessary facts. It is well established in Nevada law that a claim for wrongful foreclosure turns on whether the loan was in fact in default at the time of the foreclosure. *See Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 304, 662 P.2d 610, 623 (1983). That fact is not disputed here.

Plaintiffs' argument is contradicted by their own cases, which they cite for favorable soundbites but ignore in substance. Both cases Plaintiffs cite involved *dismissals* of wrongful-foreclosure claims. *Silvestre v. MTC Fin., Inc.*, No. 2:14-cv-01385-RFB-NJK, 2015 WL 5830818, at *4 (D. Nev. Oct. 5, 2015); *McKnight Fam., LLP v. Adept Mgmt.*, 129 Nev. 610, 616, 310 P.3d 555, 559 (2013). And while *Silvestre* indeed said that "[w]rongful foreclosure claims do not require particular elements," it continued in the same paragraph to say that what such claims *do* require, at a minimum, is that "no breach of condition or failure of performance existed on the mortgagor's or trustor's part which would have authorized the foreclosure," 2015 WL 5830818, at *4. In other words, *Silvestre* advocated the very rule Plaintiffs disclaim: that "[t]he material issue of fact … is *whether the trustor was in default*" at the time of the foreclosure. *Id.* (emphasis added). The other case Plaintiffs cite was resolved on exhaustion grounds and did not discuss the pleading standard for a wrongful-foreclosure claim at all. *See McKnight Fam., LLP*, 129 Nev. at 616, 310 P.3d at 559. Here, there is no dispute that the loans secured by deeds of trust recorded against the Liberty View and Newburg Properties were in default at the time of the respective Trustees' foreclosures. Therefore, Plaintiffs have no wrongful-foreclosure claim.

Furthermore, the sole basis for Plaintiffs' wrongful-foreclosure claim is FHFA's allegedly unconstitutional funding mechanism. *See* Am. Compl. ¶ 106. Because Plaintiffs' constitutional claims fail, as discussed above, their derivative wrongful-foreclosure claim necessarily fails too.

D. Plaintiffs do not state an APA claim.

Plaintiffs' sparing references to the APA in the Amended Complaint are insufficient to state a claim. For starters, to state an APA claim, Plaintiffs must identify a "final agency action for which there is no other adequate remedy in a court." *Bennett v. Spear*, 520 U.S. 154, 175 (1997). As discussed above, *supra* Section I.A, Plaintiffs have failed to identify *any* specific FHFA action that could support relief, let alone a *final* agency action. Further, as Plaintiffs' constitutional theories lack merit, Plaintiffs have not identified any *unlawful* agency action. Thus, Plaintiffs have not properly pleaded an APA claim. And even if they had, an APA claim could not properly be brought against FHFA as Conservator and, independently, would be precluded by Section 4617(f). *See County of Sonoma v. FHFA*, 710 F.3d 987, 992-93 (9th Cir. 2013) (holding that the plaintiff's APA claims were precluded by Section 4617(f)); *Town of Babylon v. FHFA*, 699 F.3d 221, 225-28 (2d Cir. 2012) (similar).

III. THE COURT SHOULD DENY ANY REQUEST FOR LEAVE TO AMEND

Plaintiffs alternatively request leave to amend the complaint. *See* Opp. at 43. But the Plaintiffs have had ample to time to consider—and multiple opportunities to articulate—their claims. This includes the Prior Quiet-Title Actions, as there is no claim they can assert now that they could not have asserted then. The defects in Plaintiffs' claims cannot be fixed by amendment. Even putting aside the various threshold issues that bar Plaintiffs' claims, their substantive theories lack merit in any event. As a result, Plaintiffs claims fail as a matter of law. Therefore, the Court should deny Plaintiffs' request for leave to amend. *See Hall v. United States*, 233 F.R.D. 591, 597 (D. Nev. 2005) (denying leave to amend based on futility).

CONCLUSION

Plaintiffs should never have brought this case. The Constitution's checks and balances are safeguards designed to protect our freedom, not to be used as weapons to thwart lawful and long-overdue foreclosures. Plaintiffs fail to overcome the insurmountable threshold issues that bar this lawsuit. And just as importantly, Plaintiffs' claims fail as a matter of substantive law.

The Constitution's text and history—as well as the great weight of precedent—confirm that FHFA's funding fully comports with the Appropriations Clause. As Plaintiffs' causes of action all depend on that fatally flawed theory, none states a viable claim. Accordingly, for the foregoing reasons, the Court should dismiss this case with prejudice.

Dated: February 16, 2024

Respectfully submitted:

/s/ Leslie Bryan Hart

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CERTIFICATE OF SERVICE

I hereby certify pursuant to FRCP 5, that on February 16, 2024, a true and correct copy of the above **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS THE FIRST AMENDED COMPLAINT** was served via the court's CM/ECF electronic filing / service system to all parties who have appeared in this matter

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INDEX OF EXHIBITS

Exhibit No.	Description
A	Recorded Notice of Default