

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

FAIRHOLME FUNDS, INC, ON  
BEHALF OF ITS SERIES, THE  
FAIRHOLME FUND, et al.,

Plaintiffs-Appellees,

v.

FEDERAL HOUSING FINANCE  
AGENCY, IN ITS CAPACITY AS  
CONSERVATOR OF THE FEDERAL  
NATIONAL MORTGAGE  
ASSOCIATION AND THE  
FEDERAL HOME LOAN  
MORTGAGE CORPORATION, et  
al.,

Defendants-Appellants.

Case No. 25-5113 (consolidated  
with nos. 25-5121, 25-5154, and  
25-5155)

**STATEMENT OF THE ISSUES TO BE RAISED**

Defendants-Appellants the Federal Housing Finance Agency (“FHFA” or “Conservator”) in its capacity as Conservator of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association (“Fannie Mae”), and the Federal Home Loan Mortgage Corporation (“Freddie Mac”; together with Fannie Mae, the “Enterprises”) submit the following statement of the issues to be raised:

1. Whether the Supreme Court’s decision in *Collins v. Yellen*, 594 U.S. 220, 239, 254 (2021), which held as a matter of law that the Conservator’s “business decisions are protected from judicial review” under 12 U.S.C. § 4617(f) and that “the FHFA could have reasonably concluded that [the Net Worth Sweep] was in the best interests of members of the public who rely on a stable secondary mortgage market,” forecloses Plaintiffs’ claim that FHFA acted “arbitrarily and unreasonably” in making the business decision to agree to the Net Worth Sweep.

2. Whether the implied covenant of good faith and fair dealing applies where the Enterprise shareholder contracts at issue specify the scope of FHFA’s contractual discretion through their incorporation of the Housing and Economic Recovery Act’s “best interests” provision, 12 U.S.C. § 4617(b)(2)(J).

3. Whether Plaintiffs’ claim that the Net Worth Sweep reduced the value of their shares by depriving them of future dividends is a non-cognizable claim for anticipatory breach of contract.

4. Whether Plaintiffs, who are current shareholders, proved damages with reasonable certainty where they based their damages on a one-day drop in share prices, but failed to present evidence accounting for the prompt rebound in share prices, and also failed to present evidence accounting for a potential alternative cause of the one-day price drop.

5. Whether Plaintiffs who purchased their shares after the Net Worth Sweep lack standing because the implied covenant claim here was not automatically assigned to subsequent purchasers (i.e., the claim did not “travel with the shares”).

Dated: May 14, 2025

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 14, 2025, I caused the foregoing document to be electronically filed using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: May 14, 2025

*s/ John P. Elwood*  
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