No. 21-688

In the Supreme Court of the United States

NERIS MONTILLA, ET AL., PETITIONERS

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Due Process Clause of the Fifth Amendment governed the actions of the Federal National Mortgage Association or its conservator, the Federal Housing Finance Agency, in exercising a contractual right to foreclose on petitioners' mortgages.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 999 F.3d 751. The opinion of the district court (Pet. App. 25-34) is not reported in the Federal Supplement but is available at 2020 WL 9934769.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 2021. The petition for a writ of certiorari was filed on November 5, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress created the Federal National Mortgage Association (Fannie Mae) in 1938 and the Federal Home Loan Mortgage Corporation (Freddie Mac) in 1970. See *Collins* v. *Yellen*, 141 S. Ct. 1761, 1770 (2021). Those enterprises are publicly traded companies with

private shareholders, but they operate under congressional charters and serve public missions. 12 U.S.C. 4501. The enterprises buy mortgages, pool them into mortgage-backed securities, and sell the securities to investors. *Collins*, 141 S. Ct. at 1771. Those activities improve the liquidity of the home lending market and promote access to credit. *Ibid.*

In 2008, in response to a crisis in the housing market, Congress enacted the Housing and Economic Recovery Act of 2008 (Recovery Act), Pub. L. No. 110-289, 122 Stat. 2654. The Recovery Act established the Federal Housing Finance Agency (Agency), empowered it to regulate the enterprises, and authorized it to place the enterprises in conservatorship or receivership in order to reorganize, rehabilitate, or wind up their affairs. 12 U.S.C. 4511, 4617(a).

In September 2008, the Agency placed the enterprises into conservatorships. *Collins*, 141 S. Ct. at 1772. As conservator, the Agency succeeded to "all rights, titles, powers, and privileges" of the enterprises and of their officers, directors, and stockholders. 12 U.S.C. 4617(b)(2)(A)(i). The Agency also obtained the authority to "operate" the enterprises and to "conduct all [their] business." 12 U.S.C. 4617(b)(2)(B)(i).

2. This case concerns mortgages on two properties in Rhode Island. Pet. App. 5. Rhode Island law allows parties to a mortgage to incorporate a "power of sale" provision into their agreement. R.I. Gen. Laws § 34-11-22 (2011). If the contract includes such a provision, a default by the borrower entitles the lender to foreclose on the mortgage and to sell the property without any judicial proceedings. See *Bucci* v. *Lehman Brothers Bank, FSB*, 68 A.3d 1069, 1085 (R.I. 2013).

Petitioners are two individuals who executed mortgages containing power-of-sale provisions. Pet. App. 5. Each mortgage was later acquired by Fannie Mae. *Ibid.* Each petitioner defaulted on the mortgage, prompting Fannie Mae to exercise its power of sale, foreclose on the mortgage, and sell the property without judicial proceedings. *Ibid.* Fannie Mae was under conservatorship at the time. *Id.* at 4-5.

3. In 2018, petitioners filed a putative class action against Fannie Mae and the Agency in federal district court in Rhode Island. Pet. App. 6. Petitioners alleged that, by exercising its power of sale and foreclosing on their mortgages without judicial proceedings, Fannie Mae and the Agency had deprived them and other similarly situated individuals of property without due process of law, in violation of the Due Process Clause of the Fifth Amendment. *Ibid.*

The district court dismissed the complaint. Pet. App. 25-34. The court determined that the Due Process Clause did not govern Fannie Mae's use of its power of sale, because Fannie Mae is a private corporation rather than a government actor. *Id.* at 29-32. The court similarly determined that the Clause did not govern the Agency's use of its power of sale, because that action involved the exercise of "a contractual right inherited from Fannie Mae by virtue of its conservatorship" rather than an exercise of governmental power. *Id.* at 33.

4. The court of appeals affirmed. Pet. App. 1-20.

The court of appeals held that Fannie Mae is not a government actor subject to the Due Process Clause. Pet. App. 14-20. The court observed that, in *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), this Court had held that a corporation qualifies as a government actor for constitutional purposes if

(1) the government has created the corporation "by special law," (2) the corporation serves "governmental objectives," and (3) the government retains "permanent authority" to control the corporation. Pet. App. 14 (quoting *Lebron*, 513 U.S. at 400). The court concluded that, although Fannie Mae satisfied the first two criteria, it failed the third. *Ibid.* The court explained that the conservatorship granted the Agency only "temporary" control, not "permanent authority," over Fannie Mae. *Ibid.*

The court of appeals also held that the Agency's use of its power of sale was not an exercise of governmental power subject to the Due Process Clause. Pet. App. 8-13. The court explained that, when acting as conservator, the Agency "steps into [Fannie Mae's] shoes" and "exercises [its] rights." *Id.* at 9. The court noted that the Agency's use of its power of sale involved the exercise of the "private contractual right to nonjudicially foreclose on [petitioners'] mortgages," not the exercise of governmental power. *Ibid.*

ARGUMENT

Petitioners renew their contention (Pet. 25-46) that Fannie Mae and the Agency violated the Due Process Clause by exercising their power of sale in accordance with Rhode Island law. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly determined that the Due Process Clause did not govern Fannie Mae's exercise of its power of sale.

"[T]he Due Process Clause protects indivudals only from governmental and not from private action." *Lugar*

v. *Edmondson Oil Co.*, 457 U.S. 922, 930 (1982). In *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), this Court explained that whether a corporation created by the government qualifies as part of the government for purposes of the Constitution depends on the nature of the corporation's relationship with the government. *Id.* at 394-399. Specifically, the Court "h[eld] that where * * * [1] the Government creates a corporation by special law, [2] for the furtherance of governmental objectives, and [3] retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government" for purposes of the Bill of Rights. *Id.* at 400.

As the court of appeals acknowledged, no party disputes that Fannie Mae satisfies the first two criteria set out in *Lebron*. See Pet. App. 14. Congress created Fannie Mae by special law, see 12 U.S.C. 1717(a)(1), and Fannie Mae furthers public objectives, see 12 U.S.C. 4501(1). Fannie Mae does not, however, satisfy the third criterion. The government has not retained permanent authority to control the corporation; to the contrary, Fannie Mae's private stockholders elect its directors. See 12 U.S.C. 1723.

As the court of appeals further explained, the Agency's conservatorship does not change that result. See Pet. App. 14-15. The Recovery Act empowers the Agency to put Fannie Mae in conservatorship or receivership "for the purpose of reorganizing, rehabilitating, or winding up the affairs" of the enterprise. 12 U.S.C. 4617(a)(2). The statute thus makes clear that conservatorship has "an inherently temporary purpose." Pet. App. 15 (citation omitted). In addition, the government has announced that it has "begun work to establish a timeline and process to terminate the conservatorship."

Id. at 15 n.8 (citation omitted). And the court observed that petitioners' complaint included no allegations plausibly suggesting that the government has treated the conservatorship as permanent. *Id.* at 15. The "temporary conservatorship," in short, "does not constitute permanent authority" and thus does not transform Fannie Mae into a governmental actor. *Id.* at 14.

Petitioners argue (Pet. 27-30) that a corporation can be part of the government even if the government's authority over it is temporary rather than permanent. That is incorrect. In *Lebron*, the Court "h[eld]" that a corporation constitutes a governmental actor if, among other criteria, the government exercises "permanent authority" over it. 513 U.S. at 400. The Court expressly distinguished a corporation that satisfies those criteria from one that is "merely in the temporary control of the Government (as a private corporation whose stock comes into federal ownership might be)." *Id.* at 398. In addition, in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), the Court held that a corporation controlled by the government did not form part of the government, in part because the government's control was only temporary. See *id.* at 152 ("[The corporation] is not a federal instrumentality by reason of the federal representation on its board of directors. * * * Full voting control of [the corporation] will shift to the shareholders if federal obligations fall below 50% of [the corporation's] indebtedness.").

Citing *Lebron* and *Department of Transportation* v. *Association of American Railroads*, 575 U.S. 43 (2015), petitioners also argue (Pet. 32) that the status of a corporation must turn on "the nature of the government's relationship with and control over" it, not on "a statutory disclaimer of agency status." But the court of

appeals' decision comports with that principle. The court did not deem Fannie Mae a private actor simply because Congress had labeled it as such. Rather, the court examined the nature of the government's relationship with Fannie Mae, through the lens of the factors set forth in *Lebron*. See Pet. App. 14-17.

Invoking this Court's decision in *Collins* v. *Yellen*, 141 S. Ct. 1761 (2021), petitioners also argue (Pet. 33-35) that, in practice, the Agency exercises a high level of control over Fannie Mae as conservator. But under *Lebron*, a court must consider more than just the level of governmental control over a corporation; it must also consider the duration of that control. Nothing in *Collins* suggests that the Agency exercises permanent control over Fannie Mae as its conservator.

2. The court of appeals also correctly held that the Due Process Clause does not govern the Agency's exercise of Fannie Mae's private contractual rights in the course of conducting Fannie Mae's routine business operations.

In this case, the Agency's use of its power of sale was an exercise of a private contractual right, not an exercise of governmental power. A conservator or receiver "steps into the shoes" of its ward, inheriting its ward's rights and duties. *Coit Independence Joint Venture* v. *Federal Savs. & Loan Ins. Corp.*, 489 U.S. 561, 585 (1989); see *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 83 (1994) ("st[an]d in the shoes"). In accordance with that principle, the Recovery Act provides that the Agency, as conservator or receiver, "succeed[s]" to "all rights, titles, powers, and privileges" of the enterprise. 12 U.S.C. 4617(b)(2)(A). As relevant here, the Agency succeeded to Fannie Mae's private rights under the mortgage contracts with petitioners, including the power of

sale and the right to conduct a nonjudicial foreclosure. The use of those rights does not entail the exercise of governmental power; to the contrary, a private party may likewise conduct a nonjudicial foreclosure where permitted by the contract and applicable state law. See, *e.g.*, *Scott* v. *Paisley*, 271 U.S. 632, 635 (1926) ("The validity of such a contractual power of sale is unquestionable."); *Bell Silver & Copper Mining Co.* v. *First Nat'l Bank*, 156 U.S. 470, 477 (1895) ("There is nothing in the law of mortgages * * * which prevents the conferring * * * of the power to sell the premises * * * upon default."). The Due Process Clause accordingly does not constrain the Agency's exercise of that right.

Petitioners rely (Pet. 37-45) on this Court's decisions in *FDIC* v. *Meyer*, 510 U.S. 471 (1994), and *Collins*, but neither supports their claim. In *Meyer*, a plaintiff sued the Federal Deposit Insurance Corporation (FDIC), claiming that its actions as receiver had violated the Due Process Clause. *Id.* at 473-474. The Court held that Congress, by including a sue-and-be-sued clause in the FDIC's organic statute, had waived the agency's sovereign immunity from that claim. *Id.* at 480-483. The Court, however, ultimately "d[id] not reach the merits of [the] due process claim." *Id.* at 486 n.12. *Meyer* thus establishes only that the due-process claim against the FDIC acting as a receiver was not barred by sovereign immunity—not, as petitioners seem to suggest, that the agency's actions were subject to the Due Process Clause. Petitioners likewise err in asserting (Pet. 41 n.12) that *Meyer*'s sovereign-immunity holding "logically requires" that the FDIC was subject to the Due Process Clause because only state actors have sovereign immunity to waive. The fact that the FDIC (or the Agency) is part of the federal government

for sovereign-immunity purposes does not mean that its actions are governed by the Due Process Clause when it steps into the shoes of a private entity and exercises private contractual rights.

In *Collins*, this Court held that the Agency exercised executive power and that its single head was therefore subject to removal by the President. See 141 S. Ct. at 1785-1786. But the Court reached that result because the Agency was more than just a conservator; it was also a regulator. For example, the Court observed that the Agency had the power to "put the company into conservatorship" in the first place, to "appoint itself as conservator," to issue "a 'regulation or order' requiring stockholders, directors, and officers to exercise certain functions," and to "issue subpoenas." *Id.* at 1786 (citation omitted). In this case, however, the Agency has not exercised any such regulatory authority. It has instead done what any conservator could do: exercise a contractual right on behalf of its ward. Nothing in *Collins* suggests that the Due Process Clause governs that action.

3. As petitioners concede (Pet. 28, 38), this case does not involve any circuit conflict. To the contrary, every court of appeals to consider the question has held that Fannie Mae and Freddie Mac are not part of the government under *Lebron*. In particular, the Sixth Circuit and the court below have applied *Lebron* to hold that the enterprises are not federal actors for purposes of due-process claims arising out of foreclosures. See *Mik* v. *Federal Home Loan Mortg. Corp.*, 743 F.3d 149, 168 (2014); Pet. App. 14-20. The D.C. Circuit has applied *Lebron* to hold that Fannie Mae is not a governmental actor for purposes of a First Amendment retaliation claim. See *Herron* v. *Fannie Mae*, 861 F.3d 160, 166-169 (2017). And the Fourth and Ninth Circuits have

applied *Lebron* to hold that the enterprises are not governmental actors for statutory purposes. See *Meridian Invs., Inc.* v. *Federal Home Loan Mortg. Corp.*, 855 F.3d 573, 578-579 (4th Cir. 2017); *United States ex rel. Adams* v. *Aurora Loan Servs., Inc.*, 813 F.3d 1259, 1261 (9th Cir. 2016).

The court of appeals' conclusion that the Agency does not exercise governmental power for purposes of a due-process claim when it steps into the enterprises' shoes as conservator is similarly in accord with the decisions of other courts. See Pet. App. 8-13. The D.C. Circuit has reached the same conclusion in the context of a First Amendment retaliation claim. See *Herron*, 743 F.3d at 169. And the Fourth Circuit has concluded that the Agency, when acting as conservator, does not qualify as part of the government for purposes of a statute. See *Meridian Invs.*, 855 F.3d at 579. More broadly, courts of appeals have long distinguished between other federal agencies' exercise of private rights as a conservator or receiver and their exercise of governmental power as a regulator. See, *e.g.*, *United States ex rel Petras* v. *Simparel, Inc.*, 857 F.3d 497, 502-504 (3d Cir. 2017) (Small Business Administration); *United States* v. *Beszborn*, 21 F.3d 62, 68 (5th Cir.) (Resolution Trust Corporation), cert. denied, 513 U.S. 934 (1994); *United States* v. *Ely*, 142 F.3d 1113, 1121 (9th Cir. 1997) (FDIC); *United States* v. *Heffner*, 85 F.3d 435, 439 (9th Cir. 1996) (Resolution Trust Corporation).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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