No. 21-688

In the
Supreme Court of the United States

NERIS MONTILLA AND MICHAEL KYRIAKAKIS,
Petitioners,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION AND FEDERAL HOUSING FINANCE AGENCY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONERS

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The First Circuit upheld dismissal of Petitioners' due process claims on grounds that under the Federal Housing and Finance Agency's (FHFA) conservatorship, neither the Federal National Mortgage Association (Fannie Mae) nor the FHFA are state actors. Petitioners seek certiorari and have presented to this Court square conflicts between the First Circuit's holdings and this Court's precedent, as well as a conflict between two of this Court's prior decisions revealed thereby. In opposition, Respondents merely summarize the First Circuit's reasoning, while largely ignoring Petitioners' arguments for why this Court should grant review. Where Respondents do directly address Petitioners' arguments beyond restating the lower court's holding, Respondents' counterpoints are ineffective. Given the conflicts presented and the importance of the underlying due process issues, Petitioners respectfully request that the Court grant review.

I. Respondents Misstate the Issues before This Court

Respondents unduly narrow the questions presented, which they frame as "[w]hether 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." Opp. I (emphasis added). The merits of Petitioners' due process claims were never reached by the First Circuit. Moreover, Respondents' narrowing of the issues improperly conflates the merits

of the underlying due process issue with the threshold jurisdictional issue actually decided, namely, whether the FHFA is a state actor subject to the Due Process Clause. Respondents' attempt to conflate the jurisdictional and constitutional issues before this Court with the merits is tautological and disregards the conflict in how the lower courts have treated the important state action concepts as applied to the FHFA and Fannie Mae.

With respect to Petitioners' argument that the FHFA's actions as conservator of Fannie Mae are state action, Respondents' narrow framing of the questions presented and their corresponding arguments are off the mark in two ways. First, Respondents tie the issues before this Court to the FHFA's exercise of a contractual right, rather than the FHFA's status as conservator. Second, Respondents limit the questions to the applicability of the Due Process Clause to Respondents' actions, rather than to the FHFA's status as a state actor in general.

Montilla did not compartmentalize the issue presented as whether a particular exercise of a contractual right was state action, nor whether any specific FHFA actions constituted state action. Rather, the First Circuit stated that its mission was to "determine if FHFA acted as the government in its role as the GSEs' conservator." Pet. App. 8. Its holding answered in kind: "We hold that, in its role as the GSEs' conservator, FHFA is not a government actor because it has 'stepped into the shoes' of the private GSEs." *Id*. The *Montilla* panel supported its holding by quoting its sister circuits:

> Other circuits have interpreted HERA to mean that when acting as the GSEs' conservator and exercising their rights, FHFA steps into the GSEs' shoes. See *Herron v. Fed. Nat'l Mortg. Ass'n*, 861 F.3d 160, 169 (D.C. Cir. 2017) (holding that when FHFA "step[ped] into Fannie Mae's private shoes," it became a private actor); *Meridian Invs., Inc. v. Fed'l Home Loan Mortg. Corp.*, 855 F.3d 573, 579 (4th Cir. 2017) ("[T]hough FHFA is a federal agency, as conservator it steps into Freddie Mac's shoes, shedding its government character and also becoming a private party."); see also *U.S. ex rel. Adams v. Aurora Loan Servs., Inc.*, 813 F.3d 1259, 1261 (9th Cir. 2016) (holding that FHFA's conservatorship "places [it] in the shoes of Fannie Mae and Freddie Mac, and gives the FHFA their rights and duties").

Pet. App. 9–10.

Like *Montilla*, none of the quoted holdings mentions that the FHFA's status as a state actor was dependent on the exercise of a contractual right. Instead, *Montilla* and its antecedents determined that the FHFA was not a state actor due to language in the Housing and Economic Recovery Act of 2008's (HERA) succession clause. Pet. App. 9–10 (discussing 12 U.S.C. § 4617(b)(2)(A)). It is on that basis that the First Circuit held that "FHFA is not acting as the government in its capacity as the GSEs' conservator." Pet. App. 13. The important state action questions Petitioners bring to this Court should not be viewed

through the prism that Respondents misleadingly suggest.[1]

II. *Collins* Resolves the *Meyer/O'Melveny* Conflict by Rendering *O'Melveny* Inapplicable

Petitioners present to this Court a square conflict between its *Meyer*[2] and *O'Melveny*[3] decisions, and between its *Collins*[4] decision and the circuit courts' *Montilla*-like holdings. Pet. 42–43. Respondents merely restate the *Montilla* panel's reasoning without addressing Petitioners' arguments refuting that reasoning, namely: (1) that the District Court's finding of state action was jurisdictional, Pet. 40–41, and not a ruling on the merits as Respondents suggest without

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[1] Moreover, Petitioners' underlying due process claim itself presents important constitutional issues that deserve the full consideration of the lower courts, such as the government's constitutional obligations when exercising a contractual right (*see, e.g., Wieman v. Updegraff*, 344 U.S. 183 (1952) (right to due process with respect to termination of an employment contract)) and waiver of constitutional rights (*see, e.g., Fuentes v. Shevin*, 407 U.S. 67 (1972) (a waiver of constitutional rights must be clear)). Respondents' framing underscores the importance for this Court to resolve the state action issues presented so that the lower courts can fulfill their duty to vindicate the Constitution's dictates and hold the government to its constitutional obligations when it exercises the awesome power to deprive someone of their home.

[2] *F.D.I.C. v. Meyer*, 510 U.S. 471 (1994).

[3] *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79 (1994).

[4] *Collins v. Yellen*, __ U.S. at __, 141 S. Ct. 1761 (2021).

justification, Opp. 8;[5] (2) *Meyer's* actual holding provides that when acting as a receiver, a federal agency that has waived sovereign immunity is a state actor for purposes of constitutional claims such as a Due Process claim (and thus the First Circuit's interpretation of it is in conflict with *Meyer*), Pet. 40–42; and (3) *Meyer* and *O'Melveny* have produced conflicting results when applied to the determination of the FHFA-as-conservator's state action status, leading to judicial uncertainty. Pet. 42–43.

Most importantly, Respondents do not convincingly address how this Court's recent *Collins* decision resolves the demonstrated *Meyer/O'Melveny* conflict by

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[5] The District Court here acknowledged that it did not reach the merits of Petitioners' due process claims. Pet. App. 28 n.2. Moreover, Respondents' point is irrelevant because *Meyer* and *Montilla* did not reach the merits for different reasons. *Meyer* and the lower courts here *did* both fully consider the question of state actor status that is at issue before this Court, which is a predicate, jurisdictional question to any due process claim. As the District Court here explained, it did not need to consider the merits due to its finding of private action. *Id. Meyer*, to the contrary, settled the predicate state actor question in the affirmative through its sovereign immunity holding; the due process claims there were not considered because this Court held that there is no *Bivens* remedy against *federal agencies* (and thus, no cause of action). *Meyer*, 510 U.S. at 483–86.

The District Court in *Montilla's* sister case, *Sisti*, summarized: "Applying the logic of *Meyer* to this case reveals that FHFA has waived sovereign immunity, and thus, can be considered a government actor . . . [b]ecause only federal entities can waive sovereign immunity[.]" *Sisti v. Fed. Hous. Fin. Agency*, 324 F. Supp. 3d 273, 282 (D.R.I. 2018), *rev'd sub nom. Boss v. Fed. Hous. Fin. Agency*, 998 F.3d 532 (1st Cir. 2021).

rendering *O'Melveny*—the decision on which Respondents' entire argument relies—inapplicable to the determination of the FHFA-as-conservator's state actor status. Pet. 43–45. The relevant question addressed in *Collins* was whether when the FHFA "steps into the shoes of a regulated entity as its conservator or receiver, it takes on the status of a private party and thus does not wield executive power." *Collins*, 141 S. Ct. 1761 at 1785.[6] The *Collins* Court concluded that "the FHFA clearly exercises executive power" when acting as conservator. *Id.* at 1786. Respondents' attempt to distinguish *Collins*, to which it devoted all of 200 words, is unavailing.

1. Respondents claim that this Court reached its conclusion in *Collins* "because the Agency was more than just a conservator; it was also a regulator." Opp. 9. This mischaracterizes the basis for *Collins*' conclusion, which distinguished the FHFA's regulatory powers and its powers as a conservator. Per *Collins*:

> But the Agency does not always act [as a receiver or conservator], and *even when it acts as conservator or receiver*, its authority stems from a special statute, not the laws that generally govern conservators and receivers. In deciding what it must do, what it cannot do, and the standards that govern its work, the FHFA must interpret the Recovery Act, and interpreting a law enacted by Congress to implement the

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[6] This question related to the underlying issue of whether HERA's "for cause" provision for executive removal of the FHFA's single director violated constitutional separation of powers.

> legislative mandate is the very essence of "execution" of the law.

Collins, 141 S. Ct. at 1785 (cleaned up) (emphasis added). Thus, *Collins* says that when the FHFA acts as conservator, it acts under its statutory conservatorship powers, and therefore the FHFA's actions as conservator constitute executive action. *Collins* says nothing about those actions being regulatory in nature.

Collins also based its conclusion on the fact that "the FHFA's powers under the Recovery Act differ critically from those of most conservators and receivers." *Id.* *Collins* provides a list of five examples of such powers. Respondents point to only one of those examples—that the FHFA has the power to appoint itself as conservator—as proof that *Collins'* finding of executive action was due to the FHFA's regulatory authority. Respondents wholly ignore the four other examples listed in *Collins*:

> [1] It can subordinate the best interests of the company to its own best interests and those of the public. See 12 U.S.C. § 4617(b)(2)(J)(ii). [2] Its business decisions are protected from judicial review. § 4617(f). [3] It is empowered to issue a "regulation or order" requiring stockholders, directors, and officers to exercise certain functions. [4] § 4617(b)(2)(C). It is authorized to issue subpoenas. § 4617(b)(2)(I).

Collins, 141 S. Ct. at 1785–86. Each of these four powers is housed in subsection (b) of 12 U.S.C. 4617, titled "Powers and duties of the Agency as conservator

or receiver."[7] *Collins'* determination "the FHFA clearly exercises executive power," *id.* at 1786, was based on the FHFA's conservator powers, not its regulatory powers.

2. *Collins'* rejection of *O'Melveny* was also not dependent on the FHFA's purported exercise of its regulatory powers. The *Collins* Court faced the same argument Respondents pose here: when acting as conservator, the FHFA "steps into the shoes" of the regulated entity, and thus as conservator it is a private actor. *Collins*, 141 S. Ct. at 1785. And like in *Collins*, Respondents advance the same argument that *O'Melveny* controls. Opp. 7.

Collins rejected those arguments:

> [The] *O'Melveny* . . . decision is far afield. It held that state law, not federal common law, governed an attribute of the FDIC's status as receiver for an insolvent savings bank. The nature of the FDIC's authority in that capacity sheds no light on the nature of the FHFA's distinctive authority as conservator under the Recovery Act.

Collins, 141 S. Ct. at 1786 n.20. Nothing here signals that *O'Melveny* was "far afield" because the FHFA acted as a regulator. Rather, *Collins* found *O'Melveny* inapplicable because *O'Melveny* merely held that state common law governed an *attribute* of the FDIC, not

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[7] FHFA's regulatory power is found in an entirely different section of HERA, 12 U.S.C. 4511(b)(2), which provides the FHFA with "general regulatory authority" over a regulated entity.

federal common law. *Collins'* conclusion that the FHFA as conservator wields executive power, conversely, was based on the FHFA's *statutory powers* in HERA as conservator. *Id.* at 1785–86.[8]

III. Respondents Perpetuate the First Circuit's Conflict with *Lebron* and *American Railroads*

Petitioners demonstrated that there is a clear conflict between the approaches of the circuit courts and this Court's holdings in *Lebron*[9] and *American Railroads*.[10] As with the *Meyer/O'Melveny* conflict, Respondents' response ignores Petitioners' arguments and restates the analysis of the *Montilla* panel. In doing so, Respondents perpetuate the errors of the courts of appeals.

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[8] Respondents cite another of this Court's FDIC-as-receiver decisions, *Coit Independence Joint Venture v. Federal Sav. & Loan Ins. Corp.*, 489 U.S. 561 (1989), in support of their "steps into the shoes" argument. Opp. 7. Like *O'Melveny*, this decision is "far afield" from the questions presented here. *Coit* addressed whether the FDIC's predecessor had exclusive authority to adjudicate state law claims against a failed savings and loan. *Id.* at 564. *Coit* noted that the FDIC "steps into the shoes of [a failed savings and loan] and takes control of its assets." *Id.* at 571. *Coit* first observed this in the context of the FDIC's duty to reimburse depositors, *id.*, and then in the context of receiving notice of depositor claims against the failed savings and loan, *id.* at 585. *Coit* does not concern the FDIC's power over the failed savings and loan itself, and accordingly is not relevant to the nature of the FHFA's powers over Fannie Mae.

[9] *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995).

[10] *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43 (2015).

1. Respondents continue to cite *Lebron's* holding as setting forth a three-factor test. Opp. 5. Tellingly, they do not address Petitioners' argument that the full language in *Lebron's* holding (including "to appoint a majority of the directors") establishes a more nuanced rule than the three-factor test promulgated by the circuit courts. Pet. 27–28. Nor do Respondents address Petitioners' argument that *Lebron* and *American Railroads*, when read together, show that state actor status is determined by a wider analysis of the nature of the government's relationship with and control over a government-chartered company (i.e., "the practical reality of federal control and supervision"), *Am. Railroads*, 575 U.S. at 55, in which "permanent control" is probative, not dispositive. Respondents do not address Petitioners' argument that by requiring permanency, the circuit courts are in conflict with this Court's precedents. Pet. 32.

Respondents argue that the *Montilla* panel performed the analysis that Petitioners argue *Lebron* and *American Railroads* require. Opp. 7. Not so. Rather than performing the wider analysis *Lebron* and *American Railroads* call for, the *Montilla* panel performed their analysis only "through the lens of the factors set forth in *Lebron*." Opp. 7. In other words, the *Montilla* panel mechanically applied the three-factor test as Petitioners argue it should *not* have done. Consequently, the First Circuit found that the FHFA had only temporary control over Fannie Mae because the HERA statute labels the FHFA a conservator and defines its purpose as one that is, on its face, temporary. Pet. App. 15 ("The statutory language confirms . . . that a conservatorship has "an inherently

temporary purpose.").[11] This is not what *Lebron* and *American Railroads* teaches.

2. Respondents' attempts to support their "permanent control" argument are ineffective. First, Respondents point to another of this Court's Railroad cases, the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), which they claim 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." Opp. 6. That case, however, dealt with a question of government takings. As to the applicability of that decision to Amtrak, Justice Scalia in *Lebron* remarked:

> [W]e specifically observed in that case that the directors were placed on the board to protect the United States' interest "in assuring payment of the obligations guaranteed by the United States," and that "full voting control will shift to the shareholders if federal obligations fall below 50% of Conrail's indebtedness." Moreover, we noted, "the responsibilities of the federal directors are not different from those of the other directors—to operate Conrail at a profit for

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[11] Petitioners do not argue that the *Montilla* panel relied on a statutory disclaimer of agency, despite Respondents' suggestion to that effect by their argument that *Montilla* "did not deem Fannie Mae a private actor simply because Congress had labeled it as such." Opp. 7. Strict adherence to a statutory disclaimer was at issue in both *Lebron* and *American Railroads*; this is, Petitioners argue, important to understanding what those decisions stand for. Pet. 29–30. *Montilla* made a mistake *in kind* by focusing on statutory language.

> the benefit of its shareholders"—which contrasts with the public interest "goals" set forth in Amtrak's charter. Amtrak is worlds apart from Conrail: The Government exerts its control not as a creditor but as a policymaker, and no provision exists that will automatically terminate control upon termination of a temporary financial interest.

Lebron, 513 U.S. at 399 (cleaned up). Likewise, the FHFA is "worlds apart from Conrail," as it exerts near-*total* control over Fannie Mae as its conservator, not as its creditor, and there is no provision that will automatically terminate that control.

Additionally, Respondents claim that "[t]he 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." Opp. 5. However, Fannie Mae's private shareholders have not elected Fannie Mae's board since the inception of the conservatorship, as HERA has bestowed this power upon the FHFA. 12 U.S.C. § 4617(b)(2)(A)(i). Like the rigid application of a three-part test Respondents advocate, Respondents' claim to the contrary ignores the reality of the FHFA's conservatorship, ignores *Collins*' teaching in that regard, and is without merit.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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