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

Defendants.

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

**PLAINTIFFS' MOTION FOR LEAVE
TO FILE SECOND AMENDED
COMPLAINT**

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

The Supreme Court's recent decision *Consumer Financial Protection Bureau v. Community Financial Services Association of America, Ltd.*, 601 U.S. 416 (2024), 601 U.S. 416, 429-32 (2024) ("*CFPB*") constitutes significant intervening authority that justifies an amendment to the pleadings. *CFPB* defined the meaning and contours of an "appropriation" under the Appropriations Clause. In the process, the Supreme Court resolved some of the issues raised in this litigation and elevated the importance of others. Contrary to some of Plaintiffs' allegations in the current First Amended Complaint, the Supreme Court upheld perpetual appropriations and certain types of self-generated or self-selected funding outside the annual appropriations process. But *CFPB* crystalized that *Congress*—not the agency itself—must establish a sum certain or cap on the agency's ability raise and spend. The Court held that a valid "appropriation" within the meaning of the Appropriations Clause requires a law enacted through Congress identifying

1 particular or specific funds—through either a sum certain or cap—that an agency may expend for
 2 an identified purpose. Unlike *CFPB*, the Federal Housing Finance Agency's ("FHFA") funding
 3 mechanism contains no ceiling set by Congress on the amount that FHFA can extract from
 4 Fannie Mae and Freddie Mac and then use for foreclosure operations. Thus, FHFA has been
 5 acting unconstitutionally without a valid appropriation.

6 To be sure, the First Amended Complaint contains some allegations about the FHFA's
 7 lack of a budgetary cap. But, without the benefit of *CFPB*, the litigation focused on issues that are
 8 now largely settled. *CFPB* has refocused this litigation. The proposed Second Amended
 9 Complaint removes some allegations while amplifying the allegations about the spending cap. It
 10 also adds allegations about broader separation of powers principles that, according to the *CFPB*
 11 majority, may check Congress' authority to fund administrative agencies. Finally, the proposed
 12 Second Amended Complaint clarifies the capacity in which the FHFA's Director was sued under
 13 *Bivens* given FHFA's apparent confusion in the pending motion to dismiss.

14 Under these circumstances, leave to amend should be freely given. Plaintiffs' proposed
 15 amendment is not in bad faith, dilatory, or prejudicial. The amendment is certainly not futile.
 16 Indeed, Plaintiffs' case has gotten stronger after *CFPB*. The Court should allow amendment to
 17 create the cleanest record possible for the important constitutional issues at stake.

18 **II. FACTUAL AND PROCEDURAL BACKGROUND**

19 **A. Procedural History.**

20 Plaintiff Daisey Trust filed suit on June 23, 2023, alleging that the FHFA's
 21 then-impending foreclosure on its property was unconstitutionally funded in violation of the
 22 Appropriations Clause, Nondelegation Doctrine, and separation of powers principles.
 23 (ECF No. 1.) At the time of filing, the United States Supreme Court had granted certiorari in
 24 *CFPB* which presented a virtually identical case related to the Consumer Finance Protection
 25 Bureau. *CFPB v. CFSA*, No. 22-448 (cert. granted Feb. 27, 2023). In many ways (but not all), the
 26 original complaint was patterned after the Fifth Circuit's decision in *CFPB*.

27 Along with the complaint, Daisey Trust filed a motion for temporary restraining order and
 28 preliminary injunction seeking to enjoin FHFA's foreclosure and constitutional violations.

1 (ECF Nos. 2 & 3.) In detail, Daisey Trust described the textual, historical, structural, and
2 precedential reasons that FHFA's conduct violates the Constitution. (ECF No. 3 at 8-17.) In short,
3 Daisey Trust argued that an "appropriation" under the Constitution means a "periodic payment[]
4 disbursed from the Treasury, generally for a specific purpose and for a specific time period."
5 (*Id.* at 12.) Daisey Trust also challenged the FHFA's ability to self-generate its funding through
6 assessments outside congressional control. (*See* ECF No. 1 at 1-4, 8.)

7 On September 13, 2023, the Court held a hearing on the motion for temporary restraining
8 order and preliminary injunction. (ECF No. 24.) The Court denied the motion and allowed
9 Daisey Trust to file an amended complaint. (ECF No. 31.) Plaintiffs filed the First Amended
10 Complaint on November 2, 2023. (ECF No. 34.) Based on the filing of the amended complaint,
11 Defendants' motion to dismiss was denied as moot. (ECF No. 35.)

12 The Supreme Court had not yet decided *CFPB* when the First Amended Complaint was
13 filed. So, like the original complaint, the First Amended Complaint sought a determination of
14 legal and factual questions about the constitutionality of the FHFA's self-funding through
15 assessments and non-time limited spending mechanisms as violations of the Appropriations
16 Clause, the Nondelegation Doctrine, and other separation-of-powers principles. (ECF No. 34
17 at ¶ 17.) The First Amended Complaint contains some allegations about the FHFA's unlimited
18 spending authority and lack of a cap. (*Id.* at 8, 14, 16-17.) Again, in large part, the First Amended
19 Complaint was modeled after *CFPB* but it also asserted a wrongful foreclosure claim.
20 (*Id.* at ¶¶ 104-08.) The First Amended Complaint proposes three sub-classes to avoid the FHFA's
21 transparent efforts to moot claims like it attempted to do with the original plaintiff, Daisey Trust.

22 Defendants moved to dismiss the First Amended Complaint. (ECF Nos. 36, 39, 42.) While
23 Defendants' motion to dismiss was pending, the United States Supreme Court issued its opinion in
24 *CFPB* on May 16, 2024. *See Consumer Financial Protection Bureau v. Community Financial*
25 *Services Association of America, Ltd.*, 601 U.S. 416 (2024). As a result, this Court promptly
26 ordered the parties to confer about whether the *CFPB* decision "impacts the case and whether it
27 requires amendment of the first amended complaint, withdrawal and refileing of the pending
28 motion to dismiss, or some other action." (ECF No. 43.) The parties submitted a joint status

1 report. (ECF No. 33.) As stated in the joint status report, Plaintiffs acknowledge that the
2 Supreme Court's *CFPB* decision answered some questions raised by this litigation. However, the
3 FHFA's uncapped funding and spending structure remains unconstitutional under *CFPB*'s holding
4 and broader Separation of Powers principles. (*See* ECF No. 45 at 1-2.)

5 The Court ordered supplemental briefing on "the effect of the *CFPB* decision on the
6 plaintiffs' claims." (ECF No. 48.) The Court did not comment on—or preclude—Plaintiffs' ability
7 to move to amend. (*See id.*)

8 **B. The Supreme Court's Decision in *CFPB*.**

9 In *CFPB*, the Supreme Court held that "the Appropriations Clause requires [no] more than
10 a law that authorizes the disbursement of *specified funds* for identified purposes." 601 U.S. at 438
11 (emphasis added). The appropriation "need[s] to designate *particular revenues* for identified
12 purposes" either by "require[ing] expenditure of a particular amount" or "allow[ing] the recipient
13 of the appropriated money to spend up to a cap." *Id.* at 431-32. The Court reached this conclusion
14 after analyzing the Founding Era's original public meaning of an "appropriation" as "a law
15 authorizing the expenditure of *particular funds* for specified ends." *Id.* at 427 (reviewing early
16 dictionaries) (emphasis added). The Court reviewed pre-founding history and observed that
17 "parliamentary grants of supplies *ordinarily gave the Crown broad discretion regarding how*
18 *much to spend within an appropriated sum.*" *Id.* at 429 (emphasis added). "Statutes granting
19 money often stated that the Crown could spend 'any Sum not exceeding' a particular amount." *Id.*
20 (collecting examples). The Court described colonial and early statehood practice as largely the
21 same. *Id.* at 430. "In short, the origins of the Appropriations Clause confirm that appropriations
22 needed to designate particular revenues for identified purposes. *Some appropriations*
23 *required expenditure of a particular amount, while others allowed the recipient of the*
24 *appropriated money to spend up to a cap.*" *Id.* at 431 (emphasis added).

25 Ultimately, the Court affirmed the *CFPB*'s funding mechanism because "Congress
26 determined the amount of the Bureau's annual funding *by imposing a statutory cap* ... The only
27 sense in which the Bureau decides its own funding, then, *is by exercising its discretion to draw*
28 *less than the statutory cap.*" *Id.* at 435 (emphases added). Time and again, the Court highlighted

1 the CFPB's funding cap as the linchpin of its constitutionality. *See, e.g., id.* at 435 ("The statute
2 authorizes the Bureau to draw public funds from a particular source—the combined earnings of
3 the Federal Reserve System,' *in an amount not exceeding an inflation-adjusted cap.*") (emphasis
4 added); *id.* ("the Bureau's authorization to draw an amount that the Director deems reasonably
5 necessary to carry out the agency's responsibilities, *subject to a cap*, is similar to the
6 First Congress' lump-sum appropriations.") (emphasis added). Unlike the CFPB, Congress has not
7 enacted a statute establishing a sum certain or cap on the FHFA's power to raise money from
8 Fannie and Freddie and then spend it without congressional approval.

9 On top of the Appropriations Clause's protections, the *CFPB* majority recognized "that
10 there may be other constitutional checks on Congress' authority to create and fund an
11 administrative agency" 601 U.S. at 441. The dissenters indicated that one of those broader
12 separation of power principles is the Nondelegation Doctrine. *See id.* at 471 n.20 (Alito, J.,
13 dissenting) (citing *Cnty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 51 F.4th 616, 635 (5th Cir.
14 2022)).

15 The proposed amended complaint reflects the effect that *CFPB* has had on the scope of the
16 Plaintiffs' claims. The proposed amendment removes some allegations and adds others given the
17 landscape after *CFPB*. It also revamps its causes of action to reflect *CFPB*'s elements.

18 **III. ARGUMENT**

19 **A. Legal Standard for Amending the Pleadings.**

20 Federal Rule of Civil Procedure 15(a) provides that "[t]he court should freely give leave
21 [to amend] when justice so requires," and there is a strong public policy in favor of permitting
22 amendment. *Bowles v. Reade*, 198 F.3d 752, 757 (9th Cir. 1999). The Ninth Circuit has made
23 clear that Rule 15(a) should be applied with "extreme liberality." *Eminence Capital, LLC v.*
24 *Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (per curiam). This extremely generous
25 approach applies even when there has been more than one amendment already. *Id.* at 1052. It also
26 applies before the issuance of a scheduling order. *Howard v. CVS Caremark Corp.*,
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1 2014 WL 12628457, at *2 (C.D. Cal. Sept. 26, 2014) (citing *Johnson v. Mammoth*
2 *Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir. 1992)).

3 "The party opposing amendment bears the burden to show why leave should be denied,
4 including the burden of establishing prejudice." *Underwood v. O'Reilly Auto Enterprises, LLC*,
5 342 F.R.D. 338, 342 (D. Nev. 2022). Under Rule 15(a), courts consider various factors, including:
6 (1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility of the amendment;
7 and (5) whether the plaintiff has previously amended the complaint. *See id.* at 1052. However,
8 these factors do not carry equal weight and prejudice is the "touchstone." *Id.* Absent prejudice or
9 a strong showing of any of the other factors, there is a presumption that leave to amend should be
10 granted. *Id.*

11 The Court's Rule 15 analysis "must be guided by the underlying purpose of Rule 15—to
12 facilitate decision on the merits, rather than on the pleadings or technicalities." *Id.* (quoting *Roth*
13 *v. Garcia Marquez*, 942 F.2d 617, 628 (9th Cir. 1991)). To this end, the Ninth Circuit has held
14 that amendments are particularly appropriate when there has been new, intervening authority that
15 may materially alter the course of the litigation. *Flo & Eddie, Inc. v. Pandora Media, LLC*,
16 789 Fed. App'x. 569, 572 (9th Cir. 2019) (citing *Gonzales v. U.S. Dep't of Homeland Sec.*,
17 712 F.3d 1271, 1272–73 (9th Cir. 2013) (vacating the district court's judgment and remanding for
18 reconsideration of a motion to amend the complaint in light of a relevant intervening opinion by
19 this court); *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1026–27 (9th Cir. 2014) (remanding with
20 instructions to allow plaintiffs to amend their complaint in light of relevant cases decided while an
21 appeal was pending)).

22 **C. The Court Should Grant Leave to File an Amended Complaint.**

23 **1. Leave should be granted because there has been a litigation altering**
24 **change by intervening law.**

25 *CFPB* is a significant change in intervening law governing Plaintiffs' claims since the
26 filing of the First Amended Complaint. The First Amended Complaint advanced a legal theory
27 that an "appropriation" under the Appropriations Clause "must be funded only with specific,
28 time-limited appropriations from Congress...." (ECF No. 34 at 1.) Plaintiffs contended that all

1 funding through self-financed assessments was unconstitutional. (*Id.* at 2.) At the time, Plaintiffs
2 alleged that the common questions of law and fact required a determination of constitutionality of
3 "FHFA's self-funding and spending mechanisms, which are outside the appropriations
4 process...." (*Id.* at 5.) Plaintiffs attacked the legality of any funding outside the periodic
5 appropriations process. (*Id.* at 14-15.)

6 *CFPB* addressed many of these issues. It held that appropriations do not need to be time
7 limited and can be "standing." *CFPB*, 601 U.S. at 436-37. The Supreme Court also resolved that,
8 under some circumstances, agencies can be funded through fees, assessments, or commissions
9 outside the appropriations process if Congress establishes by law the amount of the fees or
10 otherwise sets a sum certain or cap on agency expenditures. *Id.* at 431- 434

11 After *CFPB*, the proposed Second Amended Complaint reorientates the litigation's focus
12 to the lack of funding caps and Congress' missing involvement in setting the assessments from the
13 regulated entities. For instance, the proposed Second Amended Complaint now sets forth the
14 elements of an Appropriations Clause violation after *CFPB*. (Ex. 1 at ¶¶ 75-91.) Then, the
15 proposed Second Amended Complaint alleges factual allegations sufficient to constitute an
16 Appropriations Clause violation under *CFPB*. (*Id.* at ¶¶ 23-50; 75-91.) Similarly, the proposed
17 complaint modifies its Nondelegation Doctrine and wrongful foreclosure claims based on *CFPB*'s
18 criteria. (*Id.* at ¶¶ 92-114.) And the proposed Second Amended Complaint reconfigures the class
19 action common questions of law and fact, (*Id.* at ¶ 18), its explanation for predominance, (¶ 20),
20 and clarifies how the FHFA has acted on grounds applicable to the class by spending uncapped
21 funds that have never been approved by Congress, (*Id.* at ¶ 19). The Second Amended Complaint
22 also includes *CFPB*'s acknowledgment of a broader separation of powers claim layered on the
23 Appropriations Clause. (*Id.* at ¶¶ 1-3.) Lastly, the proposed Second Amended Complaint clarifies
24 FHFA's confusion about Plaintiffs' *Bivens* claim. (*Compare* ECF No. 34 at ¶¶ 13, 71, 74, 91, 94
25 *with* attached Ex. 1 at ¶¶ 14, 81, 98.)¹

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27
28 ¹ Plaintiffs do not concede that the First Amended Complaint's allegations on this point are insufficient.

1 The proposed amendment brings the *CFPB* and funding and spending cap issues into
2 sharper relief. It will create a cleaner appellate record for a case that is an obvious vehicle for a
3 follow-on case to *CFPB*. The amendment is in the interests of justice and the Court should
4 liberally grant it.

5 **2. *There has been no delay, bad faith, or prejudice to Defendants.***

6 There has been no undue delay, bad faith, or dilatory motive by Plaintiffs. Plaintiffs
7 simply seek to amend the complaint due to the recent opinion, *CFPB*, which bears directly on the
8 arguments and claims Plaintiffs' advance. *CFPB* only recently came down in May 2024. There is
9 no scheduling order and there are no deadlines pending. Discovery has not yet begun. (*See*
10 ECF No. 33.) Accordingly, there has not been any undue delay, bad faith, or dilatory motives on
11 the Plaintiffs' part in seeking this amendment.

12 Moreover, there is no prejudice—let alone substantial or undue prejudice—to the
13 Defendants. By agreement of the parties, no discovery has occurred and all other deadlines except
14 the FHFA's motion to dismiss are stayed. (ECF No. 33.) In the post-*CFPB* Joint Status Report,
15 Defendants argued that "the Amended Complaint *already* incorporates the 'cap' theory."
16 (ECF No. 45 at 4.) Thus, Defendants will not experience any surprise or disadvantage from the
17 amendment. In fact, Defendants will have the benefit of *more* information about the nature of
18 Plaintiffs' legal theories and claims.

19 Finally, the amendment is not futile. In the context of a motion to amend, futility means
20 that the complaint, as amended, would fail to state a claim upon which relief could be granted.
21 *Sonoma Cnty. Ass'n of Retired Emps. v. Sonoma Cnty.*, 708 F.3d 1109, 1118 (9th Cir. 2013).
22 Here, as shown above and in the proposed Second Amended Complaint, the amendment states
23 cognizable constitutional and other claims against the Defendants under *CFPB*. The
24 Supreme Court has now held that a valid "appropriation" requires a law enacted through Congress
25 identifying particular or specific funds for an identified purpose with a sum certain or cap. There
26 is no such appropriation for the FHFA. Letting FHFA pick its own budget without a ceiling or
27 any congressional approval is an abdication of the legislative power to an executive agency in
28

1 violation of the Nondelegation Doctrine. And because the FHFA is without a valid source of
2 funds or authority to act, its foreclosures are wrongful. This is enough to state a claim for relief.

3 **IV. CONCLUSION**

4 For these reasons, Plaintiffs respectfully ask the Court to grant leave to file the attached
5 Second Amended Complaint.

6 Dated this 31st day of July, 2024.

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8
9 By: /s/ Jordan T. Smith

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EXHIBIT 1

PROPOSED SECOND AMENDED COMPLAINT

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**SECOND AMENDED COMPLAINT
(CLASS ACTION)**

JURY DEMAND

INTRODUCTION AND NATURE OF THE CASE

1. The separation of powers is the fundamental animating principle of the Constitution. It is inherent in the Constitution's text, structure, and history as a protection of individual liberty and as a safeguard against tyranny. One feature of the separation of powers is found in the Appropriations Clause of Article I, Section 9, Clause 7. The Appropriations Clause provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]" The Supreme Court recently held in *Consumer Financial Protection Bureau v. Community Financial Services Association of America, Limited*, 601 U.S. 416 (2024) ("*CFPB*") that an "appropriation" within the meaning of the Appropriations Clause is any law enacted through Congress identifying particular or specific funds—through either a sum certain or cap—that an agency may raise and spend for an identified purpose.

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1 2. But, in 2008, Congress created the Federal Housing Finance Agency ("FHFA") as
2 an "independent" agency with the unchecked ability to raise and spend unlimited amounts without
3 any congressional oversight. FHFA does not receive funding through periodic bills enacted by
4 Congress and signed by the President. Rather, FHFA is self-financed through assessments
5 collected from entities that it simultaneously controls through a conservatorship—Fannie Mae and
6 Freddie Mac. Unlike other federal agencies, Congress has not, by law, identified a particular or
7 specific amount of money—through either a cap or sum certain—that FHFA may extract from the
8 regulated entities and then spend. Instead, the FHFA unilaterally chooses its own budget and
9 spends as much as it wants. FHFA's expenditures are completely outside any democratic
10 accountability. This violates the Appropriations Clause.

11 3. Equally bad, Congress has not set forth by law any intelligible principles to
12 constrain FHFA's discretion to demand or spend the amounts drawn from its regulated entities.
13 The lack of any congressionally imposed guardrails on FHFA's power to self-spend violates
14 another fundamental separation of powers principle—the Nondelegation Doctrine. The *CFPB*
15 majority recognized that "there may be other constitutional checks on Congress' authority to
16 create and fund an administrative agency" aside from the Appropriations Clause. 601 U.S. at 441.
17 The Nondelegation Doctrine is one of those additional separation of powers protections.
18 *See id.* at 471 n.20 (Alito, J., dissenting) (citing *Cnty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*,
19 51 F.4th 616, 635 (5th Cir. 2022)).

20 4. From its own uncapped slush fund, FHFA directs and controls foreclosure
21 operations that threaten—and have inflicted—irreparable harm on members of the three Plaintiff
22 classes described below. Therefore, FHFA's uncapped self-funding and spending structure must
23 be declared unconstitutional and all unconstitutional actions that flow from it must be declared
24 unlawful, set aside, and enjoined. FHFA must also pay compensation for the constitutional
25 violations and the wrongful foreclosures that have already been effectuated through its uncapped
26 unconstitutional funding mechanism.

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1 **JURISDICTION AND VENUE**

2 5. This Court has subject matter jurisdiction over this action pursuant to
3 28 U.S.C. § 1331 because it arises under the United States Constitution.

4 6. The Court is authorized to award the requested relief under the Administrative
5 Procedure Act ("APA"), 5 U.S.C. § 706, and the Declaratory Judgment Act ("DJA"),
6 28 U.S.C. §§ 2201–2202.

7 7. The Court is authorized to award the requested relief directly under the United
8 States Constitution and/or under *Bivens v. Six Unknown Named Agents of Federal Bureau of*
9 *Narcotics*, 403 U.S. 388 (1971).

10 8. Venue is proper in the District of Nevada under 28 U.S.C. § 1391(e) because the
11 Defendants are an officer and agency of the United States and a substantial part of the events
12 giving rise to the claim occurred here plus a substantial part of the properties that are the subject
13 of the action are situated in this judicial district.

14 9. Divisional venue is proper under LR IA 1-8(a) in the Unofficial Southern Division
15 of the District, because that is the Division in which the action arose.

16 **THE PARTIES**

17 10. Representative Plaintiff Cape Jasmine Ct. Trust by and through its trustee,
18 Eddie Haddad ("Cape Jasmine"), is a Nevada entity that owns the real property in Clark County,
19 Nevada commonly referred to as 167 Desert Pond Avenue, Henderson, NV 89015,
20 APN No. 179-31-710-050.

21 11. Representative Plaintiff Daisey Trust, by and through its trustee Eddie Haddad
22 ("Daisey Trust"), is a Nevada trust that owns the real property in Clark County, Nevada
23 commonly referred to as 33 Newburg Avenue, North Las Vegas, Nevada 89032,
24 APN No. 139-03-710-054.

25 12. Representative Plaintiff Saticoy Bay LLC, Series 10007 Liberty View
26 ("Saticoy Bay") is a Nevada entity that owns the real property in Clark County, Nevada
27 commonly referred to as 10007 Liberty View Rd., Las Vegas, Nevada 89148,
28 APN No. 163-31-213-072.

1 13. Defendant Federal Housing Finance Agency is an "independent agency" of the
2 United States that, among other things, regulates the Federal National Mortgage Association
3 ("Fannie Mae") and Federal Home Loan Mortgage Corporate ("Freddie Mac"). *See*
4 12 U.S.C. § 4511. FHFA is named as a defendant directly as well as in its capacities as regulator
5 and conservator of Fannie Mae and Freddie Mac.

6 14. Defendant Sandra L. Thompson, in her official capacity, is the Director of the
7 Federal Housing Finance Agency and is responsible for implementing and overseeing its
8 operations. *See* 12 U.S.C. § 4513. She is subject to suit in her official capacity. *See*
9 12 U.S.C. § 4513(c)(2). To the extent necessary, Plaintiffs also sue Ms. Thompson in her
10 individual capacity. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,
11 403 U.S. 388 (1971).

12 **CLASS ALLEGATIONS**

13 15. **Definition of Classes.** Plaintiffs propose certification of the following classes
14 subject to amendment as necessary:

- 15 a. Class 1: Persons or entities who own properties where the FHFA maintains
16 an interest and is directing, controlling, and threatening to foreclose
17 without a constitutional appropriation from Congress;
- 18 b. Class 2: Persons or entities who own properties where the FHFA
19 maintained an interest and directed and controlled a foreclosure without a
20 constitutional appropriation from Congress and where the property owner
21 was able to retain the property after purchasing the property at a
22 foreclosure sale;
- 23 c. Class 3: Persons or entities who owned properties where the FHFA
24 maintained an interest and directed and controlled a foreclosure without a
25 constitutional appropriation from Congress and where the property owner
26 was not able to maintain or recover the property after a foreclosure sale.
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28

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1 16. **Size of Classes.** Based on information and belief, the members of the three classes
2 defined above are so numerous that joinder of all members in separate actions is impractical. The
3 number of members in each class is expected to exceed more than 40 persons or entities. Classes
4 this size are sufficiently large that joinder of all members is impracticable.
5 Fed. R. Civ. P. 23(a)(1). The identities of each member of each class are readily ascertainable
6 from information and data in possession of the Defendants.

7 17. **Class Representatives.**

8 a. Class 1: Named plaintiff Cape Jasmine is the owner of a property in which
9 the FHFA claims an interest and anticipates an imminent foreclosure
10 directed or controlled by the FHFA without a constitutional appropriation
11 from Congress. Its claims are typical of the other members of the class and
12 Cape Jasmine will fairly and adequately represent and protect the interests
13 of the class. Fed. R. Civ. P. 23(a)(3)-(4).

14 b. Class 2: Representative Daisey Trust is the owner of a property that it was
15 forced to repurchase at a foreclosure sale after FHFA unlawfully directed
16 and controlled a foreclosure on its property without a constitutional
17 appropriation from Congress. Its claims are typical of the other members of
18 the class and Daisey Trust will fairly and adequately represent and protect
19 the interests of the class. Fed. R. Civ. P. 23(a)(3)-(4).

20 c. Class 3: Representative Saticoy Bay is the former owner of a property that
21 was unlawfully foreclosed on at the direction and control of FHFA without
22 a constitutional appropriation from Congress and was unable to repurchase
23 its property at the foreclosure sale. Its claims are typical of the other
24 members of the class and Saticoy Bay will fairly and adequately represent
25 and protect the interests of the class. Fed. R. Civ. P. 23(a)(3)-(4).

26 18. **Common Questions of Law and Fact.** This action requires a determination of
27 common questions of law and fact about the constitutionality of the FHFA's uncapped
28 self-funding and spending mechanisms, which are without any congressionally imposed

1 constraints or intelligible principles restricting the agency's discretion to raise and spend funds.
2 Adjudication of these legal issues will, in turn, determine whether FHFA may either foreclose on
3 the class members (Class 1) or otherwise owe compensation to the class members for
4 constitutional violations and wrongful foreclosures (Classes 2 and 3). Fed. R. Civ. P. 23(a)(2).

5 **19. FHFA Has Acted on Grounds Generally Applicable to the Classes.** By
6 unilaterally setting and spending its own budget without any congressionally imposed cap or
7 restrictions to threaten foreclosures (Class 1) and directing, controlling, and effectuating
8 foreclosures (Classes 2 and 3), FHFA has acted (or refused to act) on grounds generally
9 applicable to the relevant classes. Fed. R. Civ. P. 23(b)(2). Separate actions by each class member
10 would create the risk of inconsistent or varying adjudications that would establish incompatible
11 standards of conduct for the FHFA on the legal issues. Fed. R. Civ. P. 23(b)(1)(A). Additionally,
12 separate actions by each class member would, as a practical matter, be dispositive of the interests
13 of the other class members who are not parties to the individual adjudications and would
14 substantially impair and impede their ability to protect their interests. Fed. R. Civ. P. 23(b)(1)(B).
15 Certification of each class is therefore proper under Federal Rule of Civil Procedure 23(b).

16 **20. Questions of Law and Fact Common to the Classes Predominate Over**
17 **Individual Issues.** The claims of individual class members are more efficiently adjudicated on a
18 class-wide basis. Any interest that individual members have in separately controlling the
19 prosecution of separate actions is outweighed by the efficiency, in time and cost, of the class
20 mechanism. Thus, a class action is superior to other available methods of adjudication or
21 individual, piecemeal litigation. There are no unusual difficulties to be encountered in the
22 management of this class action. Upon information and belief, no class action suit has been filed
23 against FHFA over the legal issues presented or for the relief requested in this action for the same
24 or similar class. Concentrating litigation in this particular forum with this class action is desirable
25 compared to a multiplicity of suits in this District or across the nation. Issues as to the
26 constitutionality of FHFA's uncapped funding and spending mechanisms in violation of the
27 Appropriations Clause, Nondelegation Doctrine, and separation of powers principles as they
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1 relate to foreclosures predominate over any questions unique to individual members of the class.
2 Certification is therefore also proper under Federal Rule of Civil Procedure 23(b)(3).

3 21. **Venue.** This class will be most efficiently prosecuted in the District of Nevada, the
4 Representative Plaintiffs' domicile.

5 22. **Class Counsel.** Representative Plaintiffs have retained experienced and competent
6 class counsel to adequately and vigorously prosecute the claims and represent each class.

7 **GENERAL FACTUAL ALLEGATIONS**

8 23. Representative Plaintiffs repeat, reallege, and incorporate all of the allegations
9 contained in the preceding and subsequent paragraphs as though fully set forth herein.

10 24. In 2008, Congress passed the Housing and Economic Recovery Act ("HERA"), the
11 statute which created the FHFA. The 2008 Congress created FHFA as an "independent agency"
12 charged with regulating the federal housing mortgage market, including Fannie Mae and
13 Freddie Mac. *Collins v. Yellen*, 141 S. Ct. 1761, 1770 (2021) (quoting 12 U.S.C. § 4511).

14 25. Fannie Mae and Freddie Mac are for-profit stockholder owned corporations
15 organized and existing under the Federal Home Loan Corporation Act. Fannie Mae and
16 Freddie Mac buy and sell mortgages, often pooling them into mortgage-backed securities for
17 investors.

18 26. In its effort to make FHFA an "independent agency," Congress gave FHFA
19 sweeping powers and largely insulated FHFA from democratic accountability. Congress
20 attempted to achieve this goal in two ways. First, it insulated the FHFA Director from presidential
21 removal. And second, it granted FHFA complete budgetary independence.

22 27. The Supreme Court has already rejected the first aspect of the 2008 Congress's
23 attempts to insulate FHFA from democratic accountability. In *Collins*, the Supreme Court held
24 that HERA's prohibition on presidential firing of the FHFA director at will violates the separation
25 of powers and is unconstitutional. 141 S. Ct. at 1783.

26 28. The second aspect, FHFA's uncapped funding and spending structure, also violates
27 the Constitution. Article I of the Constitution states "No Money shall be drawn from the Treasury,
28 but in Consequence of Appropriations made by Law[.]" U.S. CONST. art. I, § 9, cl. 7. An

1 "appropriation" within the meaning of the Appropriations Clause is a law authorizing an
2 expenditure of a certain amount from a specified source of public money for designated purposes.
3 *CFPB*, 601 U.S. at 425-26; 431-36; 438.

4 29. "[T]he Appropriations Clause requires [no] more than a law that authorizes the
5 disbursement of *specified funds* for identified purposes." *Id.* at 438 (emphasis added). The
6 appropriation "need[s] to designate particular revenues for identified purposes" either by
7 "requir[ing] expenditure of a particular amount" or "allow[ing] the recipient of the appropriated
8 money to spend up to a cap." *Id.* at 431.

9 30. In some fashion, Congress must designate and specify the amount of money that
10 an agency is allowed to raise and spend. For instance, a law allowing an agency to draw funds
11 that its director deems "reasonably necessary to carry out the agency's responsibilities" will satisfy
12 the Appropriations Clause if Congress has imposed a statutory cap on funding and spending to
13 constrain the director's "reasonableness" determination. *Id.* at 435-36 ("Congress determined the
14 amount of the Bureau's annual funding by imposing a statutory cap."). Congress may also set by
15 law the amount of fees or assessments that an agency may charge customers or regulated entities
16 to fund the agency. *Id.* at 432-34.

17 31. Despite these principles, "FHFA is not funded through the ordinary appropriations
18 process." *Collins*, 141 S. Ct. at 1772. Instead of funding through bicameral passage and
19 presentment of periodic appropriations bills, Congress opted for a "set it and forget it" approach
20 with a dangerous twist. It enacted a perpetual statute permitting the FHFA Director to establish
21 and collect assessments, in an amount to be determined by the Director, directly from the entities
22 that FHFA regulates—Fannie Mae, Freddie Mac, and the Federal Home Loan Banks.
23 12 U.S.C. § 4516(a).

24 32. But Congress did not establish by law a sum certain or cap on the amount of the
25 assessments that the FHFA may collect from the regulated entities and then spend. Rather,
26 12 U.S.C. § 4516(a) states "[t]he Director shall establish and collect from the regulated entities
27 annual assessments in an amount not exceeding the amount sufficient to provide for reasonable
28 costs (including administrative costs) and expenses of the Agency...." *Id.*

1 33. Congress did not establish a ceiling or upper limit to cabin the FHFA Director's
2 ability to raise and spend funds outside the normal appropriations process. Congress has not set
3 by law the amount of assessments the FHFA may charge the regulated entities. The only restraint
4 on FHFA's funding and spending power is the Director's unbounded judgment of what is
5 "reasonable." *See id.* § 4516(a). Thus, "reasonable" here is a blank check for FHFA to collect and
6 spend an *uncapped* amount funds without congressional oversight or involvement.

7 34. Congress provided no cap, guidelines, boundaries, or intelligible principles to
8 cabin the Director's discretion to choose and spend the amounts extracted from the regulated
9 entities. Likewise, Congress provided no cap, guidelines, boundaries, or intelligible principles to
10 limit the Director's "reasonableness" or "sufficiency" determinations.

11 35. The Judiciary owes no deference to the FHFA Director's unilateral
12 "reasonableness" or "sufficiency" decisions.

13 36. In practical terms, the Director's authority amounts to an unconstrained power to
14 collect and spend money, as FHFA regulates entities that have *over \$8.1 trillion* of assets from
15 which it may freely draw. *See FHFA At-A-Glance, FHFA (last visited July 29, 2024) available at*
16 <https://www.fhfa.gov/about>.

17 37. The Supreme Court has observed that the amount of the FHFA's assessments and
18 resulting pot of money to spend is "*unlimited*." *Collins*, 141 S. Ct. at 1772 (quoting
19 12 U.S.C. § 4516(a)) (emphasis added).

20 38. After the Director unilaterally decrees the amounts of the assessments, the entities
21 must pay semiannually but the Director retains the unchecked discretion to demand more.
22 12 U.S.C. § 4616(b)(3), (c). The Director may use the bottomless money pit to compensate
23 herself, other employees "and for all other expenses of the Director and the Agency."
24 12 U.S.C. § 4516(f)(4); *see also* 12 U.S.C. § 4516(b)(2) (stating assessments collected from the
25 enterprises and Federal Home Loan Banks "shall not exceed the amounts sufficient to provide for
26 the costs and expenses described in subsection (a) relating to" each of them, respectively).

1 39. If the Director over-collects from the regulated entities, she is not required to
2 return the overage or to deposit it into the Treasury. The Director is empowered to keep the
3 money in a "working capital fund." 12 U.S.C. § 4516(a), (e). And, once more, the Director has
4 complete autonomy to determine the "excess" amounts "deem[ed] necessary to maintain a
5 working capital fund." *Id.* § 4516(e). The Director may also invest surplus funds "that, in the
6 Director's discretion, are not required to meet the current working needs of the Agency."
7 *Id.* § 4516(f)(6).

8 40. Congress anticipated that this structure was subject to an Appropriations Clause
9 challenge so it tried to shield the FHFA by specifying that "[t]he amounts received by the [FHFA]
10 from any assessment under this section shall not be construed to be Government or public funds
11 or appropriated money." *Id.* § 4516(f)(2). But Congress cannot simply label public money as
12 non-public money.

13 41. In September 2008, pursuant to HERA, FHFA's then-Director placed Fannie Mae
14 and Freddie Mac into a conservatorship.

15 42. Once placed in conservatorship, FHFA immediately succeeded to "all rights, titles,
16 powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such
17 regulated entity with respect to the regulated entity and the assets of the regulated entity."
18 12 U.S.C. § 4617(b)(2)(A)(i). FHFA may "take over the assets of and operate," "collect all money
19 due [to]," "perform all function of," "preserve and conserve the assets and property of" and
20 contract on behalf of Fannie Mae and Freddie Mac. 12 U.S.C. § 4617(b)(2)(B);
21 *see id.* § 4617(b)(2)(C)-(E), (J).

22 43. Also as conservator, FHFA "may transfer or sell any asset or liability of the
23 regulated entity in default, and may do so without any approval, assignment, or consent with
24 respect to such transfer or sale." 12 U.S.C. § 4617(b)(2)(G).

25 44. As conservator for Fannie Mae and Freddie Mac, FHFA is a designated Federal
26 Property Manager ("FPM"). 12 U.S.C. § 5220(a)(1)(A). As a federal property manager, FHFA
27 must oversee foreclosures, including with its servicers. *See id.* § 5220(b)(1);
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1 *see also id.* § 5220(c). FHFA must submit periodic reports about the number of foreclosures that
2 occur. *Id.* § 5220(b)(5).

3 45. Thus, FHFA directly and indirectly, through Fannie Mae, Freddie Mac, their
4 servicers, and others, controls, directs, supervises, participates in and/or funds the foreclosure of
5 delinquent loans and mortgages. FHFA is ultimately responsible for all the foreclosure operations
6 and activities of Fannie Mae and Freddie Mac. FHFA selectively chooses when and whether to
7 foreclose to manipulate national foreclosure statistics and the country's housing market.

8 46. FHFA is conducting its operations—including foreclosure activities—using
9 uncapped funds purloined in violation of the Constitution.

10 47. Each threatened or completed foreclosure by Fannie Mae, Freddie Mac, their
11 servicers or other agents is directly traceable to FHFA and its unconstitutional uncapped funding
12 mechanisms and FHFA's unconstitutional conduct. The injuries of each member of the proposed
13 classes are attributable to the unconstitutional statutes and the FHFA's unconstitutional direct and
14 indirect conduct.

15 48. For example, in just the first two months of 2023, through the entities that it
16 manages and regulates, FHFA oversaw and controlled more than 3,000 foreclosure sales and
17 13,000 foreclosure starts.

18 49. FHFA's operations—including the foreclosures of properties through Fannie Mae,
19 Freddie Mac, their servicers, and others—are unconstitutionally funded because there is no sum
20 certain or cap imposed by law through Congress on the amount the FHFA can extract for its
21 budget and then spend. FHFA is completely unaccountable to Congress and the People.

22 50. At the September 2023 preliminary injunction hearing in this case, FHFA
23 represented and admitted through counsel that there were no immunities, bars, defenses, or other
24 obstacles that would preclude Plaintiff from seeking monetary damages as a remedy should
25 FHFA's uncapped funding and spending mechanisms or foreclosure practices later be deemed
26 unconstitutional or unlawful.

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ALLEGATIONS OF REPRESENTATIVE PLAINTIFFS

A. Class 1 Representative Plaintiff Cape Jasmine Court Trust.

51. Representative Plaintiff Cape Jasmine repeats, realleges, and incorporates all of the allegations contained in the preceding and subsequent paragraphs as though fully set forth herein.

52. A deed of trust between nonparty borrowers and KB Home Mortgage Company (the "Desert Pond Lender") was recorded on May 24, 2005, granting the Desert Pond Lender a security interest in the real property known as 167 Desert Pond Avenue, Henderson, Nevada 89015 ("Desert Pond Property") to secure the repayment of \$235,000.00. The Deed of Trust also listed Mortgage Electronic Registration Systems, Inc. ("MERS") as the beneficiary and FATCO as the trustee.

53. Upon information and belief, Fannie Mae or Freddie Mac purchased the loan in or around July 2005. On May 25, 2012, Nevada Association Services on behalf of Horizon Heights Homeowners Association held a foreclosure sale where non-party Desert Pond Avenue Trust purchased the Desert Pond Property for \$7,100.00. A Foreclosure Deed reflecting the purchase was recorded on May 31, 2012.

54. Cape Jasmine obtained the Desert Pond Property from Desert Pond Avenue Trust, and a Deed memorializing that transaction was recorded on June 19, 2012. Thus, Plaintiff possesses unique, irreplaceable property rights in the property.

55. As of the filing of this complaint, FHFA has not yet directed its servicer or agents to record a Notice of Default or Notice of Sale to begin the foreclosure process on the Desert Pond Property.

56. Nonetheless, because FHFA still claims an interest in the loan and maintains the loan has not been paid, it is likely that FHFA will directly or indirectly direct, control, notice, and conduct an imminent foreclosure sale using uncapped public money that has not been specified by law through Congress in violation of the Constitution. Therefore, Plaintiff is being threatened with irreparable harm and the loss of its property rights.

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1 57. All other class members of Class 1 are similarly situated to Cape Jasmine and
2 subject to the same constitutional and legal rights violations. Common questions of law and fact
3 predominate over any differences.

4 **B. Class 2 Representative Plaintiff Daisey Trust.**

5 58. Representative Plaintiff Daisey Trust repeats, realleges, and incorporates all of the
6 allegations contained in the preceding and subsequent paragraphs as though fully set forth herein.

7 59. A deed of trust between nonparty borrowers and Countrywide Home Loans, Inc.
8 ("the Newburg Lender") was recorded on January 3, 2007, granting the Newburg Lender a
9 security interest in the real property known as 33 Newburg Avenue, North Las Vegas, Nevada
10 89032 ("Newburg Property") to secure the repayment of \$198,500.00. The Deed of Trust also
11 listed Mortgage Electronic Registration Systems, Inc. ("MERS") as the beneficiary and
12 Reconstruct Company, N.A. as the trustee.

13 60. Fannie Mae purchased the loan in or around January 2007. On or about March 27,
14 2012, Nevada Association Services, Inc., the Newburg HOA Trustee, on behalf of the Newburg
15 HOA, recorded a Notice of Foreclosure Sale.

16 61. On August 24, 2012, Representative Daisey Trust purchased the
17 Newburg Property at the foreclosure sale. Thus, Daisey Trust obtained unique, irreplaceable
18 property rights.

19 62. On August 30, 2012, the Newburg HOA, through the Newburg HOA Trustee,
20 recorded a foreclosure deed memorializing Representative Daisey Trust's purchase.

21 63. Years later, in September 2023, the FHFA directly and/or indirectly directed and
22 controlled a foreclosure sale on the Newburg Property by unilaterally spending uncapped public
23 money that was not specified by law through Congress in violation of the Constitution.

24 64. As a result of the unconstitutionally funded foreclosure, Daisey Trust was forced to
25 spend additional funds to repurchase the property at the foreclosure sale. Daisey Trust would not
26 have had to expend funds to repurchase a property that it had already bought but for FHFA's
27 unconstitutional foreclosure. Therefore, Daisey Trust has incurred substantial monetary damages
28 far in excess of \$75,000.00 and in an amount to be determined at trial.

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1 65. All other class members of Class 2 are similarly situated to Daisey Trust and
2 subject to the same constitutional and legal rights violations. Common questions of law and fact
3 predominate over any differences.

4 **C. Representative Plaintiff Saticoy Bay LLC, Series 10007 Liberty View.**

5 66. Representative Plaintiff Saticoy Bay LLC repeats, realleges, and incorporates all of
6 the allegations contained in the preceding and subsequent paragraphs as though fully set forth
7 herein.

8 67. Upon information and belief, a deed of trust between nonparty borrowers and
9 Bravo Credit Corporation (the "Liberty View Lender") was recorded on July 28, 2005, granting
10 the Liberty View Lender a security interest in the real property known as 10007
11 Liberty View Way, Las Vegas, Nevada 89148 ("Liberty View Property") to secure the repayment
12 of \$564,300.00. The Deed of Trust also named MERS as the beneficiary and Fidelity National
13 Title Insurance Company as the trustee.

14 68. Upon information and belief, Freddie Mac or Fannie Mae obtained an interest in
15 the Liberty View Property in or around June 2022.

16 69. On May 25, 2013, the Southern Terrace Homeowners Association held a
17 foreclosure sale where Saticoy Bay purchased the Liberty View Property. Thus, Saticoy Bay
18 obtained unique, irreplaceable property rights. A Foreclosure Deed Upon Sale reflecting
19 Saticoy Bay's purchase was recorded on May 30, 2013.

20 70. Upon information and belief, on March 25, 2022, National Default Servicing
21 Corp., at the direction and control of FHFA, noticed a foreclosure sale for the Liberty View
22 Property.

23 71. At FHFA's direct and/or indirect direction and control, the foreclosure sale
24 occurred in or around March 25, 2022. FHFA used uncapped public money that was not specified
25 by law through Congress to direct and control the foreclosure.

26 72. Upon information and belief, third/non-party Catamount Properties 2018, LLC
27 purchased the Liberty View Property for \$615,000.00. A Trustee's Deed Upon Sale reflecting the
28 purchase was recorded on June 1, 2022.

1 73. As a result of the unconstitutionally funded foreclosure, Saticoy Bay lost its
2 property rights and the monetary value of the property. Therefore, Saticoy Bay has incurred
3 substantial monetary damages far in excess of \$75,000.00 in an amount to be determined at trial.

4 74. All other class members of Class 3 are similarly situated to Saticoy Bay and
5 subject to the same constitutional and legal rights violations. Common questions of law and fact
6 predominate over any differences.

7 **FIRST CLAIM FOR RELIEF**

8 **Violation of the Appropriations Clause of the United States Constitution**
9 **(On Behalf of All Three Classes)**

10 75. Representative Plaintiffs repeat, reallege, and incorporate all of the allegations
11 contained in the preceding and subsequent paragraphs as though fully set forth herein.

12 76. The Supreme Court has recognized a cause of action for equitable relief to redress
13 constitutional violations by federal officials, particularly those that violate separation of powers
14 principles. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010).

15 77. Additionally, the Administrative Procedure Act requires the Court to hold unlawful
16 and set aside any agency action that is "contrary to constitutional right, power, privilege, or
17 immunity" or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
18 law." 5 U.S.C. § 706(2)(A)-(B). Similarly, the Declaratory Judgments Act empowers the Court to
19 "declare the rights and other legal relations of any interested party seeking such declaration,
20 whether or not further relief is or could be sought." 28 U.S.C. § 2201.

21 78. Moreover, *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971),
22 authorizes a damages action against federal officials for constitutional violations like those
23 alleged herein.

24 79. Additionally, the Constitution itself directly authorizes a damage action for
25 constitutional violations like those alleged herein.

26 80. FHFA is an agency of the United States.

27 81. Director Thompson is a federal official and sued in her individual capacity for the
28 purposes of *Bivens*.

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1 82. Article I, Section 9, Clause 7 of the United States Constitution provides, "No
2 Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]"
3 The power of the purse belongs solely to Congress. *See* U.S. CONST. art. I, § 1 ("[a]ll legislative
4 Powers herein granted shall be vested in a Congress of the United States."). An "appropriation"
5 within the meaning of the Appropriations Clause is a law authorizing an expenditure of a certain
6 amount from a specified source of public money for designated purposes. *CFPB*, 601 U.S.
7 at 425-26; 431-36; 438

8 83. The Appropriations Clause requires a law that authorizes the disbursement of
9 "*specified funds* for identified purposes." *Id.* at 438 (emphasis added). The appropriation "need[s]
10 to designate particular revenues for identified purposes" either by "requir[ing] expenditure of a
11 particular amount" or "allow[ing] the recipient of the appropriated money to spend up to a cap."
12 *Id.* at 431-32.

13 84. Contrary to these constitutional commands, Congress has not, by law, authorized
14 or specified the amount of funds the FHFA can raise and spend. HERA and 12 U.S.C. § 4516 do
15 not provide a sum certain or any cap on the amount that the FHFA may raise and spend from its
16 regulated entities to fund FHFA's operations, including the threatened and actual foreclosures on
17 Plaintiffs' real property.

18 85. Specifically, 12 U.S.C. § 4516 provides that "The Director shall establish and
19 collect from the regulated entities annual assessments in an amount not exceeding the amount
20 sufficient to provide for reasonable costs . . . and expenses of the Agency." *See also*
21 12 U.S.C. § 4516(b)(2). Thus, under 12 U.S.C. § 4516, the FHFA Director unilaterally sets the
22 amount of assessments, establishes its own budget, and spends funds without a cap, congressional
23 oversight, or any democratic accountability. There is no ceiling on the FHFA Director's ability to
24 raise and spend funds.

25 86. The amount of the FHFA's assessments and resulting spending are "unlimited."
26 *Collins*, 141 S. Ct. at 1772 (quoting 12 U.S.C. § 4516(a)).
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1 87. The uncapped nature of the FHFA Director's discretion and "reasonableness" are
2 violations of the Appropriations Clause. Specifically, HERA and 12 U.S.C. § 4516 violate the
3 Appropriations Clause, the Separation of Powers, and/or the Nondelegation Doctrine by allowing
4 FHFA to unilaterally raise and spend unlimited amounts without a cap. As a result,
5 12 U.S.C. § 4516 and related portions of HERA must be declared unconstitutional and unlawful.
6 *See also* 12 U.S.C. § 4516(f)(2).

7 88. All FHFA actions related to foreclosure sales taken without a constitutional
8 appropriation from Congress are void, unlawful, and must be declared so and be set aside.

9 89. FHFA's efforts to threaten, control, manage, supervise, direct, fund, and/or
10 effectuate the foreclosure on Representative Plaintiffs' Properties and their similarly situated class
11 members are unconstitutionally funded and without a constitutional appropriation. Therefore, any
12 foreclosure conduct directed and controlled by FHFA constitutes unconstitutional agency action
13 and it is void, unlawful, and must be declared so and be set aside.

14 90. As described above, FHFA's threatening, directing, supervising, controlling,
15 managing, funding, and/or otherwise participating in foreclosure conduct against the
16 Representative Plaintiffs and their similarly situated class members without a proper
17 appropriation violates the Appropriations Clause, Separation of Powers, and the Nondelegation
18 Doctrine. The FHFA's action—and all those that are caused by and flow from it—must be
19 declared unlawful, enjoined, and set aside.

20 91. Members of proposed Classes 2 and 3 are entitled to compensatory damages for
21 the amounts they were forced to spend to keep their properties in the face of FHFA's
22 unconstitutional foreclosures and/or the value of the properties (and associated investments) that
23 they lost as a result of the FHFA's unconstitutional foreclosures.

24 **SECOND CLAIM FOR RELIEF**

25 **Violation of the Nondelegation Doctrine**
26 **(On Behalf of All Three Classes)**

27 92. Representative Plaintiffs repeat, reallege, and incorporate all of the allegations
28 contained in the preceding and subsequent paragraph as though fully set forth herein.

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1 93. The Supreme Court has recognized a cause of action for equitable relief to redress
2 constitutional violations by federal officials, particularly those that violate separation of powers
3 principles. *See Free Enter. Fund*, 561 U.S. at 491 n.2.

4 94. Additionally, the Administrative Procedure Act requires the Court to hold unlawful
5 and set aside any agency action that is "contrary to constitutional right, power, privilege, or
6 immunity" or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
7 law." 5 U.S.C. § 706(2)(A)-(B). Similarly, the Declaratory Judgments Act empowers the Court to
8 "declare the rights and other legal relations of any interested party seeking such declaration,
9 whether or not further relief is or could be sought." 28 U.S.C. § 2201.

10 95. Moreover, *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971),
11 authorizes a damages action against federal officials for constitutional violations like those
12 alleged herein.

13 96. Additionally, the Constitution itself directly authorizes a damage action for
14 constitutional violations like those alleged herein.

15 97. FHFA is an agency of the United States.

16 98. Director Thompson is a federal official sued in her individual capacity for the
17 purposes of *Bivens*.

18 99. Article I, Section 9 of the United States Constitution provides, "All legislative
19 Powers herein granted shall be vested in a Congress of the United States." As the Supreme Court
20 has explained, "[t]he non-delegation doctrine provides that 'Congress may not constitutionally
21 delegate its legislative power to another branch of Government.'" *United States v. Kelly*,
22 874 F.3d 1037, 1047 (9th Cir. 2017) (quoting *Touby v. United States*, 500 U.S. 160, 165 (1991)).

23 100. While Congress retains the authority to "confer substantial discretion on executive
24 agencies to implement and enforce the laws," *Gundy v. United States*, 588 U.S. 128, 135 (2019),
25 such delegation is constitutional only if "Congress 'lay[s] down by legislative act and intelligible
26 principle to which the person or body authorized to [exercise the delegated authority] is directed
27 to conform,'" *id.* (alterations in original) (quoting *J.W. Hampton, Jr., & Co. v. United States*,
28 276 U.S. 394, 409 (1928)).

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1 101. Contrary to this constitutional command, HERA and 12 U.S.C. § 4516 violate the
2 Nondelegation Doctrine by failing to provide any sum certain or cap on the FHFA's ability to
3 raise and spend its own budget. Likewise, HERA and 12 U.S.C. § 4516 violate the Nondelegation
4 Doctrine by failing to provide intelligible principles to guide the exercise of the FHFA Director's
5 vast discretion and "reasonableness" or "sufficiency" determinations.

6 102. Specifically, 12 U.S.C. § 4516(a) provides that "The Director shall establish and
7 collect from the regulated entities annual assessments in an amount not exceeding the
8 amount sufficient to provide for reasonable costs . . . and expenses of the Agency." *See also*
9 12 U.S.C. § 4516(b)(2). FHFA's Director unilaterally sets the amount of assessments, establishes
10 its own budget, and unilaterally spends without congressional guidance, any democratic
11 accountability, or an intelligible principle governing the exercise of the FHFA Director's
12 discretion. There is no ceiling or cap on the total budget or the FHFA Director's discretion.

13 103. The standards of "reasonable" or "sufficient" costs and expenses without a sum
14 certain or total cap are not intelligible principles when the FHFA Director retains boundless
15 discretion to determine what is "reasonable" or "sufficient."

16 104. Congress has unconstitutionally delegated its legislative power to FHFA by failing
17 to provide any sum certain, cap, or other intelligible principle to limit its own budget and
18 expenditures. As a result, 12 U.S.C. § 4516 and related portions of HERA must be declared
19 unconstitutional and unlawful.

20 105. All FHFA foreclosure conduct taken directly or indirectly under guise of the
21 unlawful delegation of legislative authority are void, unlawful, and must be declared so and set
22 aside.

23 106. FHFA's efforts to threaten, control, manage, supervise, direct, fund and/or
24 effectuate the foreclosure on the Representative Plaintiffs' Properties and their similarly situated
25 class members are effectuated through unconstitutionally delegated legislative authority.
26 Therefore, FHFA's foreclosure conduct constitutes unconstitutional agency action and it is void,
27 unlawful, and must be declared so and be set aside.

28

1 107. As described above, FHFA's threatening, directing, supervising, controlling,
 2 managing, funding, and/or otherwise participating in the foreclosure conduct against the
 3 Representative Plaintiffs and their similarly situated class members under unlawfully delegated
 4 authority violates Separation of Powers and the Nondelegation Doctrine. The FHFA's actions—
 5 and all those that are caused by and flow from it—must be declared unlawful, enjoined, and set
 6 aside.

7 108. Members of proposed Classes 2 and 3 are entitled to compensatory damages for
 8 the amounts they were forced to spend to keep their properties in the face of FHFA's
 9 unconstitutional foreclosures and/or the value of the properties (and associated investments) that
 10 they lost as a result of the FHFA's unconstitutional foreclosures.

11 **THIRD CLAIM FOR RELIEF**

12 **Wrongful Foreclosure** 13 **(On Behalf of All Three Classes)**

14 109. Representative Plaintiffs repeat, reallege, and incorporate all of the allegations
 15 contained in the preceding and subsequent paragraphs as though fully set forth herein.

16 110. Courts recognize a cause of action for wrongful foreclosure. *See Bergsrud v. Bank*
 17 *of Am., N.A.*, 746 F. App'x 662, 622 (9th Cir. 2018) (recognizing a cause of action for wrongful
 18 foreclosure under Nevada law). "Wrongful foreclosure claims do not require particular elements,
 19 since a party may challenge a foreclosure sale in various ways." *Silvestre v. MTC Fin., Inc.*,
 20 No. 2:14-CV-01385-RFB-NJK, 2015 WL 5830818, at *4 (D. Nev. Oct. 5, 2015). At minimum, a
 21 wrongful foreclosure occurs when the foreclosing party lacked authority to effectuate the
 22 foreclosure. *See, e.g., Bank of Am., N.A. v. Tapestry at Town Center Homeowners Ass'n*,
 23 263 F. Supp. 3d 1063, 1067-68 (D. Nev. 2017) ("Further, '[a] wrongful foreclosure claim
 24 challenges the authority behind the foreclosure, not the foreclosure act itself.") (alteration in
 25 original) (quoting *McKnight Family, LLP v. Adept Mgmt.*, 129 Nev. 610, 616, 310 P.3d 555, 559
 26 (2013)).
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1 111. FHFA's efforts to control, manage, supervise, direct, and/or fund the foreclosure
2 on Representative Plaintiffs' Properties and their similarly situated class members are
3 unconstitutionally funded and violate the Appropriations Clause, Separation of Powers and
4 Nondelegation Doctrines as described above. As such, the foreclosure actions constitute a
5 wrongful foreclosure as they lack constitutional or other legal authority to carry out those actions.

6 112. There are no administrative remedies that apply in these circumstances to the
7 wrongful foreclosure claims. Alternatively, any administrative remedies have been waived,
8 forfeited. Excused, or satisfied under the circumstances.

9 113. Members of proposed Class 1 are entitled to injunctive relief because FHFA lacks
10 an appropriation, and therefore authority, to conduct foreclosure operations.

11 114. Members of proposed Classes 2 and 3 are entitled to compensatory damages for
12 the amounts they were forced to spend to keep their properties in the face of FHFA's
13 unconstitutional and wrongful foreclosures and/or the value of the properties (and associated
14 investments) that they lost as a result of the FHFA's unconstitutional and wrongful foreclosures.

15 **PRAYER FOR RELIEF**

16 WHEREFORE, as applicable to each class, Representative Plaintiffs pray for themselves
17 and all other similarly situated class members the following relief against FHFA, its officers,
18 agents, servants, employees, attorneys, and all other persons who are in active concert or
19 participation with them:

20 1. For an order certifying each proposed class as a class action and appointing the
21 Representative Plaintiffs and their counsel to represent each class pursuant to Federal Rule of
22 Civil Procedure 23, and directing notice to be given to members of each class once certified;

23 2. A temporary, preliminary, and permanent injunction enjoining FHFA from
24 expending any unappropriated monies to direct, supervise, control, manage, fund, or otherwise
25 participate, directly or indirectly, in the foreclosure on Representative Plaintiffs' Properties;

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1 3. A temporary, preliminary, and permanent injunction enjoining all foreclosure
2 related actions against Representative Plaintiffs' Properties that are caused by, or flow from,
3 FHFA's violation of the Appropriations Clause, Separation of Powers, and/or Nondelegation
4 Doctrine;

5 4. An order setting aside any action as described herein that facilitates the foreclosure
6 on Representative Plaintiffs' Properties in violation of the Appropriations Clause, Separation of
7 Powers, and/or Nondelegation Doctrine;

8 5. A declaratory judgment that 12 U.S.C. § 4516 and related provisions violate the
9 Appropriations Clause, Separation of Powers, and/or Nondelegation Doctrine, and are
10 unconstitutional;

11 6. A declaratory judgment that FHFA's direct and indirect foreclosure related actions
12 as described herein are unconstitutionally funded or paid for in violation of the Appropriations
13 Clause, Separation of Powers, and/or Nondelegation Doctrine;

14 7. A declaratory judgment that FHFA's structure violates the Appropriations Clause,
15 Separation of Powers, and/or Nondelegation Doctrine and declaring void the provisions of HERA
16 that purport to fund FHFA by uncapped assessments on regulated entities, including entities
17 currently under FHFA's conservatorship;

18 8. A declaratory judgment that the FHFA's direct and indirect foreclosure related
19 actions as described herein are "contrary to constitutional right, power, privilege, or immunity" or
20 "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."
21 5 U.S.C. § 706(2)(A)-(B).

22 9. Compensatory damages in an amount to be determined at trial (Classes 2 and 3);

23 10. Nominal damages (Classes 2 and 3);

24 11. Pre-and post-judgment interest at the highest legal rate allowed by law;

25 12. Attorneys' fees and costs incurred in the prosecution of this litigation;

26 13. All other relief to which the Plaintiffs may show themselves to be entitled.

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1 14. The foregoing relief should be granted to Representative Plaintiffs, individually,
2 and to similarly situated non-parties on a nationwide basis.

3 **JURY DEMAND**

4 Each Representative Plaintiff, for itself and for the members of each class, demands a trial
5 by jury on all issues so triable.

6 DATED this ___ day of _____ 2024.

7 PISANELLI BICE PLLC

8 By: _____

9 Jordan T. Smith, Esq., #12097

10 Brianna Smith, Esq., #11795

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