

Jordan T. Smith, Esq., Bar No. 12097  
JTS@pisanellibice.com  
Brianna Smith, Esq., Bar No. 11795  
BGS@pisanellibice.com  
PISANELLI BICE PLLC  
400 South 7th Street, Suite 300  
Las Vegas, Nevada 89101  
Telephone: 702.214.2100

*Attorneys for Plaintiffs and Proposed Classes*

**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' SUPPLEMENTAL BRIEF  
ON THE EFFECT OF CFPB  
[ECF No. 48]**

**ORAL ARGUMENT REQUESTED**

PISANELLI BICE  
400 SOUTH 7TH STREET, SUITE 300  
LAS VEGAS, NEVADA 89101

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1 **I. INTRODUCTION**

2 On July 8, 2024, the Court ordered supplemental briefing about the effect of the Supreme  
 3 Court's recent decision in *Consumer Financial Protection Bureau v. Community Financial*  
 4 *Services Association of America, Ltd.*, 601 U.S. 416 (2024) ("*CFPB*") on the Plaintiffs' claims.  
 5 (ECF No. 48.)<sup>1</sup> Even though *CFPB* upheld a type of agency funding through standing  
 6 self-selected amounts outside the typical appropriations process,<sup>2</sup> *CFPB* confirms that Plaintiffs  
 7 have stated plausible claims for relief against the Federal Housing and Finance Agency ("*FHFA*")  
 8 and its Director. *See* Fed. R. Civ. P. 12(b)(6).

9 In *CFPB*, the Supreme Court held that an "appropriation" within the meaning of the  
 10 Appropriations Clause is any law enacted through Congress identifying particular or specific  
 11 funds—through either a sum certain or cap—that an agency may raise and spend for an identified  
 12 purpose. Contrary to this definition and historical practice, Congress has not enacted a valid  
 13 appropriation for the FHFA. Congress has not established by law a sum certain or a cap on the  
 14 amount that FHFA can extract from the entities under its conservatorship and then spend on  
 15 foreclosure operations. Rather, Congress has abdicated its power of the purse and conferred on  
 16 the FHFA Director the uncapped discretion to raise and spend any limitless amount that she  
 17 deems "reasonable." Congress has not laid down any maximum or intelligible principle to  
 18 constrain the Director's unilateral authority to pick a "reasonable" sum to raise and spend. The  
 19 Supreme Court has observed the FHFA's "assessments are *unlimited*."<sup>3</sup> There is no statutory outer  
 20 limit on the FHFA's power to spend money for, say, golden staplers, golden desks, or even golden  
 21 buildings if the Director's whim decides those extravagancies are "reasonable" for agency  
 22 operations. Thus, FHFA is spending government funds without a valid appropriation from  
 23 Congress in violation of the Appropriations Clause, Nondelegation Doctrine, and broader  
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25 <sup>1</sup> Plaintiffs maintain their objection to this supplemental briefing process and reiterate their  
 26 position that the Court should have allowed them to move to amend their complaint in light of  
 27 *CFPB* before assessing whether Plaintiffs have adequately stated claims for relief under new  
 28 caselaw that was unavailable when the operative complaint was filed. (*See* ECF No. 45 at 2-3.)

<sup>2</sup> *CFPB*, 601 U.S. at 436-37 compare ECF No. 34 at 1, 7-8, 14-15.

<sup>3</sup> *Collins v. Yellen*, 594 U.S. 220, 231 (2021) (emphasis added).

1 separation of powers principles. And because the FHFA is acting without legal authority, the  
2 foreclosures completed are wrongful. The three proposed classes are entitled to injunctive relief  
3 and compensatory damages, respectively.

4 Plaintiffs' case has gotten *stronger* after *CFPB*. The Court should deny Defendants'  
5 pending Motion to Dismiss the First Amended Complaint (ECF No. 36) and allow this matter to  
6 proceed to the class certification process.

## 7 **II. SUPPLEMENTAL STATEMENT OF FACTS**

8 Plaintiffs' First Amended Complaint and Response to Defendants' Motion to Dismiss  
9 provide the relevant background, (ECF Nos. 34, 39 at 8-13), but certain facts warrant  
10 amplification after *CFPB*. Before Congress created the FHFA, the Office of Federal Housing  
11 Enterprise Oversight ("OFHEO") regulated Fannie and Freddie. *Collins*, 594 U.S. at 229 n.1.  
12 OFHEO was subject to the congressional appropriations process. Its director could only levy  
13 assessments on Fannie and Freddie as Congress permitted. "The Director may, *to the extent*  
14 *provided in appropriations Acts*, establish and collect from [Fannie and Freddie] annual  
15 assessments in an amount not exceeding the amount sufficient to provide for reasonable costs and  
16 expenses of the Office . . . ." 106 Stat. 3947 § 1316 (emphasis added).

17 Congress forever relinquished its involvement after the Great Recession. In 2008,  
18 Congress enacted the Housing and Economic Recovery Act ("HERA") and created FHFA as an  
19 "independent agency." *Collins*, 594 U.S. at 226. Through HERA, Congress conferred on the  
20 FHFA total budgetary independence. "FHFA is not funded through the ordinary appropriations  
21 process. Rather, the Agency's budget comes from the assessments it imposes on the entities it  
22 regulates, which include Fannie Mae, Freddie Mac, and the Nation's federal home loan banks." *Id.*  
23 at 231 (citing §§ 12 U.S.C. § 4502(20), § 4516(a)).

24 Under 12 U.S.C. § 4516(a), the FHFA Director unilaterally "establish[es] and collect[s]  
25 from the regulated entities annual assessments in an amount not exceeding the amount sufficient  
26 to provide for reasonable costs (including administrative costs) and expenses of the Agency...."  
27 Unlike OFHEO, Congress no longer needs to pass appropriations acts. Yet Congress did not  
28 impose any sum certain or cap on the amounts that the Director may extract, and spend, from the

1 regulated entities. Instead, the FHFA Director alone decides what is "reasonable" or "sufficient"  
2 without any legislative input. There are no statutory guideposts or restrictions. FHFA regulates  
3 entities with more than \$8.1 *trillion* in assets.<sup>4</sup> So, as the Supreme Court has observed, the amount  
4 of the FHFA's assessments and resulting pot of money to spend is "*unlimited.*" *Collins*, 594 U.S.  
5 at 231 (quoting 12 U.S.C. § 4516(a)) (emphasis added).

6 After the Director declares the amounts of the assessments, the entities must pay  
7 semiannually but the Director retains the unchecked discretion to decide anytime that the entities  
8 must kick in more. 12 U.S.C. § 4616(b)(3), (c). The Director may use the bottomless money pit to  
9 compensate herself, other employees "and for all other expenses of the Director and the Agency."  
10 12 U.S.C. § 4516(f)(4); *see also* 12 U.S.C. § 4516(b)(2) (stating assessments collected from the  
11 enterprises and Federal Home Lone Banks "shall not exceed the amounts sufficient to provide for  
12 the costs and expenses described in subsection (a) relating to" each of them, respectively). This  
13 largesse bankrolls the FHFA's expansive conservatorship authority: it "is authorized to take  
14 control of a regulated entity's assets and operations, conduct business on its behalf, and transfer or  
15 sell any of its assets or liabilities" — including through foreclosures. *See Collins*, 594 U.S. at 238.  
16 But unlike a typical conservatorship, FHFA can act in its own best interests and not necessarily in  
17 the best interests of the regulated entity. *Id.*

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

24 Congress has not by law established how much FHFA can extract or spend. Congress has  
25 ceded control and completely delegated its legislative power over the FHFA's slush fund to the  
26 agency itself. Congress threw up its hands and decreed that "[t]he amounts received by the  
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28 <sup>4</sup> *FHFA At-A-Glance*, FHFA (last visited July 29, 2024) available at <https://www.fhfa.gov/about>.

1 Director from any assessment under this section shall not be construed to be Government or  
2 public funds or appropriated money." *Id.* § 4516(f)(2). The Director has no obligation "to consult  
3 with or obtain the consent or approval of the Director of the Office of Management and Budget  
4 with respect to any report, plan, forecast, or other information .... or oversight over the affairs or  
5 operations of the Agency." *Id.* § 4516(g)(5).

6 In sum, the FHFA—not Congress—decides how much to raise and spend each year  
7 without any cap or ceiling. As a result, the FHFA's funding and spending structure by which it  
8 conducts foreclosures violates the Appropriations Clause, the Nondelegation Doctrine, and the  
9 separation of powers resulting in wrongful foreclosures.

### 10 **III. ARGUMENT**

#### 11 **A. The FHFA's Budget and Spending Violates the Appropriations Clause After** 12 **CFPB.**

13 The Appropriations Clause ensures that "[n]o Money shall be drawn from the Treasury,  
14 but in Consequence of Appropriations made by Law." Art. I, § 9, cl. 7. In *CFPB*, the  
15 Supreme Court defined the meaning of "appropriation" and considered whether the Bureau's  
16 funding mechanism satisfied it. To start, Congress provided the Bureau with a standing source of  
17 funds outside the annual appropriations process. *CFPB*, 601 U.S. at 422. Congress passed a  
18 statute permitting the Bureau to "requisition from the earnings of the Federal Reserve System 'the  
19 amount determined by the [Bureau's] Director to be reasonably necessary to carry out' its duties,  
20 subject only to a statutory cap." *Id.* (citing 12 U.S.C. § 5497(a)(1)). The Supreme Court  
21 emphasized that "[t]he Bureau cannot request more than 12 percent of the Federal Reserve  
22 System's total operating expenses as reported in fiscal year 2009 (adjusted for inflation)."  
23 *Id.* at 422-23. In 2017, the Bureau used the requisitioned funds to issue a regulation covering  
24 high-interest consumer loans. *Id.* at 423. Certain trade associations sued, arguing that the Bureau  
25 takes unappropriated government money. *Id.* They "contend[ed] that the Bureau's funding  
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1 mechanism is too open-ended in duration and amount to satisfy the requirement that there be an  
2 "Appropriatio[n] made by Law." *Id.* at 426.<sup>5</sup>

3 On certiorari, the Supreme Court held that, at the Founding, the ordinary meaning of an  
4 "appropriation" was "a law authorizing the expenditure of *particular funds* for specified ends."  
5 *Id.* at 427 (reviewing early dictionaries) (emphasis added). The Court surveyed pre-founding  
6 history and recounted that "[f]ollowing the Glorious Revolution, Parliament's usual practice was  
7 to appropriate government revenue to particular purposes more or less narrowly defined."  
8 *Id.* at 428 (quotations omitted). Parliament's narrow appropriations did not always contain a time  
9 limit but "parliamentary grants of supplies *ordinarily gave the Crown broad discretion regarding*  
10 *how much to spend within an appropriated sum.*" *Id.* at 429 (emphasis added). "Statutes granting  
11 money often stated that the Crown could spend 'any Sum not exceeding' a particular amount." *Id.*  
12 (collecting examples). Colonial and early statehood practice was largely the same. *Id.* at 430.

13 "In short," the Supreme Court concluded, "the origins of the Appropriations Clause  
14 confirm that appropriations needed to designate *particular revenues* for identified purposes." *Id.*  
15 at 431 (emphasis added). To satisfy this standard, "*[s]ome appropriations required expenditure*  
16 *of a particular amount, while others allowed the recipient of the appropriated money to spend*  
17 *up to a cap.*" *Id.* (emphasis added).

18 The First Congress had the same approach. It made many lump-sum appropriations with  
19 "sums not exceeding" language, "authoriz[ing] disbursements up to certain amounts for those  
20 purposes." *Id.* at 432 (collecting examples). The Executive was not required to spend the full  
21 amount and, instead, had "discretion over how much to spend up to a cap." *Id.* Other times,  
22 Congress allowed agencies to indefinitely fund themselves with a fee-based model. *Id.* at 433. But  
23 in those cases, Congress itself imposed some spending limitation by establishing the amount of  
24 the fees that could be charged or collected. For instance, "[s]oon after convening, Congress  
25 enacted laws that imposed a detailed schedule of duties on imported goods and tonnage." *Id.*  
26 (emphasis added). Customs collectors were compensated based on "*fees specified by law*, and  
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28 <sup>5</sup> Notably, the Court did not question the plaintiffs' standing to challenge the regulation promulgated with unconstitutionally appropriated funds.

1 through a commission on the amount of duties raised within their districts." *Id.* (emphasis added).  
2 This applied to the Postal Service too. Congress "authorized the Postmaster General to pay deputy  
3 postmasters 'such commission on the monies arising from the postage of letters and packets, as he  
4 shall think adequate to their respective services,' ***subject to an upper limit.***" *Id.* at 434.

5 Putting it all together, "the Appropriations Clause requires [no] more than a law that  
6 authorizes the disbursement of *specified funds* for identified purposes." *Id.* at 438 (emphasis  
7 added). The appropriation "need[s] to designate *particular revenues* for identified purposes"  
8 either by "require[ing] expenditure of a particular amount" or "allow[ing] the recipient of the  
9 appropriated money to spend up to a cap." *Id.* at 431-32.

10 Applying these foundational principles to the Bureau, the Supreme Court determined that  
11 the Bureau's funding statute contained the necessary characteristics of a congressional  
12 appropriation. *Id.* at 435. The Court explained, "[t]he statute authorizes the Bureau to draw public  
13 funds from a particular source—the combined earnings of the Federal Reserve System,' ***in an***  
14 ***amount not exceeding an inflation-adjusted cap.***" *Id.* (emphasis added). It highlighted that "the  
15 Bureau's authorization to draw an amount that the Director deems reasonably necessary to carry  
16 out the agency's responsibilities, ***subject to a cap,*** is similar to the First Congress' lump-sum  
17 appropriations." *Id.* (emphasis added). The Court reasoned that, when enacting a standing  
18 appropriation, "Congress determined the amount of the Bureau's annual funding ***by imposing a***  
19 ***statutory cap*** ... The only sense in which the Bureau decides its own funding, then, ***is by***  
20 ***exercising its discretion to draw less than the statutory cap.***" *Id.* at 436 (emphases added). With  
21 the statutory cap as the linchpin, the Supreme Court held that the Appropriations Clause was  
22 satisfied. *Id.* "[W]e cannot conclude that Congress violated the Appropriations Clause by  
23 permitting the Bureau to decide how much funding ***to draw up to a cap.***" *Id.* (emphasis added).

24 The FHFA's funding statute is fundamentally different from the Bureau's. Unlike the cap  
25 preventing the Bureau from siphoning more than 12 percent from the Federal Reserve,  
26 12 U.S.C. § 4516 contains no ceiling on the amount that FHFA can extract and spend from the  
27 regulated entities. The FHFA can generate and spend "unlimited" amounts. *Collins*, 594 U.S.  
28 at 231 (quoting 12 U.S.C. § 4516(a)). Congress has neither set the amount of the assessments the

1 FHFA may charge the entities nor provided a cap on the FHFA's expenditures. Congress  
2 therefore has not identified "specific funds" or "particular revenues" through a maximum or exact  
3 amount. The only superficial limit is the Director's own boundless discretion to determine  
4 "reasonable" costs and expenses, which is no limit at all.

5 True, the Bureau's director was similarly given the prerogative to decide "reasonable"  
6 expenditures. But the Bureau's director's discretion was constrained by the 12 percent cap. The  
7 only discretion the Bureau director exercised was its decision to spend up to the cap. The Bureau  
8 also did not control the entities that it regulates. Here, FHFA has no spending cap *and* controls  
9 Fannie and Freddie through the conservatorship. Thus, Fannie and Freddie cannot protest the  
10 amounts leached away even if they wanted to. The FHFA Director's discretion is limitless in all  
11 the ways the Bureau director's discretion is not. Plaintiffs are unaware of any other agency with  
12 the combined set of features of a (1) standing (2) uncapped (3) assessment-based model where  
13 (4) the director has complete discretion to set and spend its own assessments/budget (5) from  
14 entities it controls (6) outside the annual appropriations process (7) without any obligation to  
15 return excess funds with (8) the ability to invest the overage. In this perilously unique situation,  
16 Congress has combined the power of the purse and power of the sword into one Executive Branch  
17 agency, threatening the liberty of millions of property owners. "[T]here can be no question that  
18 the FHFA's control over Fannie Mae and Freddie Mac can deeply impact the lives of millions of  
19 Americans by affecting their ability to buy and keep their homes." *Collins*, 594 U.S. at 255.

20 **B. The FHFA's Budget and Spending Violates the Nondelegation Doctrine After**  
21 ***CFPB*.**

22 Aside from the Appropriations Clause, the *CFPB* majority recognized "that there may be  
23 other constitutional checks on Congress' authority to create and fund an administrative agency ..."  
24 601 U.S. at 441. Indeed, the dissenters criticized the majority for acknowledging "that broad  
25 separation of powers principles may provide more protection for Congress's power of the purse  
26 than does the Appropriations Clause" without bothering to apply the broader principles discussed  
27 by the court of appeals. *Id.* at 471 n.20 (Alito, J., dissenting). One of those broader separation of  
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1 powers principles was the Nondelegation Doctrine. *Id.* (citing *Cnty. Fin. Servs. Ass'n of Am., Ltd.*  
2 *v. CFPB*, 51 F.4th 616, 635 (5th Cir. 2022)). Thus, the Nondelegation claim remains live.

3 As shown in the First Amended Complaint and Response to Motion to Dismiss, Congress'  
4 failure to prescribe intelligible principles and statutory constraints on the FHFA Director's  
5 "reasonableness" and "sufficiency" determinations violates the Nondelegation Doctrine. But so  
6 too does Congress failure to establish by law a sum certain or ceiling on the FHFA's ability to  
7 raise and spend "unlimited funds." By allowing the FHFA to choose and spend its own endless  
8 budget without any constraints, Congress has unconstitutionally delegated the whole of its  
9 legislative power to the agency. "Congress [did not] 'lay down by legislative act an intelligible  
10 principle to which the person or body authorized to [exercise the delegated authority] is directed  
11 to conform.'" *Gundy v. United States*, 588 U.S. 128, 135 (2019) (quoting *J.W. Hampton, Jr. & Co.*  
12 *v. United States*, 276 U.S. 394, 409 (1928)). The FHFA's funding and spending mechanism  
13 violates the Nondelegation Doctrine and other broader separation of powers principles.

14 As presently structured, there are no checks and balances on the FHFA's actions. It is  
15 beholden to no one for funding and the sums it collects are declared by fiat "not [to] be construed  
16 to be Government or public funds or appropriated money." 12 U.S.C. § 4516(f)(2). The FHFA has  
17 no obligation "to consult with or obtain the consent or approval of the Director of the Office of  
18 Management and Budget" for anything. *Id.* § 4516(g)(5). The FHFA is the epitome of Leviathan  
19 unchained.

### 20 **C. The FHFA's Foreclosures are Still Wrongful after CFPB.**

21 The proposed classes seek injunctive relief and compensatory damages stemming from the  
22 threatened or completed foreclosure sales effectuated without a constitutional appropriation. (ECF  
23 No. 34 at 4, 11-13, 17-18.) A wrongful foreclosure claim challenges the authority behind the  
24 foreclosure, not the foreclosure itself. *Ditech Fin. LLC v. Paradise Springs One Homeowners*  
25 *Ass'n*, 799 F. App'x 526, 527 (9th Cir. 2020). For the reasons articulated above, the FHFA is  
26 without lawful authority to conduct the foreclosure actions because Congress has not passed a  
27 valid appropriation by specifying, through law, the sum certain or maximum that the FHFA can  
28 raise and spend from the regulated entities for these purposes. It is immaterial that Congress could

1 make a valid appropriation in the future. The FHFA has been, and will continue to, act  
2 unconstitutionally until Congress passes a valid appropriation.

3 **IV. CONCLUSION**

4 For these reasons, the Court should deny Defendants' Motion to Dismiss the  
5 First Amended Complaint [ECF No. 36] in light of *CFPB* and allow Plaintiffs to proceed with  
6 discovery and class certification.

7 Dated this 31st day of July, 2024.

8 PISANELLI BICE PLLC

9  
10 By: /s/ Jordan T. Smith  
11 Jordan T. Smith, Esq., #12097  
12 Brianna Smith, Esq., #11795  
13 400 South 7th Street, Suite 300  
14 Las Vegas, Nevada 89101

15 *Attorneys for Plaintiffs and Proposed Classes*

PISANELLI BICE  
400 SOUTH 7TH STREET, SUITE 300  
LAS VEGAS, NEVADA 89101

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