No. 14-804

In the Supreme Court of the United States

ENYKA M. GAINES AND RICCO R. GAINES, PETITIONERS

v.

FEDERAL HOME LOAN MORTGAGE CORPORATION, ET AL.

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

BRIEF FOR THE FEDERAL HOUSING FINANCE AGENCY IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that respondents Federal Home Loan Mortgage Corporation (Freddie Mac) and Federal National Mortgage Association (Fannie Mae), which are currently under the temporary conservatorship of respondent Federal Housing Finance Agency, are private actors not constrained by the Due Process Clause of the Fifth Amendment.

2. Whether the court of appeals erred in affirming the dismissal of petitioners' state-law claims.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. B1-B8, C1-C12) are not published in the *Federal Reporter* but are reprinted in 589 Fed. Appx. 314 and 587 Fed. Appx. 266. The opinions of the district court (Pet. App. F1-F16, H1-H7) are not published in the *Federal Supplement* but are available at 2013 WL 1282016 and 2013 WL 423777.

JURISDICTION

The judgments of the court of appeals were entered on September 29, 2014, and September 30, 2014. The petition for a writ of certiorari was filed on December 29, 2014 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondents Federal Home Loan Mortgage Corporation (Freddie Mac) and Federal National Mortgage Association (Fannie Mae) are privately owned, publicly traded corporations that were created by federal law. See 12 U.S.C. 1452, 1453; 12 U.S.C. 1716b, 1718, 1723(b). Both operate in the secondary mortgage market, purchasing residential mortgages from mortgage lenders and thereby providing those lenders with capital for funding additional mortgage loans. See, *e.g.*, 12 U.S.C. 1454; 12 U.S.C. 1716; *Montgomery Cnty. Comm'n* v. *Federal Hous. Fin. Agency*, 776 F.3d 1247, 1252 (11th Cir. 2015).

In 2008, in response to an ongoing crisis in the credit and housing markets, Congress enacted the Housing and Economic Recovery Act (HERA), Pub. L. No. 110-289, 122 Stat. 2654, which established respondent Federal Housing Finance Agency (FHFA). HERA authorized FHFA's director to appoint the agency as conservator or receiver for Freddie Mac and/or Fannie Mae in certain circumstances for "the purpose of reorganizing, rehabilitating, or winding up [their] affairs." 12 U.S.C. 4617(a).

On September 6, 2008, the director of FHFA—having determined that Freddie Mac and Fannie Mae had suffered severe damage to their financial condition—appointed the agency as conservator of both entities. See FHFA, *History of Fannie Mae & Freddie Mac Conservatorships*, http://www.fhfa.gov/Conservatorship/Pages/History-of-Fannie-Mae--Freddie-Conservatorships.aspx (last visited Mar. 9, 2015); see also 12 U.S.C. 4617(a). When FHFA became conservator, it succeeded to "all rights, titles, powers, and privileges of [each] regulated entity, and

of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." 12 U.S.C. 4617(b)(2)(A)(i). FHFA was also empowered to take actions "necessary to put [each] regulated entity in a sound and solvent condition" and "appropriate to carry on the business of the regulated entity and preserve and conserve" the entity's "assets and property." 12 U.S.C. 4617(b)(2)(D); see 12 U.S.C. 4617(b)(2)(B), (H), and (J); 12 U.S.C. 4513(a)(1)(B).

The conservatorships remain ongoing, and FHFA continues to pursue the statutory objectives of reorganizing and rehabilitating the entities' affairs. See 12 U.S.C. 4617(a); FHFA, *History of Fannie Mae & Freddie Mac Conservatorships*, *supra* ("Long-term, continued operation in a government-run conservatorship is not sustainable for Fannie Mae and Freddie Mac."); see also FHFA, *The 2014 Strategic Plan for the Conservatorships of Fannie Mae and Freddie Mac* 4-5 (May 13, 2014).

2. a. In 2004, petitioners Enyka and Rico Gaines obtained a mortgage loan on a property in Belleville, Michigan. Pet. App. H2; see *id.* at B2. After defaulting on the loan, the Gaineses entered into a trial loan-modification plan with Wells Fargo, the assignee of the mortgage. *Id.* at B2. When they failed to meet the requirements of the trial plan, Wells Fargo commenced a foreclosure action under Michigan's foreclosure-by-advertisement statute, Mich. Comp. Laws Ann. §§ 600.3201 *et seq*. Pet. App. B3. Freddie Mac received title to the property at the foreclosure sale and later filed an eviction action. *Ibid.* In responding to that action, the Gaineses filed a counter-complaint alleging that the foreclosure sale violated their rights

under the Due Process Clause of the Fifth Amendment and under Michigan law. *Id.* at H1.

After the case was removed to federal court and FHFA intervened as Freddie Mac's conservator, see 12-cv-12131 Docket entry No. 4, at 1 (July 6, 2012), the district court granted respondents' motion for judgment on the pleadings, Pet. App. G1, H7. The court concluded that the Gaineses' due process claim failed as a matter of law because Freddie Mac's "alleged wrongful conduct" did not "constitute[] * * * state action." *Id.* at H5 (collecting decisions reaching the same conclusion); see *id.* at H5-H6 (discussing *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995)). The court also disposed of the state-law claims on various grounds, noting (*inter alia*) that the Gaineses had failed to plead fraud with particularity and that key allegations in their complaint were contradicted by documents attached to the complaint. *Id.* at H4; see *id.* at H6.

b. In 2011, petitioner Linda Bernard defaulted on a mortgage loan secured by a Detroit property. Pet. App. C2. Wells Fargo initiated foreclosure by advertisement and eventually purchased the property at a sheriff's sale. *Id.* at C2-C3. Wells Fargo later quitclaimed the property to Fannie Mae. *Id.* at C3. On September 17, 2012, Bernard filed suit against Fannie Mae in state court, asserting that the foreclosure sale violated the Fifth Amendment and Michigan law. *Id.* at F1-F2, F4.

After Fannie Mae removed the suit to federal court, the district court granted Fannie Mae's motion to dismiss or, in the alternative, for summary judgment. Pet. App. E1, F16. First, the court ruled that Fannie Mae is not "a governmental actor that can be

held liable for constitutional violations." *Id.* at F7-F9. The court rejected the argument that FHFA's conservatorship transformed Fannie Mae into a government entity. The court explained that, in acting as conservator, FHFA steps into the shoes of a private corporation on a temporary basis. *Id.* at F8-F9 (discussing *Lebron*, *supra*); see *id.* at F7-F8 (stating that other federal courts to have considered this argument have rejected it "soundly and consistently"). Second, the court found that none of the state-law claims were "viable," since none alleged the kind of prejudice required under Michigan law to set aside a foreclosure sale. *Id.* at F11-F15.

3. In two unpublished decisions, the Sixth Circuit affirmed the dismissal of petitioners' constitutional and state-law claims. Pet. App. B, C.[1]

With respect to petitioners' due process claims, the court of appeals held that respondents Freddie Mac and Fannie Mae are private actors not subject to the constraints of the Due Process Clause. Pet. App. B4-B5, C8-C9. The court noted that in *Mik* v. *Federal Home Loan Mortgage Corp.*, 743 F.3d 149, 168 (6th Cir. 2014), it had applied the framework set forth in *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), for determining when a government-sponsored corporation is a state actor for constitutional purposes and had concluded that FHFA's conservatorship did not convert Freddie Mac into a state

[1] Petitioners' appeals were "submitted to the same panel on the same day, for whatever treatment that panel deems appropriate," 13-1249 Docket entry No. 47-2, at 2 (Aug. 21, 2013), and were then decided without oral argument in separate opinions. Respondent FHFA intervened in petitioner Bernard's appeal. See 13-1477 Docket entry No. 39-2, at 1 (July 3, 2013).

actor. Pet. App. B4-B5 (noting that every district court "that has confronted the question has reached the same conclusion"); see *id.* at C8-C9. The court further explained that, "even without reliance on *Mik*," it would have rejected petitioners' contention that Freddie Mac and Fannie Mae became state actors as a result of the conservatorship. *Id.* at B5; see *id.* at C9. The court explained that, under *Lebron*, "a necessary condition precedent for a conclusion that a once-private entity is a state actor is that the government's control over the entity is permanent." *Id.* at B5 (citing 513 U.S. at 399); see *id.* at C9. The court concluded that, because Congress had "empowered the FHFA to become conservator" for Freddie Mac and Fannie Mae for only a "limited" and "inherently temporary" purpose, FHFA lacks the permanent control that would strip those entities of their status as private corporations. *Id.* at B5; see *id.* at C9.

The court of appeals also affirmed the dismissal of petitioners' state-law claims. Pet. App. B5-B8, C4-C7. The court concluded that petitioners had not properly challenged the foreclosure sales under Michigan law because the complaints did not allege "fraud or irregularity related to the sheriff's sale itself." *Id.* at B6 (citing *Bank of N.Y. Mellon Trust Co. Nat'l Ass'n* v. *Robinson*, No. 311724, 2013 WL 6690678 (Mich. Ct. App. Dec. 19, 2013) (per curiam)); see *id.* at C5-C6. The court also rejected the Gaineses' breach-of-contract claim premised on Wells Fargo's purported failure to honor a temporary loan-modification plan, holding that the claim was inconsistent with the plain terms of the plan and with admissions made by the Gaineses in their complaint. *Id.* at B7-B8. Finally, the court rejected petitioner Bernard's request for

relief based on Wells Fargo's alleged violation of Michigan's loan-modification and foreclosure statutes. The court explained that this claim failed because, even assuming that a violation had occurred, Bernard had not established any prejudice from the alleged violation as state law requires. *Id.* at C6-C7.

ARGUMENT

The Sixth Circuit's unpublished decisions are correct and do not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. The Sixth Circuit correctly held that Freddie Mac and Fannie Mae remain private actors while under FHFA's conservatorship. Contrary to petitioners' contentions (Pet. 5-17), that conclusion is fully consistent with this Court's decisions in *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), and *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994). It is also consistent with the analysis of every federal court to have considered whether the conservatorship has transformed Freddie Mac or Fannie Mae into a government actor for purposes of the Due Process Clause. See, *e.g.*, *Mik* v. *Federal Home Loan Mortg. Corp.*, 743 F.3d 149, 168 (6th Cir. 2014); *Dias* v. *Federal Nat'l Mortg. Ass'n*, 990 F. Supp. 2d 1042, 1062 (D. Haw. 2013); *Matveychuk* v. *One W. Bank, FSB*, No. 1:13-CV-3464, 2013 WL 6871981, at *5 (N.D. Ga. Dec. 19, 2013); *Parra* v. *Federal Nat'l Mortg. Ass'n*, No. CV 13-4031, 2013 WL 5638824, at *3 (C.D. Cal. Oct. 16, 2013); *Herron* v. *Fannie Mae*, 857 F. Supp. 2d 87, 95 (D.D.C. 2012); *Syriani* v. *Freddie Mac Multiclass Certificates*, No. CV 12-3035, 2012 WL 6200251, at *4 (C.D. Cal. July 10, 2012).

a. In *Lebron*, this Court held that the federally chartered National Railroad Passenger Corporation, commonly known as Amtrak, was a state actor subject to constitutional constraints. See 513 U.S. at 400; see also *Department of Transp.* v. *Association of Am. R.Rs.*, No. 13-1080 (Mar. 9, 2015), slip op. 7, 10-11 (discussing *Lebron*); see generally *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 542 (1987). The Court explained that, in determining whether such a corporation is a state actor, the dispositive inquiry is whether, under the statutes governing the corporation's operation, the federal government "retains for itself *permanent* authority to appoint a majority of the directors of that corporation." *Lebron*, 513 U.S. at 400 (emphasis added). The Court concluded that the federal government had permanent authority over Amtrak because the Rail Passenger Service Act of 1970 vested the President with the power to appoint directly six of Amtrak's eight outside directors. See *id.* at 397-398; see also *id.* at 399-400. Amtrak therefore was "not merely in the temporary control of the Government," as "a private corporation whose stock comes into federal ownership" would be. *Id.* at 398.

Here, the court of appeals correctly recognized that the federal government does not possess permanent authority to exert control over Freddie Mac or Fannie Mae. See, *e.g.*, Pet. App. C9. Because Congress empowered FHFA to act as conservator of Freddie Mac and Fannie Mae for the limited purpose of "reorganizing, rehabilitating, or winding up [their] affairs," 12 U.S.C. 4617(a)(2), FHFA's conservatorship is "inherently temporary," Pet. App. C9. Once

the purpose of the conservatorship is accomplished, FHFA's tenure as conservator will end.

Petitioners argue (*e.g.*, Pet. 15) that FHFA's control is permanent because there "is no specified date for the termination of the FHFA's conservatorship" over Freddie Mac and Fannie Mae. The fact that FHFA's conservatorship does not yet have a definite end date, however, does not make the conservatorship permanent. This Court observed in *Lebron* that even if the federal government exercised control for an indefinite period over "a private corporation whose stock comes into federal ownership," that control would nevertheless be temporary for purposes of deciding whether the corporation was a government actor subject to a constitutional claim. 513 U.S. at 398. FHFA's conservatorship is no more permanent than the federal government's ownership of the majority of a private corporation's publicly traded stock—indeed, it is less so, because the conservatorship is intended to conclude once the statutory objectives of the conservatorship are achieved.

b. In *O'Melveny & Myers*, this Court considered whether a federal common-law rule, rather than state law, should govern tort claims brought by the Federal Deposit Insurance Corporation (FDIC), as receiver of a federally insured bank, against attorneys who had provided services to the bank. See 512 U.S. at 80-81, 83. The attorneys argued that federal common law applied because federal law must "govern[] questions involving the rights of the United States arising under nationwide federal programs." *Id.* at 85 (citation omitted). In rejecting that contention, the Court explained, *inter alia*, that the FDIC—operating as receiver under a statute granting it "all rights, titles,

powers, and privileges of the insured depository institution," *id.* at 86 (citation omitted)—had merely "step[ped] into the shoes" of the failed bank, obtaining and asserting the rights "*of* the insured depository institution" rather than the agency's "*own* rights." *Id.* at 85-86 (citations omitted).

Like the FDIC in *O'Melveny & Myers*, FHFA was not asserting its own rights as a federal agency when, as conservator, it oversaw actions taken to enforce Freddie Mac's and Fannie Mae's contractual rights. Those rights existed independently of the conservatorship, and FHFA merely "step[ped] into the shoes" of the two private entities in the course of fulfilling its statutory duty to exercise "all rights, titles, powers, and privileges of [each] regulated entity." 12 U.S.C. 4617(b)(2)(A)(i); see *O'Melveny & Myers*, 512 U.S. at 86; see also Pet. App. F7-F9.

Petitioners assert (Pet. 8-13) that *O'Melveny & Myers* is inapplicable because Freddie Mac and Fannie Mae control a larger share of the residential mortgage market than any single bank. Petitioners contend that FHFA's conservatorship of Freddie Mac and Fannie Mae therefore is more significant than the FDIC's takeover of an individual savings and loan. That Freddie Mac and Fannie Mae own more mortgages than any single bank has no bearing, however, on the source of the rights that were vindicated by those entities in connection with the foreclosures that petitioners challenge. Like the rights at issue in *O'Melveny & Myers*, the foreclosure-related rights with respect to petitioners' properties belonged to the private actors under conservatorship, not to the federal government. Neither the size of those private

actors nor the influence that they wield in the secondary mortgage market alters that conclusion.[2]

2. Petitioners also ask this Court (Pet. 21-29) to review the court of appeals' affirmance of the dismissal of their state-law claims. Review of that issue is not warranted.

Petitioners primarily assert that the court of appeals failed to recognize the existence of material questions of fact that should have precluded the entry of judgment in favor of respondents. But the court of appeals' conclusion that petitioners failed to plead facts sufficient to state claims for relief under Michigan law is entirely case-specific and implicates no "important question of federal law." Sup. Ct. R. 10; see *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."). In any event, the court correctly affirmed the dismissal of petitioners' state-law claims. As the court explained, the allegations that petitioners cite (Pet. 24, 25-26) as evidence of a material factual dispute either were contradicted by petitioners' own complaints (or by documents that petitioners had attached to those com-

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[2] Petitioners cite (Pet. 9-11) two court of appeals decisions and one district court ruling for the proposition that state law applies when the FDIC and the Federal Savings and Loan Insurance Corporation (FSLIC) act as receivers for failed banks, while federal law applies when the FDIC and FSLIC act in their "corporate capacity." *Ibid.* (citing *Gaff* v. *FDIC*, 919 F.2d 384 (6th Cir. 1990); *Trigo* v. *FDIC*, 847 F.2d 1499 (11th Cir. 1988); *FSLIC* v. *Locke*, 718 F. Supp. 573 (W.D. Tex. 1989)). That proposition does not aid petitioners. FHFA was unquestionably acting in its capacity as conservator for Fannie Mae and Freddie Mac, and not in any corporate capacity, with respect to the foreclosures that are the subject of petitioners' claims.

plaints) or were insufficient to support their claims even if accepted as true. See, *e.g.*, Pet. App. B7 (allegation that Gaineses never received a permanent loan-modification offer was contradicted by statements in their counter-complaint in which they admitted rejecting such an offer); *id.* at C6-C7 (allegations of violations of Michigan's foreclosure and loan-modification laws were insufficient to support Bernard's state-law claims because she could not "show prejudice as a result of" any such "noncompliance").

Petitioners also contend (Pet. 26-28) that the court of appeals' ruling on the state-law claims created an intra-circuit conflict. Such a conflict would provide no basis for this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, no such conflict exists here.

As the court of appeals explained (Pet. App. C6 n.2), the state-law ruling in *Mitan* v. *Federal Home Loan Mortgage Corp.*, 703 F.3d 949 (6th Cir. 2012), was abrogated by the Michigan Supreme Court in *Kim* v. *JPMorgan Chase Bank, N.A.*, 825 N.W.2d 329 (2012). The court of appeals therefore properly applied *Kim*, not *Mitan*, when it assessed claims that respondents had violated Michigan law. The other Sixth Circuit decision on which petitioners rely (Pet. 26-28) is simply irrelevant here. That decision addressed the existence of Article III standing to pursue a federal claim, see *Slorp* v. *Lerner, Sampson & Rothuss*, 587 Fed. Appx. 249, 253-254 (6th Cir. 2014), and petitioners' Article III standing was never in issue below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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