IN THE SUPREME COURT OF OHIO

REBEKAH R. RADATZ, individually and on behalf of all others similarly situated,	)	CASE NO. 14-1126
Plaintiff/Appellee,	)	On Appeal from the Cuyahoga County Court of Appeals Eighth Appellate District Case No. CA-13-100205
v.	)	
FEDERAL NATIONAL MORTGAGE ASSOCIATION,	)	Cuyahoga County Court of Common Pleas
Defendant/Appellant.	)	Case No. CV-03-507616

AMICUS CURIAE BRIEF OF FEDERAL HOUSING FINANCE AGENCY IN SUPPORT OF DEFENDANT-APPELLANT FEDERAL NATIONAL MORTGAGE ASSOCIATION

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae, the Federal Housing Finance Agency ("FHFA"), files this brief in support of Appellant Federal National Mortgage Association ("Fannie Mae") because the Eighth District's decision directly and adversely impacts FHFA's authority as granted by Congress and disregards the federal statutory framework governing financial institutions.

On July 30, 2008, Congress enacted the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (2008) ("HERA"). HERA amended the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 and transitioned regulatory oversight of Fannie Mae and Freddie Mac from the Office of Federal Housing Enterprise Oversight ("OFHEO") to FHFA, a newly organized successor agency. 12 U.S.C. 4511.

Federal financial regulators such as FHFA must be able to act swiftly and surely to address violations of law or unsound business practices. Thus, just like other federal financial regulators, FHFA is empowered to proceed against Fannie Mae and issue cease-and-desist orders if it "has reasonable cause to believe" Fannie Mae is "about to violate, a law, rule, regulation, or order . . . ." 12 U.S.C. 4631(a). When FHFA, acting pursuant to its Section 4631(a) authority in its capacity as Regulator of Fannie Mae or Freddie Mac, issues a cease-and-desist order that becomes final—such as the March 9, 2013 Order ("Order") against Fannie Mae[1]—"no court shall have jurisdiction to affect, by injunction or otherwise, the issuance or enforcement of" such an order, "or to review, modify, suspend, terminate, or set aside any such notice or order." *Id*.

[1] Appellant's Appx. A-039. All references to the Appendix in this brief are references to Appellant's Appendix.

4635(b). Thus, upon issuance of the final Order against Fannie Mae, *all courts* were divested of authority to review or affect the Order.[2]

In addition, HERA vested FHFA with the power to place Fannie Mae and Freddie Mac into conservatorship or receivership. *See* 12 U.S.C. 4617. On September 6, 2008, pursuant to HERA, the Director of FHFA placed Fannie Mae and Freddie Mac into FHFA's conservatorship, where they remain. Thus, FHFA currently acts as both Conservator and Regulator of Fannie Mae and Freddie Mac.

This case squarely presents the question whether a state court may review or affect a federal financial regulator's final enforcement order issued pursuant to a federal statute expressly divesting all courts, federal and state, of jurisdiction to review or affect such an order. The answer is no.

STATEMENT OF FACTS

FHFA adopts the statement of facts contained in Appellant Fannie Mae's Merit Brief. In addition, FHFA adopts the propositions of law and arguments in support thereof from Fannie Mae's Merit Brief. Appellant's Merit Br. at 3-8. FHFA will address only the first of Fannie Mae's two propositions of law in this brief because this proposition directly implicates FHFA's enforcement authority.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. I: No court has jurisdiction to review or affect cease-and-desist orders issued by federal financial regulators, including FHFA, unless expressly authorized to do so by Congress.

The Eighth District committed two errors that caused it incorrectly to conclude that federal law did not bar it from exercising jurisdiction to review FHFA's Order. *First*, the Eighth

[2] A limited exception to this withdrawal of jurisdiction exists when FHFA asks a court to enforce an order. 12 U.S.C. 4635(a).

District failed to recognize that 12 U.S.C. 4635(b) expressly withdraws jurisdiction from all courts to review or affect orders issued by FHFA as regulator of Fannie Mae pursuant to 12 U.S.C. 4631(a). This misreading of the controlling federal statute led the Eighth District to the erroneous conclusion that it had the jurisdiction to review FHFA's determination that a payment made by Fannie Mae pursuant to Revised Code 5301.36 would violate a federal law, 12 U.S.C. 4617(j)(1), (4) (the "Statutory Penalty Bar"). *Second*, the Eighth District misconstrued the Order as not expressly barring Fannie Mae from making any payments pursuant to any judgment issued in connection with this litigation.

A. The Governing Federal Statutory Framework Expressly Precludes All Judicial Review of the Order and Any Judicial Action That Would Affect Enforcement of the Order

FHFA was acting as Fannie Mae's Regulator when it ordered Fannie Mae not to pay any judgment that might be entered on Plaintiff's claims in this case because federal law immunizes Fannie Mae from liability for penalties while in FHFA conservatorship or receivership. 12 U.S.C. 4617(j)(4). The Order reflects FHFA's determination that the remedy Plaintiff seeks constitutes a penalty barred by 12 U.S.C. 4617(j).[3] The Eighth District rejected this determination and nullified FHFA's final Order by reinstating Plaintiff's complaint and directing that Plaintiff's claims be allowed to proceed to judgment. In so doing, the Eighth District not only contravened the explicit federal jurisdictional bar by "review[ing]" FHFA's Order, it unlawfully "affect[ed]" the Order's enforcement by reinstating Plaintiff's complaint and purporting to authorize the trial court to order Fannie Mae to make payments barred by the Order and governing federal law. *See* 12 U.S.C. 4635(b).

[3] The Order states in part: "Fannie Mae is ordered to cease and desist from violating 12 U.S.C. 4617(j)(4) by paying, for any reason, directly or indirectly, any amount pursuant to Ohio Code 5301.36 or pursuant to any judgment in connection with the pending lawsuit styled *Radatz v. Fed. Natl. Mortgage Assn.*, Case No. CV-03-507616 (Ohio Com. Pleas)."

The statutory framework governing FHFA's authority to issue cease-and-desist orders—including the express bar against judicial interference with such orders—can be traced to the enactment of the Financial Institutions Supervisory Act, Pub.L. 89-695, 80 Stat. 1028 (1966) ("FISA"), nearly half a century ago. When Congress enacted the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Pub. L. 102-550, 106 Stat. 3672, it included a limitation on judicial review of agency orders that is identical to, and based upon, the extensively litigated statutory bar against judicial review contained in FISA. Congress included this jurisdictional bar in HERA. *Compare* 12 U.S.C. 4635(b) (HERA) *with* 12 U.S.C. 1818(i) ("[N]o court shall have jurisdiction to affect, by injunction or otherwise, the issuance or enforcement of any notice or order" under certain sections of the statute, "or to review, modify, suspend, terminate, or set aside any such notice or order.").[4]

"In 1966, Congress enacted [FISA], granting the Comptroller [of the Currency] and other federal bank regulators broad powers to issue cease and desist orders and orders suspending and removing unfit bank officers." *Sinclair v. Hawke*, 314 F.3d 934, 941 (8th Cir.2003). Congress granted federal financial regulators the power to issue cease-and-desist orders "to prevent violations of law or regulation and unsafe and unsound practices which otherwise might adversely affect the Nation's financial institutions, with resulting harmful consequences to the growth and development of the Nation's economy." *Id*. (quoting S. Rep. No. 1482 (1966), reprinted in 1966-3 U.S.C.C.A.N. 3532, 3533). FISA also "provides explicit guidance on the proper jurisdictional limits of the district courts in reviewing agency enforcement actions." *First Natl. Bank of Scotia v. U.S.*, 530 F.Supp. 162, 168 (D.D.C.1982) (citation omitted). Courts

[4] Courts routinely look to cases interpreting other federal banking statutes when interpreting and applying HERA. *See, e.g.*, *FHFA v. UBS Ams., Inc.*, 712 F.3d 136, 142, fn. 2 (2d Cir.2013); *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C.Cir.2012); *In re Fed. Home Loan Mtge. Corp. Derivative Litig.*, 643 F.Supp.2d 790, 795 (E.D.Va.2009).

consistently have recognized that federal financial regulators may issue orders to regulated entities to enforce any law. *See, e.g., Cousin v. OTS*, 73 F.3d 1242, 1251 (2d Cir.1996) (explaining that a similarly worded statute permitting financial regulators to take action against a bank director who "has committed any violation of law," 12 U.S.C. 1464(d)(4)(A) (1982), applies to any violation, not merely bank-related violations); *Saratoga Sav. & Loan Assn. v. Fed. Home Loan Bank*, 879 F.2d 689, 693 (9th Cir.1989).

In the nearly 50 years since enactment of FISA's jurisdictional bar, the Supreme Court and dozens of other federal and state courts have applied Section 1818(i)—consistent with its comprehensive language—to dismiss for lack of jurisdiction complaints that demanded relief that would either "affect . . . review, modify, suspend, terminate, or set aside" a federal banking agency's lawfully issued order. *See, e.g., Bd. of Governors of the Fed. Reserv. Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 44-45, 112 S.Ct. 459, 116 L.Ed.2d 358 (1991) (affirming the dismissal of bank holding company's complaint seeking an injunction of its administrative prosecution); *Ridder v. Office of Thrift Supervision*, 146 F.3d 1035, 1039-40 (D.C.Cir.1998) (holding that prohibition of review of Office of Thrift Supervision order extends to third parties affected by the order); *First Natl. Bank of Grayson v. Conover*, 715 F.2d 234, 237 (6th Cir.1983) (holding that district court lacked jurisdiction over bank's suit for injunctive relief to prevent the suspension of two of its officers pursuant to OCC administrative suspension order); *Spiegel Holdings, Inc. v. Office of the Comptroller of the Currency of U.S.*, D.Or. No.Civ. 03-335-KL, 2003 U.S. Dist. LEXIS 8187, 1-2 (Apr. 28, 2003) (granting motion to dismiss complaint under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction pursuant to section 1818(i)(1)); *Am. Fair Credit Assn. v. United Credit Natl. Bank*, 132 F.Supp.2d 1304, 1312 (D.Colo.2001) (same). Each of these authorities compels dismissal of this action.

This result is not altered by the fact that the Order is a consent order. Federal financial regulators routinely enter into consent orders with regulated entities, and such orders have the same force as any other order. *See Henry v. Office of Thrift Supervision*, 43 F.3d 507, 512 (10th Cir.1994) (holding that Office of Thrift Supervision consent orders directed against the former director of a savings and loan association were "orders" within the meaning of 12 U.S.C. 1818(i)); *see also In re JPMorgan Chase Mtge. Modification Litig.*, 880 F.Supp.2d 220, 229 & fn. 1 (D.Mass.2012) (noting that the Office of the Comptroller of the Currency had the statutory authority to enter consent orders).

In sum, the comprehensive legislative scheme established by FISA and the Safety and Soundness Act, as amended by HERA, "provides us with clear and convincing evidence that Congress intended to deny [courts] jurisdiction to review and enjoin" financial regulatory proceedings. *MCorp*, 502 U.S. at 44; *see also Peoples Natl. Bank v. Office of the Comptroller of the Currency of U.S.*, 227 F.Supp.2d 645, 651 (E.D.Tex.2002) ("With regard to section 1818, it is clear that Congress intended to provide the OCC with the authority to initiate and pursue enforcement actions, and to fashion appropriate remedies without district court interference."), *aff'd*, 362 F.3d 333 (5th Cir.2004); *Federal Home Loan Bank Bd. v. Hague*, 664 F.Supp. 245, 249 (W.D.La.1987) ("Congress' intent to limit the jurisdiction of federal district courts in matters relating to financial institutions is adamantly clear."), *aff'd*, 840 F.2d 14 (5th Cir.1988).

Federal courts routinely recognize and apply the plain language of the jurisdictional-withdrawal provision at issue here, which provides that "*no court* shall have jurisdiction to affect, by injunction or otherwise, the issuance or enforcement of" a cease-and-desist order, "or to review, modify, suspend, terminate, or set aside any such notice or order." 12 U.S.C. 1818(i), 4635(b) (emphasis added). By using the term "no court," Congress mandated that state courts

are bound by this jurisdictional-withdrawal provision to the same extent as federal courts. *Doral Bank v. Fed. Deposit Ins. Corp.*, D.P.R. Civ. No. 14-1570, ___ F.Supp.3d ___, 2014 U.S. Dist. LEXIS 127741, 17 (Sept. 11, 2014) (under Section 1818(i), "no court, *federal or state*, has jurisdiction" to affect or review OTS orders (quoting *Ponce Fed. Bank v. Chubb Life Ins. Co.*, 155 D.P.R. 309, 330, 2001 PR Sup. LEXIS 139 (2001)) (emphasis added).

B. The Eighth District's Decision Necessarily and Unlawfully Reviews and Affects the Order

The Order unequivocally prohibits Fannie Mae from paying, for any reason, any amount pursuant to R.C. 5301.36 because the payment would be for amounts "in the nature of penalties or fines" under federal law in violation of the Statutory Penalty Bar. (*See* Order at 5, Appx. A-039.) Because the relief Ms. Radatz seeks plainly is prohibited by the Order, the trial court correctly recognized that any action it could take short of dismissal necessarily would "affect" the Order. The trial court therefore acknowledged that it had been divested of jurisdiction by controlling federal law and dismissed the case pursuant to 12 U.S.C. 4635(b), the only action lawfully available to it. *See Am. Fair Credit Assn.*, 132 F.Supp.2d at 1312 ("If this case went forward as currently pled and Plaintiff prevailed, Defendant . . . would be required to pay money damages included in the judgment in direct contravention of the . . . Consent Order. . . . Because such an outcome would 'affect . . . the . . . enforcement of an[ ] order' issued by the OCC, 12 U.S.C. § 1818(i)(1), jurisdiction does not exist over those claims."); *Spiegel Holdings*, 2003 U.S. Dist. LEXIS 8187, 1-2 (dismissing action for lack of subject matter jurisdiction pursuant to 12 U.S.C. 1818(i)(1) because "no relief that [the court] can grant is sought in the Complaint").

In reversing the decision of the trial court and reinstating Plaintiff's complaint, the Eighth District undertook a "review" of the merits and applicability of the Order, an act that explicitly violated the plain text of HERA's jurisdictional-withdrawal provision. *See* 12 U.S.C. 4635(b)

(no court may "review" a cease-and-desist order); *U.S. v. Leuthe*, E.D.Pa. No. CIV.A. 01-203, 2002 U.S. Dist. LEXIS 4748, 20 (Mar. 20, 2002) ("[A]djudication of [Plaintiff's] defenses and counterclaims would necessarily involve a review of the propriety of the FDIC's final order barring defendant from banking and imposing the penalty. Such is precluded by § 1818(i)(1)."), *aff'd*, 57 Fed.Appx. 989 (3d Cir. 2003); *Office of Thrift Supervision v. Paul*, 985 F.Supp. 1465, 1468 (S.D.Fla.1997) (holding that district court lacked jurisdiction to examine merits of Office of Thrift Supervision order).

C. The Eighth District Acted in Direct Contravention of the Governing Federal Statutory Framework

The Eighth District failed to recognize FHFA's separate and distinct roles as both Regulator and Conservator of Fannie Mae, a failure most sharply reflected by the court's erroneous finding that the Order was issued by FHFA as Conservator, rather than in its capacity as Regulator. *See Radatz v. Fed. Natl. Mtge. Assn.*, 2014-Ohio-2179, 11 N.E.3d 1230, ¶ 13 (8th Dist.) ("[W]e assume for the sake of this appeal that the conservator had authority to enter the consent order mimicking the immunity language of 12 U.S.C. 4617(j)(4)"). This finding of fact, which the Eighth District lacked jurisdiction to make, is categorically incorrect; FHFA issued the Order in its regulatory capacity. Indeed, the Order expressly states that FHFA is acting under 12 U.S.C. 4631 (Order at 5, Appx. A-039), which applies only to FHFA in its regulatory capacity; FHFA lacks authority to issue enforcement orders as Conservator.

That fundamental error apparently led the Eighth District to conflate HERA's jurisdictional-withdrawal provision, which applies to all enforcement orders issued by FHFA in its regulatory capacity, 12 U.S.C. 4635(b), with the federal statutory bar of payments of penalties and fines by the Conservator and Fannie Mae while in conservatorship, 12 U.S.C. 4617(j)(1), (4). The Eighth District wrote: "Fannie Mae argued that through 12 U.S.C. 4635(b), the grant of

immunity pursuant to 12 U.S.C. 4617(j)(4) became a jurisdictional concept, and therefore, the trial court lacked jurisdiction to affect any order issued by the FHFA director. In order to follow Fannie Mae's logic, it must be determined whether any damages awarded to the Plaintiffs would necessarily affect the consent order." *Radatz*, 2014-Ohio-2179, 11 N.E.3d 1230, ¶ 4.

That is incorrect. The Statutory Penalty Bar is not a jurisdictional-withdrawal provision; rather, it serves, during conservatorship, to immunize Fannie Mae and Freddie Mac from penalties and fines. *See Nevada v. Countrywide Home Loans Servicing, LP*, 812 F.Supp.2d 1211, 1216 (D.Nev.2011). The relevance of the Statutory Penalty Bar to this litigation is not, as described by the Eighth District, some type of "jurisdictional concept." Rather, the Statutory Penalty Bar is relevant here because it was FHFA's exercise of its congressionally authorized power to prevent an impending violation of this statute that caused it to issue the Section 4631 Order.

Specifically, 12 U.S.C. 4631(a) authorizes FHFA as Regulator (and not as Conservator) to issue a cease-and-desist order if it "has reasonable cause to believe" Fannie Mae is "about to violate, a law, rule, regulation, or order . . . ." *Id.* FHFA determined that payment of any amount by Fannie Mae in conservatorship pursuant to R.C. 5301.36 would constitute "penalties or fines" in violation of "a law," i.e., the Statutory Penalty Bar. Section 4631(a) empowered FHFA to issue the Order enforcing Fannie Mae's compliance with the Statutory Penalty Bar. Once FHFA did so, Section 4635(b)—not some "jurisdictional concept" arising from the Statutory Penalty Bar itself—precluded any judicial second-guessing by withdrawing jurisdiction over Plaintiff's claims.

The Eighth District's confusion about the statutory scheme is further evidenced by its statement that "the consent order appears to merely parrot the statutory immunity in an overt

attempt to create a jurisdictional issue through 12 U.S.C. 4635(b), which is not expressly provided for in the statutory scheme granting the FHFA and, in this instance, Fannie Mae, immunity from paying any amounts in the nature of penalties or fines pursuant to 12 U.S.C. 4617(j)(4)." *Radatz*, 2014-Ohio-2179, 11 N.E.3d 1230, ¶ 13. Again, the Eighth District simply ignored the dispositive, preclusive import of 12 U.S.C. 4631(a), which empowers FHFA as Regulator to issue a cease-and-desist order to prohibit a violation of any law. FHFA may issue a cease-and-desist order to prevent the violation of a "law, rule, regulation, or order," regardless whether a violation of that law otherwise would be reviewable by a court. Once FHFA issues an order pursuant to section 4631(a), the jurisdictional bar is triggered and no court may review that order.

D. The Eighth District Improperly Substituted Its Judgment for FHFA's

Here, the Eighth District impermissibly reviewed the Order and, in so doing, substituted its judgment for FHFA's determination that R.C. 5301.36 provides for penalties in violation of the Statutory Penalty Bar. *See* 12 U.S.C. 4631(a). The Eighth District concluded:

> [I]nasmuch as the consent order states that Fannie Mae is prohibited from paying "any amounts in connection" with the underlying case, the extent of the cease and desist order is limited to Congress's grant of immunity to the FHFA and Fannie Mae, immunizing Fannie Mae from paying "any amounts" in the nature of penalties or fines in connection with the underlying case. Fannie Mae has cited no authority establishing the basis of the FHFA's authority to infinitely immunize Fannie Mae from paying any amounts stemming from any actions.

Radatz, 2014-Ohio-2179, 11 N.E.3d 1230, ¶ 10. In reaching this conclusion, the Eighth District improperly substituted its judgment for FHFA's, in direct contravention of 12 U.S.C. 4635(b), as to whether damages levied under R.C. 5301.06 would constitute penalties in violation of the Statutory Penalty Bar. In any event, FHFA's conclusion that any amount awarded pursuant to R.C. 5301.06 violates the Statutory Penalty Bar, while unreviewable, is manifestly supported by

federal law for the reasons stated in Fannie Mae's Merit Brief. *See* Appellant's Merit Br. at 17-25.

E. The Eighth District Misread the Order

In addition to misunderstanding the relevant statutory scheme, the Eighth District simply misread the text of the Regulator's Order, reasoning that:

> In the consent order, the acting director of the FHFA expressly provided that Fannie Mae must cease and desist from paying any amount, subject to the modifier, in the nature of fines or penalties, pursuant to any judgment issued in the "pending" underlying case or any imposition of fines or penalties pursuant to a state's mortgage satisfaction laws. *In simple terms, the consent order did not facially prohibit the trial court from entering a judgment against Fannie Mae in this case or generally imposing damages against Fannie Mae based on R.C. 5301.36(C).* Instead, the order acknowledged the possibility of a judgment or imposition of damages in the pending action and expressed Congress's intent to limit Fannie Mae's liability for paying any amount in the nature of a penalty or fine pursuant to 12 U.S.C. 4617(j)(4).

Radatz, 2014-Ohio-2179, 11 N.E.3d 1230, ¶ 11 (emphasis added). This is an incorrect reading of the Order. The Order unequivocally directs that Fannie Mae not violate the Statutory Penalty Bar "by paying, for any reason, directly or indirectly any amount pursuant to Ohio Code 5301.06 or pursuant to any judgment in connection with [the *Radatz* litigation]." (Order at 5; Appx. A-039.) The Order thus expressly excludes the possibility that Fannie Mae could make a payment pursuant to any judgment in this litigation without violating the Order.

CONCLUSION

A proper reading of HERA and the relevant federal case law reveals that the Eighth District erred when it concluded that it had jurisdiction to review and affect the Order. Thus, FHFA respectfully requests that this Court reverse the judgment of the Eighth District and order reinstatement of the trial court's judgment dismissing the action for lack of subject matter jurisdiction.

Respectfully submitted,

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