

IN THE SUPREME COURT OF OHIO

REBEKAH R. RADATZ,
individually and on behalf of
all others similarly situated

Plaintiff/Appellee,

v.

FEDERAL NATIONAL
MORTGAGE ASSOCIATION

Defendant/Appellant.

CASE NO. 14-1126

On Appeal from the Cuyahoga
County Court of Appeals,
Eighth Appellate District
Case No. CA-13-100205

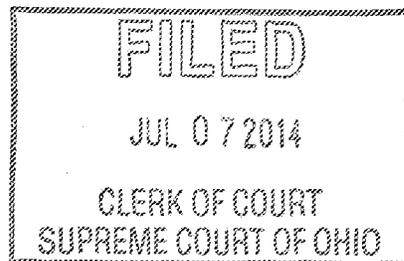
Cuyahoga County Court of
Common Pleas
Case No. CV-03-507616

MEMORANDUM OF AMICUS CURIAE FEDERAL HOUSING
FINANCE AGENCY IN SUPPORT OF JURISDICTION

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STATEMENT OF INTEREST OF AMICUS CURIAE

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, transitioned regulatory oversight of Fannie Mae and Freddie Mac from the Office of Federal Housing Enterprise Oversight to a newly organized successor agency, the Federal Housing Finance Agency (“FHFA”), and vested FHFA with conservatorship and receivership authority over Fannie Mae and Freddie Mac.

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. Like other federal financial regulators, FHFA is empowered to prosecute administrative cease-and-desist proceedings against Fannie Mae 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 in its capacity as regulator, issues a cease-and-desist order pursuant to this authority, such as the March 9, 2013 Order (“Order”) against Fannie Mae, “no court shall have jurisdiction to affect, by injunction or otherwise, the issuance or enforcement of” such an order. *Id.* at 4635(b).

This case squarely presents whether a state appellate court may ignore a federal statute expressly divesting courts of jurisdiction and review a federal regulatory agency’s order. In this brief, FHFA provides the Court with relevant background about the statutory scheme pursuant to which FHFA issued the Order and addresses the Eighth District’s erroneous interpretation of the Order.

**EXPLANATION OF WHY THIS CASE IS OF PUBLIC
OR GREAT GENERAL INTEREST**

In reversing the trial court's dismissal of this action, the Eighth District Court of Appeals ignored a federal statutory mandate that "no court shall have jurisdiction to affect" FHFA's cease-and-desist orders. 12 U.S.C. 4635(b). In its capacity as regulator, FHFA ordered Fannie Mae not to pay any judgment that might be entered on Plaintiff's claims: Federal law immunizes Fannie Mae from liability for penalties while in FHFA conservatorship, 12 U.S.C. 4617(j)(4), and FHFA determined that the remedy Plaintiff seeks amounts to a penalty. The Eighth District rejected FHFA's determination, independently evaluating the penalty bar and allowing Plaintiff's claims to proceed. That decision not only "affect[s]" FHFA's order, it rejects and purports to supersede it. *See* 12 U.S.C. 4635(b).

Because financial regulators like FHFA must be able to act swiftly and surely to address violations of law or unsound business practices, Congress enacted substantially identical jurisdictional bars to protect orders of not only FHFA but also the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (FRB), and the Federal Deposit Insurance Corporation (FDIC). Those statutes have often been applied, and FHFA knows of no other case—state or federal—where a court simply ignored the unambiguous command of a federal financial regulator's order and the governing federal statutes precluding judicial interference with such orders. To ensure that FHFA's regulatory authority is not compromised, and to make certain that Ohio law is not contrary to uniform federal precedent, this Court should assume jurisdiction and reverse.

FHFA adopts the statement of facts and propositions of law and arguments in support thereof, contained within the Memorandum in Support of Jurisdiction of Appellant Fannie Mae.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

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

The Court of Appeals committed two fundamental errors that caused it incorrectly to conclude that federal law did not bar it from exercising jurisdiction to review the Order. *First*, the Eighth District misunderstood that 12 U.S.C. 4635(b) withdraws from all courts' jurisdiction to review or affect orders issued by FHFA as regulator of Fannie Mae pursuant to 12 U.S.C. 4631(a). This error led the Court of Appeals to assume erroneously that it—not FHFA as federal regulator—had the authority to determine whether a payment made pursuant to Revised Code 5301.36 would violate 12 U.S.C. 4617(j)(1), (4) (the “Statutory Penalty Bar”). *Second*, the Court of Appeals misread the Order as not covering all payments made by Fannie Mae pursuant to R.C. 5301.36 or any judgment issued in connection with this litigation.

1. The Statutory Framework Precludes Judicial Review of the Order

The statutory framework governing FHFA's authority to issue cease-and-desist orders—including the express limitation on 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. Indeed, HERA's limitation on judicial review of agency orders is identical to, and based upon, the language in FISA. *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 any such section, or to review, modify, suspend, terminate, or set aside any such notice or order.”).

As the Eighth Circuit Court of Appeals explained, “[i]n 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 broad power to issue cease-and-desist orders “in order 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 Nat’l Bank of Scotia v. U.S.*, 530 F. Supp. 162, 168 (D.D.C. 1982) (internal quotation and citation omitted). “Section 1818 provides a comprehensive framework for regulatory enforcement and judicial review at various stages of the enforcement process; and section 1818(i) in particular evinces a clear intention that this regulatory process is not to be disturbed by untimely judicial intervention.” *Id.*

In the nearly 50 years since enactment of the FISA jurisdictional bar, the Supreme Court and dozens of other federal and state courts have applied Section 1818(i), consistent with its expansive language, to dismiss for lack of jurisdiction, as did the lower court here, 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 (1991) (affirming the dismissal of a bank holding company’s complaint seeking an injunction of its administrative prosecution); *Ridder v. Office of Thrift Supervision*, 146 F.3d 1035, 1039 (D.C. Cir. 1998) (holding that prohibition of review of Office of Thrift Supervision order extends to third parties affected by the order); *First Nat’l Bank of Grayson v. Conover*, 715 F.2d 234, 237 (6th Cir. 1983) (holding that the district court lacked jurisdiction over bank’s suit for injunctive relief to prevent the suspension of two of its officers pursuant to an OCC administrative suspension order); *Spiegel Holdings, Inc. v. Office*

of the Comptroller of the Currency of U.S., 2003 WL 21087707, at *4 (D. Or. Apr. 28, 2003) (granting motion to dismiss under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction pursuant to section 1818(i)(1)); *Am. Fair Credit Ass'n v. United Credit Nat'l Bank*, 132 F. Supp. 2d 1304, 1312 (D. Colo. 2001) (same).

In sum, the comprehensive legislative scheme established by FISA and HERA, “provides us with clear and convincing evidence that Congress intended to deny the District Court jurisdiction to review and enjoin” financial regulatory proceedings. *MCorp*, 502 U.S. at 44; *see also Peoples Nat'l Bank v. Office of the Comptroller of the Currency of U.S.*, 227 F. Supp. 2d 645, 651 (E.D. Tex. 2002), *aff'd*, 362 F.3d 333 (5th Cir. 2004) (“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.”); *Federal Home Loan Bank Bd. v. Hague*, 664 F. Supp. 245, 249 (W.D. La. 1987), *aff'd*, 840 F.2d 14 (5th Cir. 1988) (“Congress’ intent to limit the jurisdiction of federal district courts in matters relating to financial institutions is adamantly clear.”). These federal courts have all recognized and applied the plain language of the jurisdictional withdrawal provision, which provides that “no court shall have jurisdiction to affect, by injunction or otherwise, the issuance or enforcement of” a cease-and-desist order. 12 U.S.C. 1818(i), 4635(b) (emphasis added). Without question, state courts are bound by this jurisdictional withdrawal provision to the same extent as federal courts.

2. The Court of Appeals’ Decision Necessarily and Improperly Affects the Order

The Order unequivocally states that Fannie Mae is prohibited from paying, for any reason, any amount pursuant to R.C. 5301.36 because the Ohio law provides for penalties and fines in violation of the Statutory Penalty Bar. *See Order at 5.* Once the Order was issued, all

that was left for the trial court to do was determine whether continuation of the case would “affect” the Order. Because the relief Radatz seeks is plainly prohibited by the Order, any action taken by the trial court short of dismissal would necessarily “affect” the Order. Thus, all that the trial court could do was dismiss the case pursuant to 12 U.S.C. 4635(b) because it lacked jurisdiction to take any other action. *See Am. Fair Credit Ass’n*, 132 F. Supp. 2d at 1312 (“If this case went forward as currently pled and Plaintiff prevailed, Defendant UCNB would be required to pay money damages included in the judgment in direct contravention of the February 25, 2000 UCNB 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.”). In reversing the decision of the trial court, the Court of Appeals undertook a review of the merits of the Order, an act that explicitly violates 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*, 2002 WL 442840, at *5 (E.D. Pa. Mar. 20, 2002) *aff’d*, 57 Fed.Appx. 989 (3d Cir. 2003) (“[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)”; *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).

3. The Court of Appeals Misinterpreted the Statutory Framework

The Court of Appeals failed to appreciate FHFA’s distinct roles both as regulator and conservator of Fannie Mae, a failure most sharply reflected by its statement that the Order was issued by FHFA as Conservator, rather than in its capacity as a regulator. *See Radatz v. Fed. Nat’l Mortg. Ass’n*, 8th Dist. Cuyahoga No. 100205, 2014 WL 2168153, at ¶13 (May 2, 2014) (“[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)"). That is categorically incorrect; FHFA issued the Order in its regulatory capacity. This fundamental error apparently led the Eighth District to conflate HERA's jurisdictional withdrawal provision, which applies to orders issued by FHFA in its regulatory capacity, 12 U.S.C. 4635(b), with the federal statutory bar applicable to payments of penalties and fines, which applies to the Conservator and Fannie Mae, 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 WL 2168153, at ¶4.

This is incorrect. The Statutory Penalty Bar is not a jurisdictional withdrawal provision; it merely 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). However, the Statutory Penalty Bar *is* relevant to 12 U.S.C. 4631(a), which authorizes the FHFA as regulator 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, acting in its regulatory capacity, determined that payment of any amount by Fannie Mae in conservatorship pursuant to Ohio Revised Code 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 FHFA's interpretation of the Statutory Penalty Bar. Once FHFA did so, section 4635(b)—not the Statutory Penalty Bar—precluded any judicial second guessing by eliminating court jurisdiction over Plaintiff's claims.

The Court of Appeals' 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 WL 2168153, at ¶13. Again, the Court of Appeals simply ignored the dispositive 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."¹ 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 would otherwise be reviewable by a court. Once the Agency issues an order pursuant to section 4631(a), the jurisdictional bar is triggered and no court may review that order.

4. The Court of Appeals Improperly Substituted Its Judgment for FHFA's

Here, the Court of Appeals impermissibly reviewed the Order and, in so doing, superseded 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 Court of Appeals 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.

¹ Courts have held that federal financial regulators, such as FHFA, may enforce any law that is designed to protect the financial stability of the entities that it regulates. *See, e.g., Saratoga Sav. and Loan Ass'n. v. Fed. Home Loan Bank*, 879 F.2d 689, 693 (9th Cir. 1989) (explaining that the analogue of 12 U.S.C. 4631(a)—12 U.S.C. 1818(b)(1)—permits the regulator to enforce any law that has the financial stability of the regulated entity as its purpose). In conservatorship, the Statutory Penalty Bar helps to minimize losses for an entity in a financially precarious state.

Radatz, 2014 WL 2168153, at ¶10. In reaching this conclusion, the Court of Appeals improperly substituted its judgment for FHFA's 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 Memorandum in Support of Jurisdiction, *see* Mem. at 12-15, and Brief in the Court of Appeals. *See* Br. at 16-20.

5. The Court of Appeals Misread the Order

In addition to misunderstanding the relevant statutory scheme, the Court of Appeals simply misread the text of the Order. The court reasoned that:

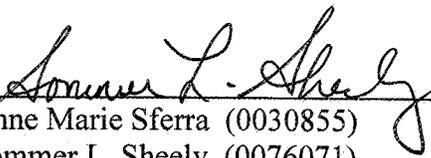
In the consent order, the acting director of the FHFA expressly provided that Fannie Mae must cease and desist from paying any amount, subject to the modifier, in the nature of fines or penalties, pursuant to any judgment issued in the "pending" underlying case or any imposition of fines or penalties 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 WL 2168153, at ¶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. The Order thus expressly excludes the possibility that there ever could be a payment made pursuant to any judgment issued in connection with this litigation that would not place Fannie Mae in violation of the Order.

CONCLUSION

A correct understanding of HERA and the relevant federal case law reveals that the trial court correctly determined that federal law prohibited it from exercising jurisdiction over Plaintiff's complaint and therefore dismissed it. Thus, the exercise of jurisdiction over this case is warranted and respectfully requested by FHFA.

Respectfully submitted,



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I hereby certify that I served a copy of the foregoing Memorandum of Amicus Curiae
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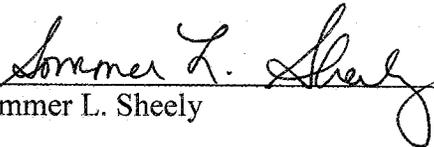
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