Appeal No. 17-20364

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PATRICK J. COLLINS; MARCUS J. LIOTTA;
WILLIAM M. HITCHCOCK,
Plaintiffs-Appellants,
v.

STEVEN T. MNUCHIN, SECRETARY, U.S. DEPARTMENT OF TREASURY;
DEPARTMENT OF THE TREASURY; FEDERAL HOUSING FINANCE AGENCY;
JOSEPH M. OTTING, ACTING DIRECTOR OF THE FEDERAL HOUSING FINANCE AGENCY,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas, No. 4:16-cv-03113

EN BANC SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLEES FEDERAL HOUSING FINANCE AGENCY AND JOSEPH M. OTTING

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CERTIFICATE OF INTERESTED PERSONS

Patrick J. Collins, et al. v. Steven T. Mnuchin, et al., No. 17-20364

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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INTRODUCTION

In this case, shareholders of Fannie Mae and Freddie Mac (the "Enterprises") seek to unwind amendments to preferred stock purchase agreements between the Federal Housing Finance Agency ("FHFA"), as Conservator for the Enterprises, and the U.S. Department of the Treasury. Since the Enterprises were placed in conservatorships during the 2008 financial crisis, those agreements have been the vehicle for infusions of many billions of dollars required to offset massive losses and keep the Enterprises running.

For the protection of taxpayers, the 2008 agreements gave Treasury priority rights to be repaid for its assistance and to be fully compensated for its ongoing capital commitments through dividends and fees. The consideration due Treasury for its nearly $200 billion in infusions and continuing obligation to provide up to a quarter-trillion more thus rendered the other shareholders' stock virtually worthless. Shareholders did not challenge those measures, and the time for any such challenge has long passed. However, the shareholders now bring constitutional and statutory claims seeking to invalidate 2012 amendments to the Treasury agreements, commonly known as the Third Amendment, adjusting the forms of consideration Treasury receives for its one-of-a-kind commitments.

Those challenges lack merit. Plaintiffs lack standing to bring their constitutional claim—that as an independent agency FHFA is unconstitutionally

insulated from Presidential control. Assuming *arguendo* that the 2012 adjustment to Treasury's compensation mechanism caused Plaintiffs a cognizable injury-in-fact (which is doubtful), there is a fundamental mismatch between any such injury and the alleged constitutional violation: no conceivable causal link exists between the two, and the relief available for the purported violation would not redress the supposed injury.

Plaintiffs' arguments to the contrary rest on a mistaken assumption of *per se* standing for separation-of-powers claims—that any action an unconstitutionally independent agency takes is conclusively presumed traceable to its independence, and must be automatically voided on demand of any litigant. But neither standing nor separation-of-powers jurisprudence supports that misplaced approach.

As to Plaintiffs' statutory claims, those have been rejected by every other court that has considered them—five of this Court's sister circuits and still more district courts. Plaintiffs offer no arguments not already thoroughly and repeatedly analyzed, discredited, and rejected.

Plaintiffs would have this Court rewrite both the Conservator's financing contracts with Treasury and the governing statute itself, all in service of Plaintiffs' financial interests. But Congress prohibited precisely such interference with the Conservator's transactions, 12 U.S.C. § 4617(f), and "editorial freedom" to amend

statutes "belongs to the Legislature, not the Judiciary," *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 510 (2010).

Under prior leadership, FHFA petitioned for rehearing en banc seeking consideration by the full Court of the Panel's holding that FHFA's structure, in particular its leadership by a single director removable only for cause, unconstitutionally limits the President's ability to supervise FHFA. As of January 7, 2019, FHFA is led by a new Acting Director, who has reconsidered the issues presented in this case. For the reasons discussed herein, it remains FHFA's position that it is unnecessary for this Court to reach the constitutionality of the Housing and Economic Recovery Act's ("HERA") for-cause removal provision in order to resolve this case and affirm the dismissal of Plaintiffs' claims. To the extent the Court concludes it is necessary to reach the constitutional issue, FHFA will not defend the constitutionality of HERA's for-cause removal provision and agrees with the analysis in Section II.A of Treasury's Supplemental Brief that the provision infringes on the President's control of executive authority.

Nevertheless, that issue provides no basis for awarding any relief to Plaintiffs in this case. Therefore, the Court should affirm the District Court's judgment dismissing Plaintiffs' claims.

STATEMENT OF THE CASE

A. The Enterprises and the Financial Crisis

Congress chartered the Enterprises to provide liquidity to the mortgage market by purchasing residential loans from banks and other lenders. Panel 3.[1] They own or guarantee trillions of dollars of mortgages and mortgage-backed securities and play a vital role in housing finance and the U.S. economy. Panel 1, 3.

In the late 2000s, "the United States was engulfed in perhaps the worst financial crisis since the Great Depression." Panel 1. "As essential players in the housing market, Fannie and Freddie suffered multi-billion dollar losses," losing "more in 2008 ($108 billion) than they had earned in the previous thirty-seven years combined ($95 billion)." Panel 2.

In July 2008, "to protect the fragile economy from further losses," Panel 4, Congress enacted HERA, Pub. L. No. 110-289, 122 Stat. 2654. As detailed below, HERA both established FHFA as a new federal agency to supervise and regulate the Enterprises and endowed the U.S. Treasury Department with new authority to infuse massive amounts of funding into them.

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[1] Citations to "Panel ___" refer to the Panel opinion. Citations to "Br. ___" refer to Plaintiffs' supplemental en banc brief.

B. The Federal Housing Finance Agency

Congress established FHFA as an agency headed by a Director appointed by the President, with the advice and consent of the Senate, "for a term of 5 years, unless removed before the end of such term for cause by the President." 12 U.S.C. § 4512(b)(2). In the event of a vacancy, HERA empowered the President to designate one of three FHFA deputy directors to serve as acting Director. *Id.* § 4512(f); *see also* 5 U.S.C. § 3345 (additional authority under the Vacancies Act for President to designate acting FHFA director). Neither § 4512(f) nor the Vacancies Act restricts the President's ability to rescind a designation of an acting director.

Consistent with the longstanding model Congress uses for federal financial regulators, FHFA is funded through assessments charged to the entities it regulates. 12 U.S.C. § 4516(a). Congress also established a Federal Housing Finance Oversight Board ("FHFOB"), composed of the Director, SEC Chairman, and Secretaries of Treasury and Housing and Urban Development, to advise the Director on strategy and policy. *Id.* § 4513a.

C. FHFA's Conservatorship Authority

HERA also authorized FHFA to place an Enterprise in conservatorship. 12 U.S.C. § 4617(a)(2). As Conservator, FHFA "operate[s]," "take[s] over the assets," and "conduct[s] all business" of the Enterprise, and may "take any

[authorized action], which the Agency determines is in the best interests of the [Enterprises] or the Agency." *Id.* § 4617(b)(2). As Conservator FHFA also "immediately succeed[s] to … all rights, titles, powers, and privileges of the regulated entity, and of any stockholder … of such regulated entity with respect to the regulated entity and the assets of the regulated entity." *Id.* § 4617(b)(2)(A). As in other financial regulatory statutes, Congress shielded conservatorship operations from litigative interference, providing that "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator." *Id.* § 4617(f).

D. HERA's Provisions for Treasury Support of the Enterprises

Anticipating the potential need for a large infusion of taxpayer funding into the Enterprises, HERA simultaneously authorized Treasury to purchase securities from the Enterprises if the Secretary makes an emergency determination that such action is "necessary to (i) provide stability to the financial markets; (ii) prevent disruptions in the availability of mortgage finance; and (iii) protect the taxpayer." 12 U.S.C. §§ 1455(l), 1719(g). That authority was conditioned on "protecting the taxpayers" through consideration of several factors, foremost among them "[t]he need for preferences or priorities regarding payments to the Government." *Id.*

E. The Conservatorships and Preferred Stock Purchase Agreements

In September 2008, FHFA exercised its authority under HERA to place the Enterprises into conservatorships. FHFA as Conservator thus took over the operations and management of the Enterprises, and succeeded to the rights of private shareholders of the Enterprises. 12 U.S.C. § 4617(b)(2). All "[c]ommon stock and preferred stock dividends" were immediately "eliminated" as a "key component[] of [the] conservatorship[s]." Statement of FHFA Director James Lockhart, Sept. 7, 2008, https://bit.ly/2kvJYAg.

Simultaneously, Treasury exercised its new authority to purchase newly created senior preferred stock in the Enterprises, as a vehicle to commit hundreds of billions of dollars as needed to ensure the Enterprises' continued solvency and the performance of their statutory missions. This commitment was accomplished through stock purchase agreements between FHFA as Conservator and Treasury. ROA.209-236. Under the stock purchase agreements, if at the end of any quarter an Enterprise has a negative net worth, Treasury must invest additional funds in the Enterprise to make up the shortfall and avert mandatory receivership. Treasury initially committed up to $100 billion per Enterprise, a cap soon lifted as detailed below.

In exchange for this massive commitment, and to effectuate the taxpayer-protection mandate, the agreements gave Treasury several forms of consideration.

Treasury received a senior liquidation preference equal to the cumulative amount of money each Enterprise drew under the agreements. To "fully compensate [Treasury] for the support provided by the ongoing Commitment," the Conservator also agreed to pay Treasury periodic commitment fees reflecting "the market value of the Commitment as then in effect." ROA.214, 228; *see* Pay It Back Act, Pub. L. No. 111-203, § 1304(d), 124 Stat. 2134 (July 21, 2010) (addressing commitment fees as key component of compensation).[2]

In addition, the Conservator agreed to pay Treasury a quarterly dividend equal to 10% of the liquidation preference annually (*i.e.*, 2.5% per quarter). If the Conservator missed a dividend payment, the rate for that dividend and all future dividends would increase by 20%, and the amount of the as-increased dividend would be added to the liquidation preference. Payment of dividends to Treasury does not reduce the liquidation preference, and the Enterprises are prohibited from paying down the liquidation preference while the agreements are in effect. ROA.240, 249-50. Finally, Treasury received warrants to acquire 79.9% of the Enterprises' common stock.

It was only by virtue of their contractual rights under the Treasury agreements to take large and recurring draws that the Enterprises were able to

[2] Treasury waived the fees during initial periods.

avoid mandatory placement into liquidating receiverships, and maintain their critical role in the national economy during conservatorship.

But it was also widely recognized that these 2008 measures gave the government a "complete claim to the equity" of the Enterprises, reducing junior stock to "negligible value." CONGRESSIONAL BUDGET OFFICE, CBO'S BUDGETARY TREATMENT OF FANNIE MAE AND FREDDIE MAC 10 n.26, 13 (2010), https://bit.ly/1klbBat; *accord* U.S. DEP'T OF TREASURY, PERFORMANCE AND ACCOUNTABILITY REPORT 21 (2010), https://bit.ly/2Fi257s (2008 agreements were "structured in such a way that ensures that virtually all profits in the company revert to the Government"). The Treasury agreements prohibited dividends to junior shareholders, ROA.216, 230, and the shares were delisted from the NYSE, ROA.307. As FHFA's independent OIG reported, the measures "rendered the common shares of the Enterprises virtually worthless"; shareholders "effectively lost their investments." FHFA OIG, FANNIE MAE AND FREDDIE MAC: WHERE THE TAXPAYERS' MONEY WENT 25 (2012), https://bit.ly/2M0Ms53.

F. The Third Amendment

Within months, "[i]t quickly became clear … that Fannie and Freddie were in a deeper financial quagmire than first anticipated," and "would require even greater capital infusions by Treasury." *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 601 (D.C. Cir. 2017). So the Conservator and Treasury amended the

agreements twice to increase the initial $100 billion-per-Enterprise caps, first to $200 billion each, and later to a formulaically determined maximum exceeding $200 billion. *Id.*; ROA.257-58, 263-64.

By August 2012, the amount the Enterprises had together drawn from Treasury's funding commitment had climbed to $189 billion. Panel 11. Under the 10% formula, this imposed upon the Enterprises a staggering $19 billion annual dividend obligation. That amount exceeded the Enterprises' average historical earnings per year, and they "struggled to generate" sufficient cash to pay it. *Id.* Indeed, in many quarters they drew on the Treasury commitment in order to make their dividend payments, *i.e.*, borrowing more money from Treasury in order to pay the obligations to Treasury based on what they had already borrowed. The Enterprises stated in SEC filings that they "d[id] not expect to generate net income or comprehensive income in excess of our annual dividend obligation to Treasury over the long term."[3]

In a Third Amendment to the Treasury agreements dated August 17, 2012, the Conservator and Treasury adjusted how Treasury would be compensated for its financial assistance and continuing commitment going forward. Panel 12. The parties accomplished this in twin provisions. In Section 3 of the Third

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[3] *See* FANNIE MAE, QUARTERLY REPORT (FORM 10-Q), at 12 (Aug. 8, 2012), https://bit.ly/2REVlq2; FREDDIE MAC, QUARTERLY REPORT (FORM 10-Q), at 10 (Aug. 7, 2012), https://bit.ly/2H1iWNv.

Amendment, they replaced the fixed 10% dividend with a variable dividend equal to the Enterprise's net worth less a capital buffer. ROA.273, 281. In Section 4, they agreed that "for as long as" that revised dividend formula remained in effect, "no Periodic Commitment Fee shall be set, accrue, or be payable." ROA.274, 282.

Accordingly, under the Third Amendment, if an Enterprise's net worth is negative or zero at the end of a given quarter, it pays no dividend to Treasury. If an Enterprise's net worth is positive, it pays that amount less the capital buffer. Under this variable formula, the dividend component of Treasury's compensation turns out to be smaller in some quarters than it would have been under the prior fixed percentage, larger in others. Panel 11-12. In all quarters, the Conservator is relieved of paying commitment fees for the market value of Treasury's remaining quarter-trillion dollar backstop—fees the Government Accountability Office had recognized as a "long-term challenge to the enterprises' financial viability" prior to the Third Amendment. Report GAO-09-782 at 47, 2009 WL 2903896.

G. Shareholder Challenges

In 2013, shareholders began bringing lawsuits challenging the Third Amendment. Although the conservatorships and original Treasury agreements in 2008 had already rendered their shares of negligible value, shareholders asserted that it was the Third Amendment in 2012 that ruined their investments. They

alleged that the Third Amendment was a giveaway to Treasury and violated HERA, and sought orders invalidating it under the APA.

Those challenges failed. *See Perry Capital*, 864 F.3d 591; *Robinson v. FHFA*, 876 F.3d 220 (6th Cir. 2017); *Roberts v. FHFA*, 889 F.3d 397 (7th Cir. 2018); *Saxton v. FHFA*, 901 F.3d 954 (8th Cir. 2018); *Jacobs v. FHFA*, 908 F.3d 884 (3d Cir. 2018); *Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828 (S.D. Iowa 2015).[4] The courts held uniformly that the Third Amendment fell within FHFA's powers as Conservator. The Supreme Court denied certiorari. *Perry Capital LLC v. Mnuchin*, 138 S. Ct. 978 (2018).

In 2016, eight years into the conservatorships, Plaintiffs brought this case seeking to invalidate the Third Amendment based on the same APA claims as the prior cases, and a new claim that FHFA's structure violates the Constitution. Both sides moved for summary judgment. The District Court ruled for Defendants. ROA.946-961. By *per curiam* opinion, a panel of this Court affirmed the judgment dismissing the APA claims, reversed the judgment rejecting the constitutional claim, and held that Plaintiffs were not entitled to invalidation of the

[4] The D.C. Circuit remanded certain claims by shareholders for damages for further litigation, which remain pending. *Perry Capital*, 864 F.3d at 630-33. Takings and related claims by shareholders are also pending in the Court of Federal Claims.

Third Amendment as relief for the latter claim. Chief Judge Stewart dissented from the constitutional holding; Judge Willett dissented from the APA holding.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO BRING THEIR SEPARATION-OF-POWERS CLAIM

A. Standing Requirements Apply to Plaintiffs' Separation-of-Powers Claim

To establish standing to challenge the constitutionality of a statute, plaintiffs must show both that their alleged injury-in-fact is "fairly traceable" to the allegedly unconstitutional provision and that it "will be redressed in the event that statute is enjoined and/or declared unconstitutional." *Henderson v. Stalder*, 287 F.3d 374, 379 (5th Cir. 2002); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

These requirements are as applicable to separation-of-powers claims as to any other type of claim. *See, e.g.*, *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 264 (1991); *Comm. for Monetary Reform v. Bd. of Gov. of Fed. Reserve Sys.*, 766 F.2d 538, 542-43 (D.C. Cir. 1985). "The law of Article III standing" is itself "built on separation-of-powers principles." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

Regulated entities may have standing to enforce a general right to be regulated by an agency that conforms to constitutional requirements, even without a particular past agency action for which injury-in-fact, traceability, and

redressability can be shown. *See*, *e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 117 (1974) (political action committees regulated by the Federal Election Commission had "standing to raise constitutional questions of separation of powers" about that agency because it was "designated to adjudicate their rights," even though no adjudication had yet occurred). But that form of standing does not apply here because Plaintiffs *do* challenge a specific past action—the Third Amendment—and they are not subject to adjudication or otherwise regulated by FHFA.

Regulated-entity standing under *Buckley* is only for parties answerable to an agency "designated to adjudicate their rights." *Buckley*, 424 U.S. at 117; *see also Comm. for Monetary Reform*, 766 F.2d at 543 (articulating test as whether plaintiff is "directly subject" to the agency's "regulatory, administrative, or adjudicative" authority). For example, businesses not regulated by the Federal Reserve System could not rely on *Buckley* regulated-entity standing to challenge the Fed's constitutionality, despite being "substantially affected" by adverse Fed monetary policy. *Comm. for Monetary Reform*, 766 F.2d at 543.

Similarly here, although Plaintiffs insist FHFA "directly affects" them (Br. 8), in no sense are they regulated by FHFA. FHFA regulates the Enterprises, not their shareholders. The HERA provisions Plaintiffs cite do not provide for regulation of shareholders. One simply authorizes the Conservator to delegate functions. 12 U.S.C. § 4617(b)(2)(C). The other provides for Conservator

succession to shareholders' rights. *Id.* § 4617(b)(2)(A). Plaintiffs' 190-paragraph complaint, which named FHFA solely "in its capacity as Conservator" (ROA.8), alleges no injury from ongoing enforcement or regulation targeting Plaintiffs. Rather, Plaintiffs allege injury from a Conservator transaction "[i]n August 2012" that they say "took … the entire value of [their] rights." ROA.8.

Because Plaintiffs do not qualify for general forward-looking standing under *Buckley* as regulated entities, they are required to make the traditional Article III showing that they have suffered cognizable injury-in-fact that is both "fairly traceable to the asserted constitutional violations" and "likely to be redressed by a favorable decision." *Comm. for Monetary Reform*, 766 F.2d at 541-42. Plaintiffs fail to meet those requirements.

As an initial matter, it is doubtful Plaintiffs have an cognizable injury-in-fact. Plaintiffs' rights as shareholders were substantially impacted by the conservatorships and original Treasury agreements in 2008, but they have not challenged those actions and any challenge would now be untimely under any conceivable statute of limitations. 12 U.S.C. § 4617(a)(5); 28 U.S.C. § 2401; Br. 33 (acknowledging statutes of limitation can bar separation-of-powers claims). Even before the Third Amendment, Plaintiffs could not receive any dividends, their claims on assets of the Enterprises stood behind a senior shareholder preference of nearly $200 billion, and their shares were delisted from the NYSE

and trading for speculative value. Conclusory rhetoric about "expropriation" or "nationalization" aside, Plaintiffs do not identify any "concrete," "particularized," and "actual or imminent" impact on their tangible economic interests from the Third Amendment's rebalancing of various consideration streams to Treasury. *Lujan*, 504 U.S. at 560. In any event, the multiple traceability and redressability problems set forth below independently defeat Article III standing.

B. Traceability Is Lacking

Plaintiffs' injury from the Third Amendment is not traceable to HERA's for-cause removal standard because (1) that standard was not operative at the relevant time, and (2) Plaintiffs' own theory of the case conflicts irreconcilably with the notion that FHFA's independence played any causal role in the adoption of the Third Amendment.

1. The FHFA Acting Director Did Not Have the Challenged Removal Protection

Plaintiffs' challenge to FHFA's independence focuses primarily on the protection from removal without cause that HERA affords to permanent FHFA Directors upon being appointed by the President and confirmed by the Senate. *See* 12 U.S.C. § 4512(b)(2) (FHFA Directors serve "for a term of 5 years, unless removed before the end of such term for cause by the President."). However, the decision to enter into the Third Amendment in 2012 was made by an FHFA deputy director, Edward DeMarco, who was temporarily *acting* as FHFA Director under a

separate provision, § 4512(f), that neither sets a fixed term nor limits the President's power to withdraw such a designation for cause or otherwise.

"Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). Because § 4512(b)(2)'s cause requirement for removal was inoperative at the relevant time, and the President could freely have designated a different acting director at will and thereby replaced Mr. DeMarco, it is impossible for there to have been any connection between HERA's for-cause removal provision and FHFA's execution of the Third Amendment.

The Panel held that the Acting Director nevertheless "is covered by the removal restriction" because of Congress's general intent that FHFA be an independent agency. Panel 19-20. But the statutory text controls, and the Court has a "'duty … to construe the statute in order to save it from constitutional infirmities'" and to avoid "'overstating the matter.'" Panel 15 (quoting *Morrison v. Olson*, 487 U.S. 652, 682 (1988)). If the Court perceives for-cause protection as raising constitutional problems, then "every reasonable construction must be resorted to in order to save [the] statute from unconstitutionality." *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 387 (5th Cir. 2013).

Wiener v. United States, 357 U.S. 349 (1958), is not to the contrary. There, the Supreme Court inferred removal protection for a Senate-confirmed adjudicatory official appointed to a term of years—not for a temporary acting official. And quite unlike HERA, the statute did not prescribe removal protection in one subsection while omitting it in another.

Plaintiffs also argue that even though the President could have removed Mr. DeMarco at will, the President's influence over FHFA was still limited because he "could have only been replaced by one of Mr. DeMarco's own handpicked deputies." Br. 12 (citing 12 U.S.C. § 4512(c)-(f)); *see* Panel 37 n.199. That overlooks concurrent authority possessed by the President under the Federal Vacancies Reform Act to designate an Acting FHFA Director who is not one of the deputies. *See Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 556 (9th Cir. 2016) (holding that "the President is permitted to elect" between the Vacancies Act and agency-specific acting official provisions as "two statutory alternatives to designate an Acting General Counsel" of the NLRB). Indeed, FHFA's current Acting Director, Joseph M. Otting, was not an FHFA deputy director when the President designated him Acting FHFA Director.

2. Plaintiffs' Theory Rules Out FHFA's Independence as a Causal Factor

If the fact that the alleged constitutional violation did not exist at the time of the challenged agency action were not enough, there is a separate, even more

"glaring" traceability problem. *Bhatti v. FHFA*, 332 F. Supp. 3d 1206, 1213 (D. Minn. 2018). The crux of Plaintiffs' claim is that HERA's for-cause removal provision, together with other features, result in an FHFA "that is not accountable to the President." Panel 51. But any such lack of accountability could not have had anything to do with the "joint FHFA-Treasury action" that Plaintiffs claim injured them, ROA.515, because Treasury—an agency that no one disputes is fully accountable to the President—was a necessary and indispensable party to that action.

The President always had total control over whether the Third Amendment would happen, because he could have directed Treasury not to enter into it. Increasing the President's influence over FHFA would not have added to that power. Plenary control over both sides of the transaction, rather than just one, could only have *facilitated* adoption of the Third Amendment—not made it less likely. The Panel found it constitutionally problematic that as a general matter, "the Treasury Secretary … cannot pump the brakes on the FHFA's actions." Panel 43. But the Treasury Secretary could bring the action Plaintiffs are complaining about to a complete stop without needing to brake FHFA itself.

Indeed, before even mentioning FHFA, Plaintiffs' Complaint dubs the Third Amendment a "deliberate strategy" of the Administration and Treasury. ROA.10; *see* ROA.15 (Treasury "secretly resolved" to do the Third Amendment); ROA.17

(purpose was to facilitate "the Administration's plans"); ROA.20 (describing "renewed push" by Treasury). The Complaint alleges that a "senior White House official" and Treasury were responsible for "development and rollout" of the Third Amendment, which it calls an "accomplish[ment]" of Treasury. ROA.17-18, 55-56. According to Plaintiffs, the Third Amendment effected a "massive financial windfall" for Treasury and the Administration, resulting in a "major revenue source for the United States Government." ROA.79. In the face of Plaintiffs' own narrative that "Treasury was in the driver's seat and had to convince the Agency to come along for the ride," *Roberts*, 889 F.3d at 406, "[i]t simply makes no sense to argue that the Third Amendment is 'fairly traceable' to the lack of presidential control." *Bhatti*, 332 F. Supp. 3d at 1214.

Plaintiffs cite several cases that they say make traceability essentially automatic when agency action is challenged on the ground that the decision-maker was protected from removal. Br. 4-6. However, those cases generally involved challenges to an adjudicator's authority that were raised as a defense in an adjudication. *See, e.g.*, *Nguyen v. United States*, 539 U.S. 69 (2003); *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962); *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000). Because the underlying proceeding constituted a justiciable case-or-controversy, standing was not at issue. "Article III does not restrict the opposing party's ability to object to relief being sought at its expense," *Bond v. United States*, 564 U.S.

211, 217 (2011), particularly on "jurisdictional" grounds, *Glidden Co.*, 370 U.S. at 536. If a non-Article III judge purports to preside over a federal trial, harmless-error analysis of course will not save the judgment on appeal.

In each of the cases Plaintiffs cite in support of *per se* traceability, moreover, the alleged constitutional violation was an Appointments Clause or other issue affecting the very power of an official to act at all, not the conditions under which he might be removed. That distinction is key. In the invalid-appointment context, absent the constitutional violation, the official never would have been in a position to take the complained-of action. And if the issue is whether the official who made the appointment had the power to do so, a court "cannot assume" that the proper appointing authority "would have made the same appointments" or that different appointees would have adopted the same policies. *Free Enterprise Fund*, 561 U.S. at 512 n.12.[5] In contrast, where the alleged violation consists of protection from removal, the violation did not put the official in office or empower him to act. In

[5] Plaintiffs mistake the referenced footnote in *Free Enterprise Fund* as addressing standing for the removal-restriction claim that was the primary subject matter of that case. Br. 3. In fact, the footnote addressed standing for a separate and distinct claim—that the Appointments Clause required PCAOB members to be appointed by the Chairman of the SEC rather than the full SEC. *Free Enterprise Fund*, 561 U.S. at 511-12. While the Court did not discuss standing for the removal-restriction claim, *Buckley* forward-looking regulated-entity standing likely applied because—unlike this case—the PCAOB regulated "every detail of [plaintiff's] practice." *Id.* at 485; *supra* at 14-15.

that context, traceability examines whether the protection from removal had any connection to the action.

Most importantly, no case holds that plaintiffs can invoke the jurisdiction of the federal courts to render an opinion on a constitutional issue where, as here, their own averments *refute* any possible connection between the alleged violation and injury. Even if traceability might be presumed, there is no reason such a presumption should be irrebuttable. "Unlike cases such as *Free Enterprise Fund* and *Landry* in which it was simply impossible to know whether an alleged constitutional error caused any injury, here there is no doubt that the alleged constitutional violation (too little presidential control over FHFA) did *not* cause the alleged injury (an FHFA action that was too favorable to the President)." *Bhatti*, 332 F. Supp. 3d at 1214.

Plaintiffs speculate that if the Administration had fully controlled both sides of the transaction, it "might not have been willing to run the risks" of the Third Amendment. Br. 7. But Plaintiffs do not identify any "risks" in taking an action they characterize as a "massive financial windfall" for the Government and U.S. taxpaying public that helped the Administration abate a debt ceiling crisis. ROA.67, 79. There is nothing in this summary-judgment record to suggest the President had any interest in "pretending" that the choice to enter into the Third Amendment was "not his own." Br. 7. Rather, Plaintiffs insist that the

Administration immediately and publicly endorsed the Third Amendment and its "benefit[s] [to] taxpayers." ROA.58, 72. "Standing is not an ingenious academic exercise in the conceivable." *Lujan*, 504 U.S. at 566. The Court should reject Plaintiffs' inverted logic, in which *greater* Administration influence translates into a *lesser* likelihood that the President pursues his chosen policies.

C. Redressability Is Lacking

Plaintiffs also cannot satisfy the redressability requirement for standing because a holding that FHFA's independent structure violates the separation of powers would not undo the Third Amendment—much less authorize the injunction, elaborate recapitalization agenda, and rewriting of the Treasury agreements that Plaintiffs ask the Court to superintend (Br. 29-32).

The Panel unanimously agreed with FHFA that setting aside the Third Amendment was not an available remedy for Plaintiffs' constitutional claim. That was correct. This Court should now follow that proper holding through to its necessary implication: because "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court," *Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83, 107 (1998), Plaintiffs lack Article III standing.

1. Courts Do Not Set Aside or Enjoin Agency Actions Due to Officials' Removal Protection

No court has invalidated or enjoined past agency action on the ground that the official who took it could be removed by the President only for cause. The

bedrock precedents addressing presidential removal power were backpay suits by officials who were actually removed. *Wiener*, 357 U.S. at 350-51; *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Myers v. United States*, 272 U.S. 52 (1926). In that setting, whether the removal restriction was unconstitutional simply determines the validity of the removal, and there was no suggestion that actions taken by the agency while the removal restriction was in effect might somehow be called into question. The unconstitutionality of the statute limiting the President's power to remove the postmaster in *Myers* was not understood as presenting an opportunity for third parties to void Postal Service transactions or regulations.

Only recently have third parties tried to use removal-restriction claims as a means of stopping an agency from operating or invalidating its past actions, and the Supreme Court made short work of that tactic in *Free Enterprise Fund*. An accounting firm aggrieved by PCAOB regulation and investigation brought a constitutional challenge to that board's structure, urging that because of removal restrictions, "the Board and all power and authority exercised by it violate the Constitution." 561 U.S. at 508; *see* Compl. ¶ 1, *Free Enterprise Fund v. PCAOB*, No. 1:06-cv-217-JR (D.D.C.). The firm identified a litany of PCAOB actions that had injured it, including allegedly excessive auditing standards and a burdensome investigation causing a five-fold drop in business, Compl. ¶¶ 69-80, *Free*

Enterprise Fund, No. 1:06-cv-217-JR (D.D.C.), and sought injunctive relief including an order "nullifying and voiding" those "prior adverse action[s]," *id.* ¶ 23; *see* 561 U.S. at 487.

The Supreme Court rejected those requests. While the Court held that an unusual set of restrictions on the President's power to remove PCAOB members unconstitutionally infringed the President's Article II powers, it categorically rejected the plaintiffs' remedy arguments. 561 U.S. at 508-09. The Court explained that "the unconstitutional tenure provisions are severable from the remainder of the statute." *Id.* at 508. "Putting to one side petitioners' Appointments Clause challenge," the Court held, "the existence of the Board does not violate the separation of powers"; only "the substantive removal restrictions imposed by 15 U.S.C. §§ 7211(e)(6) and 7217(d)(3) do." *Id.* at 508-09. The plaintiffs were thus denied the "broad injunctive relief" they sought, and the complained-of auditing requirements and standards were not vacated. *Id.* at 513. Rather, their relief was limited to "declaratory relief" lessening the restraint on the President's removal power, *id.* at 513, leaving the PCAOB fully functional in its past and present actions, albeit separated from the President "by only a single level of good-cause tenure." *Id.* at 509.

Plaintiffs parse the Court's decision, insisting that all that was denied was "an injunction against the continued operations of the PCAOB" and the Court did

not specifically "address whether past PCAOB actions should be vacated." Br. 22. That overlooks the fundamental inconsistency between Plaintiffs' vision of remedies for unconstitutional removal restrictions and the approach the Court took. The reason why Plaintiffs say "the Court must set aside the Net Worth Sweep" is that "the agency was operating in violation of the separation of powers." Br. 24. But *Free Enterprise Fund* teaches that the presence of unconstitutional removal restrictions does *not* cause "the existence of the [agency] [to] violate the separation of powers." 561 U.S. at 508; *accord John Doe Co. v. CFPB*, 849 F.3d 1129, 1133 (D.C. Cir. 2017) ("traditional constraints on separation-of-powers remedies" precluded invalidation as remedy for removal-restriction claim).

The Panel thus correctly followed *Free Enterprise Fund* in concluding that "[t]he appropriate remedy … is to strike the language providing for good-cause removal from 12 U.S.C. § 4512(b)(2)," while "leav[ing] intact the remainder of HERA and the FHFA's past actions." Panel 52-53. As the Panel held, there is no basis to find HERA's for-cause removal provision any less severable than the provision in *Free Enterprise Fund.* "HERA remains operative as a law without the restriction; its remaining provisions are capable of functioning independently from the removal restriction." Panel 52. And "[g]iven the exigent context in which the law was passed, it is unlikely that the entirety of HERA depended on a removal restriction." *Id.*; *see supra* at 4. It does not matter that HERA has no express

severability clause; neither did the statute in *Free Enterprise Fund*, and "the absence of a severability clause" does not "raise a presumption against severability." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987).

This is not a situation where leaving the rest of the statute intact would result in a regime that is "exactly backward," decouple provisions "meant to be deployed in tandem," or trigger new constitutional problems. *Murphy v. NCAA*, 138 S. Ct. 1461, 1482-84 (2018). That the Panel was correct about severability would be all the more clear under the more rigorous approach Justice Thomas advocated in his concurrence in *Murphy*. "[E]arly American courts" were far more restrained in their approach to relief for unconstitutional statutes; "they would simply decline to enforce [the statute] in the case before them," nothing more. *Id.* at 1486 (Thomas, J., concurring). The notion that the unconstitutionality of one statutory provision "places every other provision at risk of being declared nonseverable and thus inoperative" not only is inapplicable to this case but stands "in tension with longstanding limits on the judicial power." 138 S. Ct. at 1487 (Thomas, J., concurring).

Contrary to Plaintiffs' contentions (Br. 36-40), their requests for vacatur and injunctive relief necessarily presuppose that the for-cause removal provision in HERA is *non*-severable. The heart of Plaintiffs' remedy argument is that the Third Amendment is "void" as an action pursuant to "an unconstitutional statute."

Br. 20. But their constitutional attack trains on just a few discrete provisions of HERA (*e.g.*, the for-cause removal provision), while the conservatorship transaction they challenge was taken pursuant to *other* provisions. So the only way their theory could conceivably work is if the alleged defects in the challenged provisions undercut the remainder of the statute. Plaintiffs' freewheeling suggestion that the Court consider invalidating miscellaneous other HERA provisions that they find objectionable (*id.* at 38-40), despite having nothing to do with restricting presidential authority, is even more misguided. That approach would be the very kind of judicial legislation Justice Thomas warned against. *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring).

2. Vacatur Is Particularly Inappropriate Here

In sum, invalidation of past agency action is generally not a proper remedy for an unconstitutional removal restriction. But the Court need not make a categorical ruling that vacatur could never be available as a removal-restriction remedy because a host of additional, case-specific reasons make vacatur particularly inappropriate here.

1. The underpinning for Plaintiffs' claim is the constitutional mandate that the President retain "general administrative control of those executing the laws." *Free Enterprise Fund*, 561 U.S at 492-93. But as the District Court observed, "the challenged Third Amendment was adopted by the FHFA in its

capacity as conservator of Fannie Mae and Freddie Mac, not as an executive enforcing the laws of the United States." ROA.959. The Third Amendment was a financing transaction, not an exercise of the type of sovereign executive powers that the Constitution vests in the President.

When agencies such as FHFA serve as conservators or receivers for financial institutions, they are deemed to step into the shoes of those institutions and generally do not act as Government entities. *United States v. Beszborn*, 21 F.3d 62, 68 (5th Cir. 1994); *see generally O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86-87 (1994). The Third Amendment in particular lies far outside the sovereign executive realm that Article II commits to the President. Plaintiffs do not complain about FHFA prosecuting them, sanctioning them, exercising police power against them, or imposing restrictions on their conduct. They protest a transaction born of "broad operational authority" to "renegotiate an existing lending agreement"—a sort of action "within the heartland of powers vested in the officers or board of directors of any corporation." *Saxton*, 901 F.3d at 960-61 (Stras, J., concurring); *accord Jacobs*, 908 F.3d at 890; *Perry Capital*, 864 F.3d at 607.

Article II does not mandate that the President have final authority over such business operations of financial institutions in conservatorship. Thus, even if an excessive limitation on the President's removal authority could in theory warrant

setting aside an *executive* action, that rationale would not apply to the Third Amendment. *See John Doe Co.*, 849 F.3d at 1132 (removal-restriction claim was not basis for invalidating CFPB investigative demand because "requesting information from private entities subject to regulation" is not a function "exclusively confined to the Executive Branch").[6]

2. Vacating the challenged action in this case would also be particularly inappropriate because Plaintiffs waited over five years to bring their challenge. As discussed below, in contrast to removal-restriction cases, vacatur of agency action is sometimes a proper remedy when an official's appointment is invalid. *See infra* at 35-36. But even in that context, the *de facto* officer doctrine insulates past agency actions unless the challenge is brought "at or around the time that the challenged government action [was] taken" and the agency had "reasonable notice." *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 81 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017); *see Ryder v. United States*, 515 U.S. 177, 180 (1995) (*de facto* officer

[6] Plaintiffs are wrong to assume that FHFA makes discrete approvals of contractually-required dividend payments to Treasury in FHFA's distinctive capacity as regulator. Because the considerations relevant to whether to approve a dividend under the regulation referenced by Plaintiffs are the same considerations that guide the Conservator in the performance of its duties in the first place, and because the Treasury agreements are recognized as an integral and foundational part of the conservatorships, FHFA has not seen it as necessary to engage in a second round of authorization, as regulator, of dividend payments under the Treasury agreements. In any event, non-approval under the regulation would simply result in Treasury's liquidation preference being increased by the same amount; Plaintiffs do not claim that distinction affects their injury. ROA.239, 248.

doctrine promotes "orderly functioning of the government" and avoids the risk of "chaos"). In the cases Plaintiffs cite vacating agency action because of invalid appointments, for example, the challenge was brought in "real time," *e.g.*, as a defense in an unfolding agency proceeding, never in a period measured in years. It would make no sense to apply any less protection in the context of removal-restriction claims, where there is no precedent for vacating past agency actions at all.

3. If any further reason foreclosing vacatur were needed, the particular remedy Plaintiffs seek here is the archetype of what Congress intended to place off limits in 12 U.S.C. § 4617(f), which proscribes judicial action that would "restrain or affect the exercise of powers or functions of the Agency as a conservator." It is difficult to imagine a more intrusive restraint than unwinding the terms of agreements the Conservator negotiated to promote continued availability of funds to avert receivership.

This is put in sharp relief by Plaintiffs' request that the Court rewrite the stock agreements with their preferred terms and overhaul the Enterprises' capital structures. Plaintiffs' recapitalization plan asks the Court "to order Defendants to treat the excess Net Worth sweep dividends … as having paid down the liquidation preference." Br. 29-32. But the original agreements prohibit the Enterprises from paying down the liquidation preference "[p]rior to termination of the

Commitment." ROA.240, 249-50. Plaintiffs' pro forma calculations (Br. 51-52) likewise ignore the obligation of the Enterprises to pay commitment fees triggered if the Third Amendment no longer "remains … in effect." ROA.274, 282. Plaintiffs recommend that the Court emulate "the Government's experience investing in AIG" (Br. 30), but Congress could not have been clearer about committing those kinds of operational and policy matters to the Conservator.

This is not to suggest that § 4617(f) by its own force would preclude constitutional claims from being litigated. But Congress can specify remedies and channels for claims. *See Hindes v. FDIC*, 137 F.3d 148, 161 (3d Cir. 1998) (holding that rescission of receiver transaction as "void *ab initio*" was not an available remedy for shareholders' constitutional claims). Here, the fact that the extravagant remedy Plaintiffs seek is a textbook example of the type of interference proscribed by § 4617(f) simply adds to the reasons why the Court should not diverge from the straightforward remedial approach enunciated in *Free Enterprise Fund*.

3. Plaintiffs' Authorities Are Inapposite

In support of their position that vacatur of past agency action is the preferred remedy in removal-restriction cases, Plaintiffs rely chiefly on *Bowsher v. Synar*, 478 U.S. 714 (1986). In that case, the Supreme Court overturned a deficit-reduction statute that assigned core executive functions to an agent of Congress,

the Comptroller General, and the lower court vacated budget actions taken as part of that unconstitutional process. *Bowsher* does not support Plaintiffs' position, and if anything underscores the *un*availability of vacatur on the facts presented here.

For starters, the constitutional violation in *Bowsher* was not the Comptroller General's independence from the President, but the operation of an automatic deficit-reduction process in which "an officer controlled by Congress … execut[ed] the laws," creating what amounted to a "congressional veto." 478 U.S. at 726. Thus, upon finding that "the automatic deficit reduction process" requiring the President to defer to the Comptroller General was "unconstitutional," the court naturally held that orders issued "pursuant to the unconstitutional automatic deficit reduction process" were "without legal force and effect." *Synar v. United States*, 626 F. Supp. 1374, 1404 (D.D.C. 1986), *aff'd*, 478 U.S. 714 (1986).

That is far different from this case. Plaintiffs' theory here is not that a specific unconstitutional process caused the Third Amendment, but rather that *any* action FHFA takes while the removal restriction is in effect is itself a violation of the separation-of-powers, "*ultra vires*[,] and subject to vacatur," regardless of the lack of any connection between the independence and the action. Br. 20. *Bowsher* offers no support for that sweeping proposition.

In fact, the *Bowsher* court observed that the Comptroller General had long performed a vast array of functions "as a legislative aid, in the performance of

which he cannot in any proper sense be characterized as an arm or an eye of the executive." 626 F. Supp. at 1399 n.29 (internal quotation marks omitted). There was no suggestion those actions were rendered invalid, only the specific functions assigned to him by the deficit-reduction statute—and as to those, only after searching analysis established their "executive nature." 478 U.S. at 733. That distinction underscores the irrelevance of Plaintiffs' theory to the Conservator's entry into the Third Amendment, which was *not* of an executive nature. *See supra* at 29-30.

Moreover, unlike *Free Enterprise Fund* and this case, the statute in *Bowsher* expressly mandated that if any aspect of the scheme was found unconstitutional, the whole process would be null and the budget would have to be redone. *Synar*, 626 F. Supp. at 1381. Thus, the statute directly answered the severability and redressability questions, making it unnecessary to consider what type of remedy might have been available absent Congress's specification.

Plaintiffs' repeated description of the remedy in *Bowsher* as backward-looking (Br. 1, 17, 22) is misleading. Plaintiffs sued in December 1985 "[w]ithin hours" of the statute's enactment, seeking to enjoin a budget process that had not yet begun, and the litigation and budget process proceeded simultaneously. 478 U.S. at 719; 626 F. Supp. at 1377-78. The order upon which Plaintiffs rely issued on February 7, 1986 to vacate a challenged sequestration order released on

February 1, 1986, during the pendency of litigation and with a one-month delay of effectiveness. 626 F. Supp. at 1377, 1404. That timeline bears no resemblance to this case, filed over five years after the challenged transaction. Had the *Bowsher* suit been brought in 1991, it is difficult to imagine the courts being receptive to nullifying aspects of the 1986 budget.

Plaintiffs' cases involving Appointments Clause issues in adjudications are also inapposite. Br. 19. To be sure, "the appropriate remedy for an *adjudication* tainted with an *appointments violation* is a new hearing before a properly appointed official." *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) (internal quotation marks omitted; emphasis added). This case, however, involves neither an Appointments Clause challenge nor an adjudication. It is logical that adjudications by officials who lacked jurisdiction to adjudicate, or by boards that "did not have [the] quorum" needed "to lawfully take action," *Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013), *aff'd*, 134 S. Ct. 2550 (2014), must be redone. But there is no warrant for extending that approach to removal-restrictions claims, which do not implicate the power of the official to act, particularly when the object of the challenge is not an adjudication but a financial transaction taken long in the past.

Free Enterprise Fund, which included both an appointments claim and a removal-restriction claim, speaks directly to the difference in remedial approaches

between the two types of claims. When explaining the narrowness of the remedy for an unconstitutional removal restriction, the Court stressed that it was "[p]utting to one side petitioners' Appointments Clause challenge." 561 U.S. at 508-09. And while it rejected the appointment claim, it remarked that the remedy for that claim would have consisted of "broad injunctive relief against the Board's continued operations." *Id.* at 513. In contrast, the relief for the unconstitutional removal restrictions was limited to striking the problematic provisions to make the agency "accountable to the Executive." *Id.* So too here.

Finally, there is no merit to Plaintiffs' arguments that the Panel's remedial approach constitutes improper "prospective decisionmaking," or violates a mandate in the APA to set aside agency action. Br. 1-2, 21, 24-27. Neither Defendants nor the Panel rely on the presumption against retroactive constitutional adjudication that Plaintiffs say is obsolete. And Plaintiffs did not bring their constitutional claim under the APA. *Compare* ROA.81, 83, 85 (APA counts) *with* ROA.81 (constitutional count). In any event, the general provisions of the APA neither displace the classic judicial function of fitting remedies to particular claims and situations, *see Webster v. Doe*, 486 U.S. 592, 604-05 (1988), nor mandate equitable relief barred by other statutes, 12 U.S.C. § 4617(f). Most fundamentally, Plaintiffs' APA argument presumes that if HERA's *removal-restriction* is unconstitutional, that would necessarily mean "FHFA's *conduct* … violate[s] …

the Constitution." Br. 21-22 (emphasis added). But that disregards *Free Enterprise Fund*'s rejection of the premise that an unconstitutional removal restriction renders "all power and authority exercised by [the agency] in violation of the Constitution." 561 U.S. at 508.

Plaintiffs' APA-mandate argument does, however, expose how sweeping their position is and how radical the consequences would be if the Court were to adopt it. By Plaintiffs' logic that any agency action taken while a removal restriction is in effect is itself rendered a constitutional violation that must be vacated on demand, literally every action FHFA has taken would be at risk. Moreover, the unsettling implications of Plaintiffs' position extend beyond FHFA to any agency. Those implications are all the more pernicious to the extent the alleged violation lies in a "unique constellation of insulating features" (Panel 44), a standard that provides little notice to Congress and other agencies of what other constellations might have the effect of retroactively nullifying an agency's work long after the fact. Plaintiffs' assurances that obstacles such as standing would make the practical consequences "very limited" (Br. 33) ring hollow given that Plaintiffs elsewhere insist standing is virtually automatic for separation-of-powers claims.

4. The Unavailability of Vacatur and Injunctive Relief Defeats Redressability

For all of the above reasons, and as the Panel opinion illustrates, if Plaintiffs were to succeed on their constitutional claim, the result would be a declaration that the for-cause provision in HERA unconstitutionally limits presidential authority and shall have no effect. That declaration would do nothing to relieve Plaintiffs' alleged injury, which defeats redressability and Article III standing.

As the Panel correctly acknowledged, redressability hinges on "whether a plaintiff personally would benefit in a tangible way from the court's intervention." Panel 22. Plaintiffs allege injury from what they characterize as an "expropriat[ion]" or "nationaliz[ation]" effected by the Third Amendment. ROA.15. A declaration of presidential rights that leaves that transaction intact benefits Plaintiffs neither personally or tangibly. Plaintiffs "have no standing to complain simply that their Government is violating the law," *Bond*, 564 U.S. at 225, and "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court." *Steel Co.*, 523 U.S. at 107.

Despite finding the relief Plaintiffs sought unavailable, the Panel found redressability satisfied on grounds unrelated to the Third Amendment: that Plaintiffs are "being subjected to enforcement or regulation by an unconstitutionally constituted body." Panel 23. However, as discussed above, Plaintiffs are not regulated or subject to enforcement activity by FHFA, and

alleged no injury distinct from the Third Amendment. *See supra* at 14-15. Indeed, the Panel's discussion of injury-in-fact rested on "the expropriation of [Plaintiffs'] rights" supposedly effected by the Third Amendment, Panel 16-17, and Article III does not permit "mixing [of] a stated injury" with "redressability of an entirely different injury," *HealthNow N.Y. Inc. v. N.Y.*, 448 F. App'x 79, 81 (2d Cir. 2011).

* * *

Enforcing Article III's redressability requirement does not impermissibly conflate standing and the merits as Plaintiffs contend. In any event, whether the remedial issue is viewed as Article III standing or the merits ultimately makes little practical difference given the posture of this case, where no party contends that anything remains to be done other than enter judgment for one side or the other. Regardless of standing, courts do not "reach out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 184 (1999). Whether as a matter of jurisdiction or prudential restraint, the Court should not reach the merits of an important constitutional question in a case where the answer makes no difference to any concrete personal interest of the Plaintiffs. If the Court nevertheless concludes that Plaintiffs do have Article III standing, and reaches the merits, it should hold that the considerations set forth above, and those discussed in Treasury's Supplemental Brief at Section

III.B.3, which FHFA adopts and incorporates by reference, still preclude any relief in this case beyond a declaration that the for-cause removal provision is unconstitutional and unenforceable.

II. PLAINTIFFS' STATUTORY CLAIMS FAIL

Because the Conservator "acted within its statutory authority" under HERA in agreeing to the Third Amendment, the Court "lack[s] authority" under Section 4617(f) "to grant relief on any of the Shareholders' statutory claims." Panel 15. Including the Panel and district court in this case, a total of 23 jurists—16 circuit and seven district judges—have rejected Plaintiffs' arguments, with only two dissenting. *See supra* at 12. Nothing in Plaintiffs' arguments warrants splitting from five of this Court's sister circuits.

A. Section 4617(f) Bars Relief That Would Restrain or Affect FHFA's Exercise of Conservatorship Powers

To enable the Conservator to carry out its functions, Congress mandated that "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator." 12 U.S.C. § 4617(f). This "plain statutory text" draws a "sharp line" against "litigative interference—through judicial injunctions, declaratory judgments, or other equitable relief—with FHFA's statutorily permitted actions as conservator." *Perry Capital*, 864 F.3d at 606.

Section 4617(f) is materially identical to a FIRREA provision this Court has construed to bar claims seeking injunctive or other equitable relief against

conservators and receivers. *See, e.g.*, *Ward v. RTC*, 996 F.2d 99, 103 (5th Cir. 1993); *281-300 Joint Venture v. Onion*, 938 F.2d 35, 39 (5th Cir. 1991). Such provisions "effect a sweeping ouster of courts' power to grant equitable remedies," *Freeman v. FDIC*, 56 F.3d 1394, 1399 (D.C. Cir. 1995), and apply "regardless of [the plaintiff]'s likelihood of success on the underlying claims." *281-300 Joint Venture*, 938 F.2d at 39.

The analysis to determine whether such provisions preclude judicial review is straightforward and "quite narrow." *Bank of Am. Nat'l Ass'n v. Colonial Bank*, 604 F.3d 1239, 1243 (11th Cir. 2010). "[A]s long as the [conservator] is exercis[ing] judgment under one of its enumerated powers such as running the affairs of a troubled financial institution … the courts may not enjoin the [conservator's] activities." *Ward*, 996 F.2d at 103; *see also Jacobs*, 908 F.3d at 889.

Thus, the dispositive question is whether the Third Amendment fits within FHFA's statutory powers as Conservator. It plainly does.

B. The Third Amendment Is Within FHFA's Statutory Conservatorship Powers

HERA grants the Conservator "broad powers to operate Fannie and Freddie," to "assume complete control" over the Enterprises in conservatorship, and to exercise "exclusive authority over [their] business operations." *FHFA v. City of Chicago*, 962 F. Supp. 2d 1044, 1058, 1060 (N.D. Ill. 2013). Indeed,

HERA uses "terms so broad that it authorizes FHFA to do almost anything when it comes to Fannie and Freddie." *Saxton*, 901 F.3d at 960 (Stras, J., concurring).

The Conservator's execution of the Third Amendment fell squarely within its broad statutory powers and functions, including to "take over the assets of and operate the [Enterprises]," "carry on [their] business," "perform all functions" of the Enterprises, "contract" on their behalf, and "conduct all business of the [Enterprises]"—all in the manner the Conservator "determines is in the best interests of the [Enterprises] or the Agency." 12 U.S.C. § 4617(b)(2). As the Third Circuit reasoned, "[t]o operate their businesses, Fannie and Freddie must secure ongoing access to capital, manage debt loads, control cash flow, and decide whether and how to pay dividends." *Jacobs*, 908 F.3d at 890. "The Third Amendment is in essence a renegotiation of an existing lending agreement"—the Treasury stock agreement—that provides the Enterprises with a capital backstop of hundreds of billions of dollars. *Id.*; *see also Perry Capital*, 864 F.3d at 607 ("Renegotiating dividend agreements, managing heavy debt and other financial obligations, and ensuring ongoing access to vital yet hard-to-come-by capital are quintessential conservatorship tasks designed to keep the Companies operational.").

Accordingly, "HERA does not bar FHFA's decision as conservator to restructure the Companies' dividend payments to Treasury" via the Third Amendment. *Robinson*, 876 F.3d at 231.

C. Plaintiffs' Arguments Do Not Overcome Section 4617(f)

Plaintiffs nevertheless argue the Third Amendment fails to preserve and conserve Enterprise assets, is not authorized by HERA's "best interests" provisions, and constitutes an impermissible "wind down." These arguments fail.

1. HERA provides that FHFA "*may*, as conservator or receiver, … preserve and conserve the assets and property" of the Enterprises, and "*may*, as conservator, take such action *as may be* ... appropriate to … preserve and conserve the[ir] assets and property." 12 U.S.C. §§ 4617(b) (emphases added). Plaintiffs and the dissent argue these provisions create mandatory obligations to be policed through litigation. Br. 41-44; Panel 60, 62 (Willett, J., dissenting in part).

However, every court to consider this issue has held that "the most natural reading of [HERA] is that it permits FHFA, but does not compel it in any judicially enforceable sense, to preserve and conserve Fannie's and Freddie's assets." *Perry Capital*, 864 F.3d at 607; *accord Saxton*, 901 F.3d at 958 ("Reading § 4617(b) as a whole, it is clear that Congress intended the permissive 'may' to grant FHFA broad discretion in its management and operation of Fannie and Freddie."); *Roberts*, 889 F.3d at 403 ("HERA does not impose such mandatory duties on conservators.");

Robinson, 876 F.3d at 230 (HERA's "language is permissive and . . . details *powers* that FHFA holds rather than *duties* that FHFA must perform."). "Typically, 'may' implies discretion." Panel 73 (Willett, J., dissenting in part); *accord Saxton*, 901 F.3d at 961 (Stras, J., concurring) ("Ordinarily, the word may is permissive, while shall is mandatory."). The dissent's reasoning that the Conservator nonetheless "may *not* take an action that is inconsistent" with the power to preserve and conserve assets (Panel 73 (Willett, J., dissenting in part)) does not hold, because "[n]ot every statutory 'may' is coupled with an implied 'may not.'" *Saxton*, 901 F.3d at 958. Plaintiffs' argument obliterates any distinction between Congress's use of "may" in some parts of Section 4617 (over 50 times) and "shall" in others (over 100 times). *Id.* at 961. "Under the whole-statute and consistent-usage canons, there is no reason to doubt that the powers-as-conservator provision uses 'may' in its normal, permissive sense, consistent with the rest of the statute." *Id.*[7]

Even if "may" were a mandatory term, Plaintiffs' argument still fails. The Third Amendment preserves and conserves the Enterprises' assets and protects

[7] Plaintiffs and the Panel dissent also suggest that HERA requires the Conservator to "build capital reserves." Br. 42; Panel 82 (Willett, J., dissenting in part). But the court below and D.C. Circuit both rightly concluded that HERA contains no "mandate, command, or directive to build up capital for the financial benefit of [Enterprise] stockholders." ROA.955 (quoting *Perry Capital*, 848 F.3d at 1088); *accord Robinson*, 876 F.3d at 231 ("Nor does HERA oblige FHFA as conservator to preserve certain capital.").

their safety and soundness by ensuring an ongoing financial lifeline from Treasury. *See Jacobs*, 908 F.3d at 894 ("The Third Amendment … prevent[ed] unpayable dividends from ratcheting up their debt loads to unsustainable levels."); *Roberts*, 889 F.3d at 404-05 ("The Third Amendment permanently eliminated the risk that cash-dividend payments would consume the companies' financial lifeline, and it forever prevented Treasury from demanding payment of commitment fees."); *Robinson*, 876 F.3d at 232 ("Treasury's continuing funding commitment guarantees that the Companies will remain solvent."); *Saxton*, 901 F.3d at 962 (Stras, J., concurring) (Third Amendment "provid[ed] immediate relief from having to pay $19 billion in fixed annual dividends" and "commitment fees" on top of that). In short, the Third Amendment "was among a range of actions suitable for preserving and conserving assets, well within the discretion granted to the FHFA under the statute, even if the shareholders would have preferred a different course of action." *Saxton,* 901 F.3d at 962 (Stras, J., concurring); *accord Roberts*, 889 F.3d at 404 ("[A] conservator could have believed that the [Third] amendment's terms would further the conservation of the companies' assets better than" plaintiffs' proposed alternatives.); *Perry Capital*, 864 F.3d at 610 (HERA "does not compel" FHFA to plaintiffs' proposed alternatives and "Section 4617(f)

flatly forbids . . . superintending to that degree FHFA's conservatorship or receivership judgments.").[8]

Plaintiffs also rely on HERA's provision that the Conservator "shall … maximize[] the net present value return" from any disposition of Enterprise assets. Br. 44 (quoting 12 U.S.C. § 4617(b)(11)(E)). But this Court rejected an identical argument under FIRREA, holding that even where a conservator allegedly "failed to maximize the net present value return" for the entity's assets, Section 1821(j) barred relief. *Ward*, 996 F.2d at 103. "For, even if the [conservator] improperly or unlawfully exercised an authorized power or function, it clearly did not engage in an activity outside its statutory powers." *Id.*

2. Plaintiffs and the dissent also argue that HERA's "best interests" provision (12 U.S.C. § 4617(b)(2)(J)(ii)) does not allow the Conservator to act in a manner "wholly untethered from its specific powers as conservator." Panel 75 (Willett, J., dissenting in part); *see* Br. 45-46. But the Conservator's execution of the Third Amendment *is* "tethered" to the numerous statutory powers described

[8] Plaintiffs and the Panel dissent also cite certain FHFA statements they characterize as describing the Conservator's powers as mandatory. Br. 43-44; Panel 71 (Willett, J., dissenting in part). At most, these statements reflect the Conservator's efforts to balance various, potentially competing, high-level goals and priorities set forth by Congress. They do not suggest that the Conservator's powers are binding in any "judicially enforceable sense," *Perry Capital*, 864 F.3d at 607, nor do they give Plaintiffs license to challenge the manner in which the Conservator balances its goals and priorities. *See Robinson*, 876 F.3d at 232 ("HERA does not require FHFA to prioritize one of its obligations over others.").

above. And while Plaintiffs suggest the Conservator must consider interests of shareholders, it is significant that in transplanting FIRREA's "best interests" provision to HERA, Congress "omit[ted] the analogue of depositors—shareholders—from its list, referring only to the best interests of Fannie, Freddie, and the Agency." *Jacobs*, 908 F.3d at 893. "In short, [FHFA] is supposed to act in its own interests (which reflect the interests of the government and the public), *not* in the interests of Fannie's and Freddie's shareholders." *Id.*

Nor is HERA's best-interests provision limited by an implied understanding that FHFA must act as a traditional common-law conservator. Br. 45-46; Panel 69 (Willett, J., dissenting in part). HERA enumerates conservatorship powers and duties in detail, demonstrating that Congress did not expect courts to resort to common-law analogies. "Congress made clear in [HERA] that FHFA is not your grandparents' conservator." *Perry Capital*, 864 F.3d at 613. Here, "clear statutory text," not common law, "dictates the outcome." *Saxton*, 901 F.3d at 963 (Stras, J., concurring); *see also id.* at 959 ("HERA does not limit FHFA to the discretion traditionally ascribed to conservators."); *Robinson*, 876 F.3d at 230.

3. The Panel's rejection of Plaintiffs' APA claims does not blur the "distinct" roles of conservators and receivers. Panel 63-67 (Willett, J. dissenting in part). HERA permits these roles to overlap, allowing FHFA to "be appointed *conservator or receiver* for the purpose of *reorganizing, rehabilitating, or winding*

up the affairs of" the Enterprises, 12 U.S.C. § 4617(a)(2) (emphases added), and granting many of the same powers to the "conservator or receiver," *see, e.g.*, *id.* § 4617(b)(2). "Undertaking permissible conservatorship measures even with a receivership mind"—like shrinking the Enterprises' operations until an ultimate resolution is determined—is not outside of the Conservator's "statutory bounds." *Perry Capital*, 864 F.3d at 612. In any event, contrary to Plaintiffs' argument, the Third Amendment has not wound down or liquidated the Enterprises, which "continue to operate long-term, purchasing more than 11 million mortgages and issuing more than $1.5 trillion in single-family mortgage-backed securities," and "remain fully operational entities with combined operating assets of $5 trillion." *Id.* at 610-11. The Panel's dismissal of the APA claims was sound.

III. HERA'S SUCCESSION PROVISION BARS PLAINTIFFS' CLAIMS

FHFA incorporates by reference the arguments set forth in Section I of Treasury's Supplemental Brief that HERA's succession provision, 12 U.S.C. § 4617(b)(2)(A)(i), precludes all of Plaintiffs' claims.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment dismissing the Complaint.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because the brief contains 10,812 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

Dated: January 14, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

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