UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

J. PATRICK COLLINS, *et al.*, Plaintiffs, v. THE FEDERAL HOUSING FINANCE AGENCY, *et al.*, Defendants.	Civil Action No. 4:16-CV-03113

REPLY MEMORANDUM OF DEFENDANTS FEDERAL HOUSING FINANCE AGENCY AS CONSERVATOR FOR FANNIE MAE AND FREDDIE MAC AND FHFA DIRECTOR MELVIN L. WATT IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT ON CONSTITUTIONAL CLAIM

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

Plaintiffs' summary judgment opposition does not offer any sound reason for this Court to go out of its way to opine on an abstract legal issue about the scope of Presidential power that has no causal or other connection to their grievance. If the Court chooses to reach the merits of Count IV, FHFA's structure easily passes constitutional muster under longstanding precedent. Plaintiffs have failed to carry their burden to show that any aspect of FHFA's structure impermissibly interferes with the President's duty and power to oversee the Executive Branch.

NATURE AND STAGE OF THE PROCEEDING

In this action Plaintiffs challenge the Third Amendment to Senior Preferred Stock Purchase Agreements between the U.S. Department of the Treasury and FHFA as Conservator for Fannie Mae and Freddie Mac. FHFA and the Treasury Department have each moved to dismiss, which motions remain pending. Plaintiffs have moved for summary judgment on Count IV of their Complaint, which asserts that the Housing and Economic Recovery Act ("HERA") creating FHFA "violates the Constitution's separation of powers" by "making FHFA's head a single Director rather than a multi-member Board and eliminating the President's power to remove the Director at will." Compl. ¶ 185. FHFA has cross-moved for summary judgment on Count IV, and this reply brief is submitted in support of that cross-motion.

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

The issues are (1) whether Plaintiffs' claim attacking HERA's "cause" limitation on removal of the FHFA Director, if successful, would require invalidation of the Third

Amendment, and (2) if so, whether HERA's "cause" limitation on removal of the Director is consistent with the separation of powers doctrine, and more specifically Article II of the U.S. Constitution. These are pure questions of law that the Court may decide on motions for summary judgment. Fed. R. Civ. P. 56(a).

ARGUMENT

I. THE COURT NEED NOT DECIDE PLAINTIFFS' CONSTITUTIONAL CLAIM BECAUSE IT WOULD NOT INVALIDATE THE THIRD AMENDMENT

If, *arguendo*, the Court were to agree with Plaintiffs that Article II's mandate that the President oversee the executive functions of the Government requires him to have greater power to remove an FHFA Director than is afforded by HERA, the remedy would be limited and prospective: going forward, the President would have the power to which the Constitution entitles him and any contrary provisions of HERA would be disregarded. That would not affect the validity of the Third Amendment, otherwise redress Plaintiffs' injury, or benefit them in any way. The Third Amendment was approved over four years ago by an Acting Director not subject to HERA's limitations on removal of a full Director, and adopted by FHFA in its capacity as Conservator, not a regulator performing executive functions. By Plaintiffs' own allegations, moreover, the Third Amendment was joined in and fully supported and advanced by the Administration, belying the essential hypothesis behind Plaintiffs' claim: that a higher level of Presidential influence over FHFA might somehow have led FHFA to *reject* the Third Amendment.

Plaintiffs therefore lack Article III standing, which requires both that their alleged injury-in-fact be *traceable* to the alleged constitutional violation, and that the judicial

relief available for that issue would *redress* that injury. Aside from standing, moreover, Plaintiffs simply cannot establish a connection between the theoretical issue they raise and the actual, tangible relief they seek. Plaintiffs devote most of their latest brief to trying to overcome these issues and manufacture a connection, but make no headway.

A. Past, Settled Agency Actions Like the Third Amendment Are Not Subject to Post Hoc Invalidation Due to Removal Restrictions

In its opening summary judgment brief, FHFA established that in the rare instances when limitations on the President's ability to remove a federal officer at will are deemed to violate Article II, the consequence is not that the office no longer exists, the officer can no longer serve, or her past acts are generally annulled, but merely that the offending restriction will no longer be given effect in the future. ECF No. 36 ("FHFA SJ Mem.") at 5-9. This is exemplified by the Supreme Court's decision in *Free Enterprise Fund*, which rejected the broader position urged by the plaintiffs in that case that the removal restriction rendered "all power and authority exercised by [the PCAOB] in violation of the Constitution." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 508 (2010).

The D.C. Circuit reaffirmed these "traditional constraints on separation-of-powers remedies" just last month. *John Doe Co. v. CFPB*, 849 F. 3d 1129, 1133 (D.C. Cir. 2017). Rejecting a request by a company challenging the constitutionality of the CFPB that the agency "be stopped in its tracks," the D.C. Circuit emphasized that "severance of the unconstitutional provision is the chosen remedy" in removal-restriction cases. *Id.* Even in cases involving other kinds of separation-of-powers violations, such as Appointments Clause problems that go to an official's ability to serve in the first place,

"vacatur of past actions is not routine" and "the Supreme Court and this court have often accorded validity to past acts of unconstitutionally structured governmental agencies." *Id.* (collecting cases).

Nothing in Plaintiffs' most recent brief overcomes or establishes why any exception would apply to the traditional constraints on relief in removal-restriction cases. Plaintiffs suggest the remedy in *Free Enterprise Fund* was limited to prospective invalidation of removal restrictions only because no broader remedy was needed to afford meaningful relief to the plaintiffs in that case. ECF No. 41 ("Pls. SJ Mem.") at 3-4. On the contrary, the plaintiffs in *Free Enterprise Fund* sought the broader remedy, yet the Court rejected that remedy—not because of its perception of what would or would not help the plaintiffs, but for the more fundamental reason that "when confronting a constitutional flaw in a statute, we try to limit the solution to the problem" and "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." *Free Enter. Fund*, 561 U.S. at 508-09. In any event, Plaintiffs' novel spin on *Free Enterprise Fund* only highlights why the plaintiffs had a redressable injury-in-fact there (they were subjected to an ongoing investigation that a PCAOB once stripped of removal protection could choose to halt anytime), in contrast to Plaintiffs here who do not (their asserted injury flows from a binding contract amendment entered into years in the past that would not be undone if the for-cause limitation on the FHFA Director's removal were lifted).

Plaintiffs implicitly acknowledge that they are unable to cite any case invalidating a past, settled agency action because an official who took it enjoyed more statutory

protection from removal than Article II permits. *See* Pls. SJ Mem. at 5-6. Rather, they analogize to cases vacating actions by individuals who purported to be judges or otherwise conduct criminal or other adjudicatory proceedings despite never having been constitutionally or lawfully appointed.[1] Plaintiffs seek to bridge the gap between those very different situations by postulating that "an agency head who is unconstitutionally unaccountable to the President is no more 'lawfully serving' than one who unconstitutionally holds office in violation of the Appointments Clause." Pls. SJ Mem. at 5. But the *Free Enterprise Fund* Court directly rejected any such equivalence, holding that the presence of unconstitutional removal restrictions does not render "all power and authority exercised by [the agency] in violation of the Constitution" but rather leaves the agency's underlying authorities intact and operative. *Free Enter. Fund.*, 561 U.S. at 508.

Plaintiffs also engage in a protracted analysis (Pls. SJ Mem. at 6-11) of the *de facto* officer doctrine, which "prevents plaintiffs from launching wholesale attacks on the actions of *de facto* officers, from attacking even particular past actions of *de facto* officers long after they were taken, or from attacking any actions of *de facto* officers if the appropriate agency or department is not on notice of the defect claimed." *Andrade v.*

[1] In one case cited by Plaintiffs, *Kuretski v. Commissioner*, 755 F.3d 929 (D.C. Cir. 2014), the D.C. Circuit indicated that a constitutional challenge under Article III to the President's *ability* to remove Tax Court judges—as opposed to the challenges under Article II to *restrictions* on removability here—if successful, could be a basis for invalidating a ruling of the Tax Court on direct appeal of that ruling. *Id.* at 938. The D.C. Circuit proceeded to reject the constitutional claim on the merits. *Id.* at 938-39. Even putting aside that the constitutional claim in this case asserts basically the *opposite* of that in *Kuretski* (where the claim was that the Constitution *requires* independence), *Kuretski*'s statement about potential relief does not help Plaintiffs here because they are not appealing from any trial-like proceeding in which FHFA made an adjudicatory ruling against them in the nature of a judge deciding a case.

Lauer, 729 F.2d 1475, 1500 (D.C. Cir. 1984). As FHFA explained in its prior brief, FHFA SJ Mem. at 8-9, while the *de facto* officer doctrine does not necessarily apply of its own force here, it provides a useful analogue to the extent courts have used it to shield past, settled agency actions from attack even when the very ability of an official to hold office in the first place is at issue. After all, it is hard to see why courts should be *less* willing to shield past agency action from stale attacks when only the President's ability to remove the official (which may or may not ever be exercised), rather than the official's very authority to take action against citizens in the first place, is the source of concern.

Plaintiffs' attempts to dismiss the relevance of the *de facto* officer doctrine fall flat. Far from an "'ancient' doctrine that has fallen out of favor in recent decades" (Pls. SJ Mem. at 6), the Fifth Circuit upheld it in 2013, *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 352-53 (5th Cir. 2013), and the D.C. Circuit applied it even more recently, finding it did not insulate an NLRB adjudicatory order only because, unlike here, the company had "challenge[d] [the] officer's authority as a *defense* to the enforcement action." *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 82 (D.C. Cir. 2015), *aff'd on other grounds*, 2017 WL 1050977 (U.S. Mar. 21, 2017).

Plaintiffs' main argument is that the *de facto* officer doctrine can only apply if there is a *de jure* office. *See* Pls. SJ Mem. at 7-9. They rely heavily on a case from the 1800s in which the U.S. Supreme Court deferred to the Tennessee Supreme Court's conclusion that a law purporting to replace a county court established by the Tennessee Constitution with a new body was entitled to no effect, indeed "never became a law." *See Norton v. Shelby Cty.*, 118 U.S. 425, 441 (1886) ("As the act attempting to create the

office of commissioner never became a law, the office never came into existence. Some persons pretended that they held the office, but the law never recognized their pretensions, nor did the Supreme Court of the State."). *Norton* does not help Plaintiffs because their removal-restrictions challenge here, even if successful, would not make the FHFA Director something other than a *de jure* office and would not mean HERA never became a law. As discussed above, the Supreme Court specifically rejected the argument that the association of removal restrictions with a federal office renders that office not *de jure* or makes pretenders or usurpers out of its occupants. *See Free Enter. Fund*, 561 U.S. at 508-09 (holding that unconstitutional removal restrictions have "no effect . . . on the validity of any officer's continuance in office" and "the existence of the Board does not violate the separation of powers"), *supra* at 3-5.

Nor are Plaintiffs correct (Pls. SJ Mem. at 9-10) that the *de facto* officer doctrine is limited to "technical" arguments or unavailable in constitutional cases. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 142 (1976) (applying *de facto* officer doctrine to shield "past acts" of the Federal Election Commission despite successful structural constitutional challenge); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708 (D.C. Cir. 1996) (observing that "[i]n *Buckley*, the Supreme Court accorded *de facto* validity to all FEC proceedings and allowed the FEC to continue to function" despite "severe" constitutional violation). Plaintiffs rely principally on cases allowing litigants to challenge lower court judgments on direct appeal based on the fact that their judge lacked life tenure contrary to Article III, but the reasoning in those cases is narrowly confined to that judicial context. *See Nguyen v. United States*, 539 U.S. 69, 77 (2003) ("Whatever the force of the *de facto*

officer doctrine in other circumstances, an examination of our precedents concerning alleged irregularities in the assignment of judges does not compel us to apply it in these cases."); *see also Glidden Co. v. Zdanok*, 370 U.S. 530, 535-36 (1962) (plurality); *Wrenn v. Dist. of Columbia*, 808 F.3d 81, 84 (D.C. Cir. 2015). These cases hardly support withholding the *de facto* officer doctrine's protections in the very different circumstances presented here, where a financial institution conservator's entry into a financing amendment is attacked collaterally in a free-standing lawsuit years after the fact.

In short, whether the Court looks to the *de facto* officer doctrine for guidance, or follows the straightforward remedial analysis in *Free Enterprise Fund*, sustaining Plaintiffs' constitutional challenge would not provide a path to invalidation of the Third Amendment and would not afford Plaintiffs relief that would redress their alleged injury.

B. FHFA's Approval of the Third Amendment In Its Capacity as Conservator Was Not an Executive Function

As explained in FHFA's opening summary judgment brief, another reason Plaintiffs' separation-of-powers challenge would not invalidate the Third Amendment is that FHFA entered into that contract amendment in its capacity as Conservator. FHFA SJ Mem. at 9-11. Conservatorship of financial institutions is not the type of governmental executive function over which Article II commands that the President retain plenary control. Plaintiffs protest that HERA gives FHFA as Conservator additional powers beyond those of common-law conservators (Pls. SJ Mem. at 11), but do not explain why that transforms an FHFA conservatorship into an executive function of the type that requires close oversight by the President.

Plaintiffs also argue that the scope of the President's constitutional removal power does not depend on whether an official performs executive functions, citing *Morrison v. Olson*, 487 U.S. 654, 689 & n.28 (1988). But they get the point of the *Morrison* passage they rely on backwards. The Supreme Court was rejecting the absolutist position that the fact that the independent counsel performed "purely executive" functions *automatically* required that the President have the power to remove the independent counsel at will. *See id.* at 688-90. In other words, that the official performs executive functions is a necessary, *but not sufficient*, condition for a removal restriction to be found inconsistent with Article II. Nothing in that discussion suggests that the President's Article II powers require him to have the ability to supervise functions *not executive* in nature. On the contrary, the Court explained that the fundamental issue is whether removal restrictions "interfere with the President's exercise of the '*executive* power' and his constitutionally appointed duty to 'take care that the laws be faithfully *executed*.'" *Id.* at 689-90 (quoting U.S. Const., art. II; emphasis added).

The D.C. Circuit's recent decision in *John Doe Company* confirms that, contrary to Plaintiffs' position, the executive character of the agency actions challenged is of critical relevance in a removal-restrictions case. In that case, the company challenging the constitutionality of restrictions on the President's ability to remove the CFPB Director was aggrieved by a voluntary request for information the CFPB had propounded. The D.C. Circuit held that to establish standing to make the constitutional claim, the company was required "to demonstrate that the action of merely requesting information from private entities subject to regulation is by itself exclusively confined to the Executive

Branch." *John Doe Co.*, 849 F.3d at 1132-33. In other words, the plaintiff's separation-of-powers theory required it "to show that *only* the Executive Branch can demand information from regulated businesses or take such investigative steps," a showing the plaintiff was unable to make. *Id.* (emphasis in original). Similarly here, Plaintiffs' constitutional claim requires them to show that a Conservator's entry into financial contracts like the Third Amendment is the type of function performed *only* by the Executive Branch. That is a showing that Plaintiffs, like their counterparts in *John Doe Company*, have not made and cannot make.

Finally, Plaintiffs state that "FHFA cannot deny that its actions as conservator depend on the authorization and continuing supervision of FHFA as regulator." Pls. SJ Mem. at 13. They do not explain what they mean by that statement and cite no support for it except their own prior brief. When FHFA acts as Conservator, it functions in a capacity separate and legally distinct from that of regulator, and Plaintiffs have sued FHFA solely "in its capacity as Conservator." Compl. at p. 1 (caption). Plaintiffs are thus left without any nexus to connect their separation-of-powers theory with the non-executive conservatorship actions they allege caused their injury.

C. The Third Amendment Was Approved by an FHFA Acting Director

FHFA also established that Plaintiffs' separation-of-powers challenge to the "for cause" removal provision in HERA is irrelevant to the Third Amendment because the Acting Director who approved the Third Amendment was not even covered by that provision. FHFA SJ Mem. at 12-14.

Plaintiffs' main response again invokes the faulty premise that "there was no lawful office of FHFA Director" that could be occupied by Mr. DeMarco in an acting capacity because "an unconstitutional office . . . does not exist in the eyes of the Constitution." Pls. SJ Mem. at 14. As explained above, that view is simply wrong and inconsistent with precedent because removal restrictions, even if found to impinge on the President's Article II powers, do not render the underlying office void or lawless. *See supra* at 3-5. Plaintiffs also repeat arguments from their opening brief that the "for cause" removal provision for full Directors in 12 U.S.C. § 4512(b)(2) should be engrafted onto § 4512(f), the Acting Director provision. Pls. SJ Mem. at 14-16. But FHFA already explained how that approach disregards basic rules for interpreting statutory language, FHFA SJ Mem. at 13, to which Plaintiffs offer no rebuttal.

The fact that a separate part of HERA and the Paperwork Reduction Act each classify FHFA as an "independent agency" (Pls. SJ Mem. at 16) does not provide any basis for construing the "for cause" standard of § 4512(b)(2) as carrying over to Acting Directors serving temporarily under § 4512(f). Congress demonstrated in § 4512(b)(2) that it knew how to give the FHFA Director protection from removal except for cause, and it conspicuously did not include that same language four subsections later when it addressed Acting Directors. That juxtaposition bears far greater weight than anything Plaintiffs have to say on this score. Because the Acting Director who executed the Third Amendment (the sole source of Plaintiffs' asserted injury) on behalf of Fannie Mae and Freddie Mac did not enjoy the benefit of the "for cause" removal provision that lies at the

heart of Plaintiffs' separation-of-powers challenge, that entire claim is misdirected and academic in this case.

D. Plaintiffs' Allegations that Treasury Supported the Third Amendment Further Demonstrate the Irrelevance of Their Separation-of-Powers Theory

Finally, FHFA showed in its opening summary judgment brief that Plaintiffs' own allegations defeat their ability to show that their alleged injury here is traceable to any removal protection that might be deemed to have applied to the Acting Director. FHFA SJ Mem. at 15-16. Plaintiffs challenge what they term "joint FHFA-Treasury action" (ECF No. 32, Pls. Mem. in Opp. to Def. MTD at 54): a bilateral contract amendment approved, entered into, and signed by the Acting Director of FHFA *and* the Secretary of the Treasury, who is removable by the President at will. The necessary link for Plaintiffs to have standing is the notion that if the President had been able to remove FHFA's Director at will rather than only for cause, that greater susceptibility to Presidential control might have led FHFA to reject the Third Amendment. But that hypothesis collapses in the face of simultaneous support and approval by Treasury, an agency no one disputes was fully subject to Presidential control. It becomes even more of a *non sequitur* in the face of Plaintiffs' allegations that a "senior White House official" actively worked to encourage and bring about the Third Amendment. Compl. ¶ 19; *see also id.* ¶ 107.

Rather than trying to make a showing of traceability that their own Complaint belies, Plaintiffs ask to be exempted from the Article III requirements that every litigant in federal court must satisfy. They suggest traceability is unnecessary because "structural" separation of powers cases call for "automatic reversal." Pls. SJ Mem. at 17.

That argument directly conflicts with settled Supreme Court precedent, which requires every plaintiff to satisfy all three elements of standing: injury, traceability, and redressability. *See Allen v. Wright*, 468 U.S. 738, 751 (1984). Moreover, the cases they cite do not support any such exemption. *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), was an appeal from an FDIC administrative proceeding that the respondent defended, in part, by arguing the FDIC ALJ who tried and decided his case was not constitutionally serving in office. *Id.* at 1130. While the D.C. Circuit was willing to presume prejudice in that setting, it did not generally dispense with standing requirements in separation-of-powers cases or overrule its prior decision in *Committee for Monetary Reform v. Board of Governors of Federal Reserve System*, 766 F.2d 538 (D.C. Cir. 1985), applying such requirements in the separation-of-powers setting. *United States v. Davila*, 133 S. Ct. 2139 (2013), is even further afield; it involved a presumption of prejudice to a criminal defendant due to a magistrate's improper participation in plea discussions.

Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991), relied on by Plaintiffs, actually supports FHFA's position, not Plaintiffs' attempt to elude standing requirements. There, Washington area residents aggrieved by an airport expansion plan challenged the constitutionality of a Congressional Board of Review designed to steer airport policy toward higher-intensity operations. The Supreme Court confirmed, contrary to Plaintiffs' arguments in this case, that bedrock Article III standing principles apply no less in separation of powers cases than any other: "respondents must allege personal injury *fairly traceable* to the defendant's allegedly unlawful conduct and *likely to be redressed* by the requested

relief." *Id.* at 264 (emphases added). The Court found the plaintiffs' injury in *Airports Authority* "'fairly traceable' to the Board of Review's veto power because knowledge that the master plan was subject to the veto power undoubtedly influenced MWAA's Board of Directors when it drew up the plan." *Id.* at 264-65. Here, in contrast, Plaintiffs have not even tried to articulate how any injuries arising out of the Third Amendment are fairly traceable to the FHFA Director's "for cause" protection from removal. Again, Plaintiffs cannot plausibly suggest that *greater independence* tilted FHFA in favor of the Third Amendment when Treasury approved the same Amendment *without* such independence.[2]

Plaintiffs also state in passing that FHFA should be "judicially estopped" from questioning Plaintiffs' standing because FHFA has argued in other litigation that the Third Amendment was negotiated with Treasury at "arms' length." Pls. SJ Mem. at 18. FHFA has not argued in this case that the Third Amendment negotiations were anything other than arms' length, so there is no inconsistency. In any event, it is Plaintiffs' burden to establish standing (not FHFA's burden to disprove it), *see, e.g.*, *Williams v. Parker*, 843 F.3d 617, 623 (5th Cir. 2016), and estoppel cannot cure a lack of Article III standing. *See Lara v. Trominski*, 216 F.3d 487, 495 n.9 (5th Cir. 2000) ("We are especially wary of applying judicial estoppel to create subject matter jurisdiction in federal courts.").

To be sure, "'standing does not require *precise proof* of what the [agency's] policies might have been in [the] counterfactual world'" free of a separation-of-powers

[2] Plaintiffs imply that *Airports Authority* implicitly overrules *Committee for Monetary Reform*. Pls. SJ Br. at 18. In fact, the two decisions are perfectly consistent: both confirm that in order to have Article III standing, a plaintiff who seeks to bring a separation-of-powers claim must establish how his injury is

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problem. Pls. SJ Mem. at 17 (quoting *Free Enter. Fund*, 561 U.S. at 512 n.12) (emphasis added). But the problem here is not that Plaintiffs' "proof" is not "precise" enough; it is that Plaintiffs' whole theory of the case *negates* any reason to think that the FHFA might have rejected the Third Amendment in a "counterfactual world." Plaintiffs never explain how being under more direct supervision of an Administration that supported the Third Amendment could somehow have made FHFA more likely to part ways with the Administration and decline to enter into the Third Amendment.

II. PLAINTIFFS' CONSTITUTIONAL CHALLENGE TO FHFA'S STRUCTURE IS WHOLLY WITHOUT MERIT

In its opening summary judgment brief, FHFA showed that its structure comports with long-established separation-of-powers principles permitting independent agencies and that Plaintiffs' novel challenge had no support in jurisprudence. FHFA SJ Mem. at 16-25. Plaintiffs' latest arguments remain unavailing, and they still have not demonstrated that HERA's requirement that the President have "cause" in order to terminate a permanent FHFA Director is a restriction "of such a nature that [it] impede[s] the President's ability to perform his constitutional duty." *Morrison v. Olson*, 487 U.S. 654, 691 (1988).

A. The Court Should Not Follow the Defunct *PHH* Panel Opinion

Plaintiffs begin by urging this Court to adopt the reasoning of the obsolete D.C. Circuit panel opinion in *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016), *vacated and*

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fairly traceable to the alleged structural feature he complains about.

reh'g en banc granted, --- F.3d ---, 2017 WL 631740 (D.C. Cir. Feb. 16, 2017), which they rely on extensively as if it were good law, while not even acknowledging two lengthy, well-reasoned, never reversed or vacated opinions by district courts rejecting their arguments. *CFPB v. ITT Educ. Servs., Inc.*, --- F. Supp. 3d ---, 2015 WL 1013508, at *7-14 (S.D. Ind. Mar. 6, 2015); *CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1086-89 (C.D. Cal. 2014). The full D.C. Circuit is slated to rehear the *PHH* case en banc, and the panel opinion is not even good law within the D.C. Circuit, so this Court should decline Plaintiffs' invitation to follow it in this case.

Plaintiffs protest that the en banc D.C. Circuit only "vacated the panel's judgment, not its opinion." Pls. SJ Mem. at 19. But the D.C. Circuit itself does not appear to see it that way. In its recent *John Doe Company* decision, the D.C. Circuit confronted a claim by another litigant trying to ride on the coattails of *PHH*. The D.C. Circuit soundly rejected the claim, leading off by emphasizing that "the *PHH* decision on which the Company relies has now been vacated." *John Doe Co.*, 849 F. 3d at 1132. Plaintiffs are at a loss to explain why this Court should give more credence to what the D.C. Circuit repeatedly called "the vacated majority opinion in *PHH*," *id.*, than that Circuit itself does.

Plaintiffs also emphasize that the United States Department of Justice recently filed an en banc stage *amicus* brief in the *PHH* case, taking the position that the restriction on the President's ability to remove the CFPB Director is unconstitutional. Pls. SJ Mem. at 20, Ex. A; *see also* ECF No. 46, Treasury Defs. Advisory. However, the DOJ brief in *PHH* did not take a position on the constitutionality of HERA's provision requiring cause for removal of the FHFA Director. The brief in fact contrasts FHFA's

narrow role as a safety and soundness regulator of a handful of specified "regulated entities" with the CFPB's sweeping authority over "any person that engages in offering or providing a consumer financial product or service." DOJ *PHH* Brief at 19.

Moreover, the DOJ brief in *PHH* explains that the proper remedy for an unconstitutional removal restriction simply "is to sever the provision limiting the President's authority . . . , not to declare the entire agency and its operations unconstitutional." *Id*. That is precisely why a holding that the "cause" provision of HERA is unconstitutional would not help Plaintiffs here and why the Court need not reach the issue in this case. *See supra* Section I.A. In *PHH*, the limited forward-looking remedy would provide the plaintiff a tangible benefit to support standing because the plaintiff is subject to the CFPB's regulation and enforcement on a continuing basis, including potentially a retrial on remand. Here, in contrast, a decree giving the President the ability to remove the FHFA Director at will in the future would provide no meaningful benefit to Plaintiffs, and they consequently lack standing to pursue the claim.

B. Congress's Enactment of HERA Is Entitled to a Presumption of Constitutionality

Plaintiffs dispute that HERA enjoys a presumption of constitutionality, Pls. SJ Mem. at 20-21, but that is also wrong. In a case involving a separation-of-powers challenge to a statute, no less than any other form of constitutional challenge, when a court "is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should do so only for the most compelling

constitutional reasons." *Mistretta v. United States*, 488 U.S. 361, 364 (1989) (internal quotation marks omitted). The Third Circuit case Plaintiffs cite for the proposition that the presumption of constitutionality "does not apply . . . in separation of powers cases" (Pls. SJ Mem. at 20) declined to apply that presumption to *unilateral Presidential actions* (recess appointments that avoided the Senate's advice and consent role), not duly enacted statutes. *See NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 240-41 (3d Cir. 2013).[3] Courts apply the presumption of constitutionality without hesitation to statutes subject to separation-of-powers challenges. *See, e.g.*, *ITT*, 2015 WL 1013508, at *13 (rejecting separation-of-powers challenge to CFPB and emphasizing courts "should declare legislation unconstitutional only when '[t]he opposition between the constitution and the law [is] such that the judge feels a clear and strong conviction of their incompatibility with each other'") (quoting *Fletcher v. Peck*, 10 U.S. 87, 128 (1810) (Marshall, C.J.)).

C. Plaintiffs' Arguments that Multi-Member Boards Promote Presidential Management of the Executive Branch Are Makeweight

Plaintiffs do not dispute that when an agency is headed by *multiple* individuals, nothing in the Constitution prevents Congress from giving *all* of them protection from removal by the President. But Plaintiffs claim that Congress is somehow disabled from

[3] Plaintiffs also rely on a passage from Justice Scalia's dissent in *Morrison v. Olson* that neither drew support from any other Justice, nor cited any support for the notion that statutes are not presumed constitutional in separation-of-powers cases. In any event, Justice Scalia's point was that where "the political branches are (as here) in disagreement, neither can be presumed correct." *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting). Unlike *Morrison*, which pitted Congress directly against an Executive Branch that sought to invalidate the independent counsel statute being used against it, this case involves no such inter-branch dispute.

enacting the same removal protection when the agency has a single head. According to Plaintiffs, an "independent agency headed by a single individual" is subject to "reduced" Presidential control, and presents an "increased risk of departures from presidential policy," compared to an independent multi-member board. Pls. SJ Mem. at 21-22. Those suggestions are not supported by authority and do not stand up to scrutiny.

For example, Plaintiffs note that "[b]ecause the terms of commission members are staggered, a President inevitably will have the ability to influence the deliberations of a multi-member commission such as the FDIC by appointing one or more members." *Id.* at 21. But staggered terms also may be likely to *impede* Presidential control, because the President's chosen appointee will share diffuse power with multiple co-equal individuals aligned with the previous Administration. Plaintiffs insist that the bipartisanship feature of some commissions and boards helps the President by assuring that "at least some members will belong to the President's party," *id.*, but they ignore the flip side that it equally guarantees at least some members will owe their loyalty to the opposition party. And Plaintiffs' assertion that "[m]ulti-member commissions also must deliberate and compromise in ways that reduce the risk that they will adopt policies that are inconsistent with those of the President" (*id.*) is makeweight with no logical heft behind it. A President might well believe a particular situation calls for quick and bold action, in which case the deliberation and compromise characteristic of multi-member boards will frustrate, not facilitate, his policy objectives.

Depending on the particulars of a specific case, a President may find it easier to work with an individual head of an independent agency in some cases, and with a multi-

member board in others. But nothing Plaintiffs have offered suggests that a multi-member board structure offers any kind of inherent or systematic advantages to Presidential control of the Executive Branch. On the contrary, as the court explained in *Morgan Drexen*, if anything it is likely to be more, not less, difficult for a President to influence the policy direction of an agency headed by a multi-member commission than one headed by a single individual. *See Morgan Drexen*, 60 F. Supp. 3d at 1088 ("[I]f the President had needed to fully revamp the leadership of the FTC at [the] time [of *Humphrey's Executor*] . . . he would have been required to affect five separate for cause removals, while only one is required in order to change the leadership of the CFPB."); *accord ITT*, 2015 WL 1013508, at *11 n.10 (finding "no support for the notion that creating [an agency] with a single head rather than a commission structure necessarily runs counter to constitutional principles"). There is accordingly no reason to doubt that the judicial approval of independent agencies embodied in *Humphrey's Executor* and its progeny applies with full force to the structure Congress chose when it created FHFA.

D. Plaintiffs' Judicial Review and Non-Delegation Arguments Are Irrelevant

Plaintiffs persist (Pls. SJ Mem. at 22-23) in arguing that Congress's directive that "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver," 12 U.S.C. § 4617(f), somehow enhances their Article II claim. But their Complaint makes no argument that § 4617(f) itself is unconstitutional, and they fail to respond to the authority FHFA cited (FHFA SJ Mem. at 23) that Congress has wide latitude to enact such provisions. Plaintiffs have not even

tried to demonstrate how § 4617(f) bears on "whether the removal restriction[]" applicable to an FHFA Director is "of such a nature that [it] impede[s] the President's ability to perform his constitutional duty." *Morrison*, 487 U.S. at 691.

Plaintiffs also intimate for the first time in their most recent brief that HERA may present some kind of non-delegation issue. *See* Pls. SJ Mem. at 23 (citing *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001)). As the Fifth Circuit has explained, "the limits on delegation are frequently stated, but rarely invoked: the Supreme Court has not struck down a statute on nondelegation grounds since 1935." *United States v. Whaley*, 577 F.3d 254, 263 (5th Cir. 2009). The "modern test" is simply "whether Congress has provided an intelligible principle," which may be "broad," to guide the agency's exercise of its discretion. *Id.* Plaintiffs' non-delegation argument consists of nothing more a hyperbolic charge that the D.C. Circuit's *Perry Capital* decision "reads out of the statute all congressional guidance as to how FHFA should exercise its conservatorship powers." Pls. SJ Mem. at 23. That the D.C. Circuit did not agree with the interpretations advocated by Plaintiffs hardly suggests that Congress did not lay down any "intelligible principles" in the lengthy and detailed statutory text that comprises § 4617. In any event, as with Plaintiffs' judicial review argument, any non-delegation issue would have nothing to do with whether the protection from arbitrary removal that HERA confers on the FHFA Director impermissibly interferes with the President's Article II duties, the sole constitutional claim raised by the Complaint.

E. While Unnecessary to Sustain HERA's Constitutionality, FHFA's Structure Comports with a Longstanding Constitutional Model

Plaintiffs finally claim that FHFA's structure is constitutionally suspect because, they say, there is not a "longstanding practice" of independent agencies headed by a single individual, only "scattered examples." Pls. SJ Mem. at 23-25. As an initial matter, Plaintiffs assign far too much weight to this issue. Even if FHFA's structure were novel (as discussed below, it is not), that would not condemn it as unconstitutional. After all, there will necessarily be a first time for any new agency structure Congress may choose to adopt, but the Constitution has never been thought to forbid Congress from experimenting with new structures that do not offend separation-of-powers principles. Regardless of whether any "direct analogue" to FHFA's structure "has existed before, '[o]ur constitutional principles of separated powers are not violated . . . by mere anomaly or innovation.'" *Morgan Drexen*, 60 F. Supp. 3d at 1087 n.2 (quoting *Mistretta v. United States*, 488 U.S. 361, 385 (1989)).[4]

More importantly, FHFA's structure is not novel at all. In addition to other examples cited in FHFA's earlier brief (FHFA SJ Mem. at 23-25), the Office of the Comptroller of the Currency serves as a longstanding precedent for a financial institution regulator headed by a single individual protected from removal at will and independent

[4] *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), is not to the contrary. That case did not address statutes or agency structures enacted by Congress. Rather, in part because the Court had not previously addressed the President's recess appointment power, the Court surveyed the background history of "thousands of recess appointments" over the "past 200 years" to discern what length of recess the President and Senate have viewed as triggering the President's recess appointment power. *Id.* at 2560, 2566-67.

from the Administration. Plaintiffs continue to insist that the President can remove the Comptroller "at will." Pls. SJ Mem. at 24. But "at will" removal can be "for a good reason, a bad reason, *or no reason at all*," *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 606 (2008) (emphasis added), which cannot be squared with the statutory requirement that the President must indeed have "reasons" to remove the Comptroller (and, further, communicate them to the Senate). 12 U.S.C. § 2.

As previously noted, case law near the time of the OCC's creation reflects the understanding that Congress limited the President's ability to remove the Comptroller at will. FHFA SJ Mem. at 24 (citing *Case of the Dist. Att'y of United States*, 7 F. Cas. 731, 737 (E.D. Pa. 1868)). Plaintiffs contend that authority addressed only an obsolete 1863 provision that had unconstitutionally required Senate advice and consent for a removal and was repealed the next year. That is wrong; the 1868 opinion leaves no doubt that the court fully understood the two iterations of the statute. *See* 7 F. Cas. at 737 n.4 ("The comptroller thus appointed was, according to the act of 1863, to hold the office for a certain term, unless sooner removed by the president by and with the advice and consent of the senate, and, according to the act of 1864, to hold for such term unless sooner removed by the president upon reasons to be communicated by him to the senate."). When the court identified the OCC as the rare instance where, as of 1868, "the power of congress . . . to prevent removals at the mere will of the president" had been "exercised,"

id. at 737, there is no reason to think the court did not have in mind the statute as it was then in force.[5]

Moreover, Plaintiffs do not address the provision in the OCC statute that the Secretary of the Treasury "may not delay or prevent the issuance of any rule or the promulgation of any regulation by the Comptroller of the Currency, and may not intervene in any matter or proceeding before the Comptroller of the Currency (including agency enforcement actions), unless otherwise specifically provided by law." 12 U.S.C. § 1(b)(1). It is hard to conceive of a clearer indicium of agency independence than this. Plaintiffs' position that the President can remove the Comptroller at will would deprive this provision of any practical effect because it would give an Administration free rein to delay or prevent an OCC rule or regulation, or influence an OCC proceeding, simply by wielding the threat of at-will removal. The Court should hesitate to embrace a construction so inconsistent with the cardinal rule that "each part or section of a statute should be construed in connection with every other part or section to produce a harmonious whole." *United States v. Williams*, 400 F.3d 277, 281 n.2 (5th Cir. 2005).

Reading 12 U.S.C. § 2 according to its plain language to require that the President have "reasons" for removing the Comptroller goes hand in hand with 12 U.S.C. § 1's

[5] More recent historical surveys corroborate that the "reasons" provision in the 1864 National Bank Act "limit[ed] [the President's] power to remove the Comptroller of the Currency." *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 713 n.27 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (quoting Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 Harv. J.L. & Pub. Pol'y 667, 734-36 (2003)). As with the 1868 judicial opinion, Plaintiffs err in characterizing this statement as solely describing the short-lived Senate advice and consent provision in the 1863 legislation. The scholars Judge Kavanaugh quotes cited the 1864 superseding legislation deleting that provision, not just the 1863 version. *See* Calabresi & Yoo, 26 Harv. J.L. & Pub. Pol'y at 734 n.375.

assurance to the Comptroller of a certain level of independence from the Administration.[6] Indeed, each time in the last three decades a Comptroller's five-year term has straddled multiple Presidential Administrations (including of different political parties), the Comptroller has stayed on in the new Administration to finish out his term without being replaced. *See* OCC, Past Comptrollers of the Currency, http://goo.gl/bjmJJy. That is what one would expect to see with an independent agency, and not with one whose head serves at the pleasure of the President. Thus, the OCC serves as a longstanding precedent for a financial institution regulator headed by a single individual protected from removal at will and independent from the Administration, and further confirms the constitutionality of HERA's provision requiring cause for removal of the FHFA Director.

CONCLUSION

For the foregoing reasons, FHFA respectfully requests that the Court grant summary judgment for FHFA on Count IV.

[6] Plaintiffs take the position elsewhere in their brief that the Paperwork Reduction Act's classification of an agency as an "independent regulatory agency" means the agency's head cannot be removed at will. Pls. SJ Mem. at 16. By that measure, the OCC is plainly independent and the Comptroller protected from removal at will. *See* 44 U.S.C. § 3502(5) ("the term 'independent regulatory agency' means . . . [among other agencies] Office of the Comptroller of the Currency").

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon the parties to this action by serving a copy upon each party listed below on April 3, 2017, by the Electronic Filing System.

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