**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

MICHAEL ROP, *et al.*,

Plaintiffs,

v.

THE FEDERAL HOUSING FINANCE AGENCY, *et al.*,

Defendants.

Case No. 1:17-cv-00497

**Oral Argument Requested**

**BRIEF OF FHFA DEFENDANTS IN SUPPORT OF MOTION TO DISMISS**
**(ORAL ARGUMENT REQUESTED)**

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## INTRODUCTION

This case is the latest in a protracted series of civil actions around the country in which shareholders of government-sponsored enterprises Fannie Mae and Freddie Mac (the "Enterprises") attack agreements between the Federal Housing Finance Agency ("FHFA"), as Conservator of those Enterprises, and the U.S. Department of the Treasury, providing for an extraordinary infusion of billions of dollars of capital into those Enterprises. Specifically, Plaintiffs challenge the Third Amendment to preferred stock purchase agreements between the Conservator and Treasury. Numerous courts have roundly rejected these claims.

While the prior lawsuits generally sought review of the Third Amendment under the Administrative Procedure Act, this action takes a new and different tack. Rather than asking the Court to rule on the merits of the Third Amendment, Plaintiffs advance a panoply of novel theories that FHFA's structure and the statute creating FHFA are unconstitutional and therefore the Third Amendment must be vacated.

Those claims are entirely without merit, and one court has already rejected Plaintiffs' principal claim—that it is unconstitutional for FHFA to have a Director removable by the President only for cause. That claim fails under longstanding Supreme Court precedent, as do Plaintiffs' other claims. The Court should dismiss the Complaint with prejudice.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. Fannie Mae, Freddie Mac, and FHFA

Fannie Mae and Freddie Mac are government-sponsored enterprises chartered by Congress to provide liquidity to the mortgage market by purchasing residential loans from banks and other lenders. *See* Am. Compl. ¶¶ 16-17, PageID.201. During the first half of 2008, the Enterprises suffered multi-billion dollar losses on their mortgage portfolios and guarantees. *See* Am. Compl. ¶ 33, PageID.209. In July 2008, "[c]oncerned that a default by Fannie and Freddie

would imperil the already fragile national economy," *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 599 (D.C. Cir. 2017), Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654, 2661 (codified at 12 U.S.C. § 4511 *et seq*.).

HERA created a new agency, FHFA, to supervise and regulate the Enterprises. 12 U.S.C. § 4511. Congress provided that FHFA would be headed by a Director appointed by the President and confirmed by the Senate to serve "for a term of 5 years, unless removed before the end of such term for cause by the President." *Id.* § 4512(b).

Congress also provided that FHFA would have three Deputy Directors. *Id.* §§ 4512(c), (d), (e). To ensure continuity of agency operations during a vacancy in the office of Director, Congress empowered "the President [to] designate [one of the three Deputy Directors] to serve as acting Director until . . . the appointment of a successor pursuant to subsection (b)." *Id.* § 4512(f). Congress did not impose a time limit on such acting service, nor did it place any cause or other restrictions on the President's power to withdraw such a designation.

Congress authorized FHFA to place the Enterprises in conservatorship "for the purpose of reorganizing, rehabilitating, or winding up [their] affairs." *Id.* § 4617(a)(2). HERA further amended the Enterprises' charters to authorize the U.S. Treasury Department to purchase securities from the Enterprises to "provide stability to the financial markets," "prevent disruptions in the availability of mortgage finance," and "protect the taxpayer." *Id.* §§ 1455(*l*), 1719(g).

**B. The Conservatorships and Preferred Stock Purchase Agreements**

On September 6, 2008, having concluded that the Enterprises could not operate safely and soundly and fulfill their critical statutory mission, FHFA placed the Enterprises into conservatorships. Am. Compl. ¶ 37, PageID.211. Simultaneously, Treasury used its new authority under HERA to purchase Enterprise-issued securities via Senior Preferred Stock

Purchase Agreements ("PSPAs"). Am. Compl. ¶ 42, PageID.213. In exchange for senior preferred stock, Treasury committed to advance funds to each Enterprise for each quarter in which that Enterprise's liabilities exceeded its assets, so as to maintain the positive net worth of that Enterprise. Am. Compl. ¶ 43, PageID.213. Treasury originally agreed to advance up to $100 billion per Enterprise. *Id.* Each Enterprise committed to pay Treasury a 10% annual dividend, assessed quarterly, based on the total cumulative amount drawn from Treasury (known as the liquidation preference), as well as an annual periodic commitment fee reflecting the "market value" of Treasury's total funding commitment. *See* Am. Compl. ¶¶ 47, 52, PageID.214, 217.

In the ensuing years, Treasury provided the Enterprises with billions of dollars in funding. In 2009, the PSPAs were amended twice, first to double Treasury's funding commitment to $200 billion per Enterprise and then to remove the cap entirely through the end of 2012. Am. Compl. ¶ 54, PageID.218.

### C. The Designation of Edward DeMarco as Acting FHFA Director and Unsuccessful Nomination of Joseph Smith for FHFA Director

Meanwhile, in August 2009, the original FHFA Director, James B. Lockhart III, resigned. Am. Compl. ¶ 55, PageID.218. At that time, career civil servant Edward DeMarco was serving as one of FHFA's Deputy Directors. *Id.* ¶ 56, PageID.218. Given the vacancy created by Mr. Lockhart's resignation, on August 25, 2009, the President designated Deputy Director DeMarco to serve as acting Director pursuant to 12 U.S.C. § 4512(f). *Id.*

On November 12, 2010, President Obama nominated Joseph Smith as FHFA Director. *See* Am. Compl. ¶ 57, PageID.219; 156 Cong. Rec. S7911 (Nov. 15, 2010). Although the Senate Banking Committee approved the nomination, opposition blocked a vote in the full Senate,

forcing the President to withdraw the nomination. *See* Am. Compl. ¶ 57, PageID.219; 156 Cong. Rec. S11071 (Dec. 22, 2010).

**D. The Third Amendment to the Preferred Stock Purchase Agreements**

As the cumulative amount of Treasury's funding climbed into the hundreds of billions, the Enterprises' corresponding dividend obligations—calculated as 10% of the Treasury liquidation preference—were substantial. *See* Am. Compl. ¶ 70, PageID.226-227. Between 2009 and 2011, the Enterprises' net worth was not enough to pay the dividend, and they drew billions more from Treasury to make their dividend payments. *See id.* Those draws increased Treasury's liquidation preference and the Enterprises' future dividend obligations. *See id.* Both Enterprises advised in mid-2012 SEC filings that the dividends they owed to Treasury exceeded their annual income at any point in their history (with one exception in Freddie Mac's case), and that they did not expect to generate income in excess of those dividend obligations over the long term.[1]

On August 17, 2012, FHFA and Treasury executed the Third Amendment to the PSPAs, which is the focus of this litigation. Am. Compl. ¶ 84, PageID.233. The Third Amendment replaced the fixed-rate 10% annual dividend with a quarterly variable dividend in the amount (if any) of each Enterprise's positive net worth, subject to a declining capital reserve. *Id.* The Third Amendment also suspended the Enterprises' obligation to pay an annual periodic commitment fee to Treasury. *Id.* Mr. DeMarco, as Acting Director, approved the Third Amendment on

[1] *See* Fannie Mae, Quarterly Report (Form 10-Q), at 4, 12 (Aug. 8, 2012), http://goo.gl/bGLVXz; Freddie Mac, Quarterly Report (Form 10-Q), at 8, 10 (Aug. 7, 2012), http://goo.gl/2dbgey.

behalf of FHFA, in its capacity as Conservator of the Enterprises; the Secretary of the Treasury approved the Third Amendment on behalf of Treasury.

The Third Amendment thus relieved the Enterprises from obligations to pay fixed dividends of approximately $19 billion annually plus commitment fees equal to the market value of Treasury's massive and historic commitment. Rather, if in a given quarter an Enterprise's net worth is negative, it pays no dividend at all. If an Enterprise's net worth is positive, it pays that amount as a dividend, whether that amount happens to be more or less than the 10% dividend obligation previously in effect.

### E. The Nomination and Confirmation of FHFA Director Watt

On May 1, 2013, President Obama nominated Rep. Melvin L. Watt as FHFA Director. Am. Compl. ¶ 57, PageID.219. The Senate Banking Committee approved the nomination, 159 Cong. Rec. S5799 (July 18, 2013), but it was filibustered in the full Senate, 159 Cong. Rec. S7706 (Oct. 31, 2013). After the Senate took the historic action of abolishing the filibuster for certain executive nominees, Rep. Watt was confirmed. 159 Cong. Rec. S8417-18 (Nov. 21, 2013); 159 Cong. Rec. S8593 (Dec. 10, 2013). Over eight months after being nominated, Mr. Watt was sworn in as FHFA Director on January 6, 2014 for a five-year term. Am. Compl. ¶ 57, PageID.219.

### F. The Coordinated Shareholder Litigation Campaign Attacking the Third Amendment

Beginning in 2013, shareholders of the Enterprises have waged a coordinated litigation campaign attacking the Third Amendment in numerous courts across the country. For the first three years of litigation, the shareholders claimed that the Conservator acted outside its statutory authority and violated the Administrative Procedure Act by executing the Third Amendment.

Every court that considered those arguments rejected them.[2] In late 2016, shareholder plaintiffs filed a new action in Texas federal court alleging, in addition to APA counts, that HERA violates the Constitution by establishing FHFA as an independent agency headed by a single Director removable by the President only for cause. The court dismissed that action as well. *See Collins v. FHFA*, 2017 WL 2255564, at *4-6 (S.D. Tex. May 22, 2017), *appeal docketed*, No. 17-20364 (5th Cir.).

In this action, filed the week after the court dismissed *Collins*, Enterprise shareholders rehash the same removal restriction claim rejected in *Collins*. Plaintiffs also allege that FHFA's structure violates the separation of powers for additional reasons; that the FHFA Acting Director who approved the Third Amendment was acting in violation of the Appointments Clause; and that HERA violates the nondelegation doctrine. Shortly after this case was filed, yet another group of Enterprise shareholders filed a complaint alleging the same claims in Minnesota federal court. *Bhatti v. FHFA et al.*, No. 17-cv-2185 (D. Minn. June 22, 2017).

## ARGUMENT

### I. THE COURT SHOULD DISMISS PLAINTIFFS' CONSTITUTIONAL CHALLENGES TO FHFA'S STRUCTURE (COUNTS I AND II)

Plaintiffs allege in Count I that the Third Amendment should be vacated because HERA "violates the President's constitutional removal authority" 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." Am. Compl. ¶ 136, PageID.257-258. Plaintiffs allege in Count II that "this

[2] *See, e.g.*, *Perry Capital LLC v. Mnuchin*, 864 F.3d 591 (D.C. Cir. 2017); *Roberts v. FHFA*, --- F. Supp. 3d ----, 2017 WL 1049841 (N.D. Ill. Mar. 20, 2017), *appeal docketed*, No. 17-1880 (7th Cir.); *Saxton v. FHFA*, 2017 WL 1148279, at *13 (N.D. Iowa Mar. 27, 2017), *appeal docketed*, No. 17-1727 (8th Cir.); *Robinson v. FHFA*, 223 F. Supp. 3d 659, 670 (E.D. Ky. 2016), *appeal docketed*, No. 16-6680 (6th Cir.); *Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828, 840 n.6 (S.D. Iowa 2015).

feature of FHFA's structure" violates the separation of powers "when combined with" HERA's funding mechanism for FHFA and its limitations on judicial review of certain FHFA actions. Am. Compl. ¶¶ 147-149, PageID.261-262.

The Court should dismiss both counts for failure to state a claim because (a) Plaintiffs lack Article III standing to assert the claims, (b) Plaintiffs' legal theories are contrary to longstanding Supreme Court precedent upholding the constitutionality of independent agencies, and (c) the funding mechanism and limitations on judicial review Congress chose to adopt for FHFA are irrelevant to the constitutionality of FHFA's structure.

### A. Plaintiffs Lack Standing to Assert Their Constitutional Challenges to FHFA's Structure

To have Article III standing to challenge the constitutionality of a statute, Plaintiffs must show an injury-in-fact, "a causal link . . . between the injury" and the alleged constitutional violation (*i.e.*, traceability), and a likelihood that the injury "will be redressed by a favorable decision" (*i.e.*, redressability). *Midwest Media Prop., L.L.C. v. Symmes Twp.*, 503 F.3d 456, 461 (6th Cir. 2007); *see also Comm. for Monetary Reform v. Bd. of Gov. of Fed. Reserve Sys.*, 766 F.2d 538, 542-43 (D.C. Cir. 1985) (dismissing separation-of-powers claim for lack of standing). Plaintiffs claim to have been injured by the Third Amendment. But that injury is not traceable to the requirement of cause for removal of a Senate-confirmed FHFA Director, and would not be redressed by a judicial holding that such a cause requirement is unconstitutional.

#### 1. Plaintiffs' Alleged Injury Is Not Traceable to the Tenure Protection For Senate-Confirmed FHFA Directors

For two independent reasons, Plaintiffs cannot show a causal link between an FHFA Director's tenure protection and their alleged injury. *First*, the Conservator's decision to enter into the Third Amendment was made by an official who did not have the allegedly unconstitutional tenure protection. Plaintiffs attack 12 U.S.C. § 4512(b)(2), which provides that

an FHFA Director appointed by the President and confirmed by the Senate shall serve "for a term of 5 years, unless removed before the end of such term for cause by the President." But Plaintiffs concede that an *acting* Director, *not* a full Director confirmed by the Senate for a term of five years, made the decision on behalf of FHFA to enter into the Third Amendment. Am. Compl. ¶¶ 56-59, PageID.218-220.

As Plaintiffs further concede, the circumstances under which someone at FHFA may serve as acting Director are governed by a *separate* provision of the statute, § 4512(f). Am. Compl. ¶ 56, PageID.218. Section 4512(f) does not give an acting Director any fixed term nor does it contain any "cause" limitations on the President's authorities; rather, it simply provides that the designated Deputy Director may act as Director until a permanent Director is appointed and confirmed or the acting designation is withdrawn. Plaintiffs therefore cannot show any causal link between the for-cause removal provision in § 4512(b)(2) and the Third Amendment.

*Second*, the crux of Plaintiffs' claim is that "the President has less influence over FHFA's decisions" than the Constitution requires. Am. Compl. ¶ 136, PageID.257-258. Thus, traceability requires Plaintiffs to demonstrate that *more* Presidential influence over FHFA might have spurred FHFA to reject the Third Amendment. But Plaintiffs' own allegations indicate exactly the opposite. Plaintiffs allege that the Third Amendment is a contract between FHFA as Conservator and the Secretary of the Treasury, and all parties agree that the Secretary is removable by the President at will and subject to plenary Presidential control. *See, e.g.*, Am. Compl. ¶ 84, PageID.233. Had the President not supported the Third Amendment, he of course could have directed Treasury not to enter into it. He did not, and the Complaint gives no reason to suspect that more presidential influence over Treasury's contractual counterparty would have led to any different outcome.

### 2. Plaintiffs' Alleged Injury Would Not Be Redressed If They Were to Prevail on Their Constitutional Claim

Nor would a holding that § 4512(b)(2) is unconstitutional redress Plaintiffs' alleged injury. When a limitation on the President's removal authority crosses constitutional lines (which is not the case here), the remedy is to declare that limitation prospectively inoperative, not to void past actions by the official who was protected from removal. Where, as here, Plaintiffs' alleged injury stems from past action that would not be undone by a victory in court, Plaintiffs cannot show redressability.

In *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), cited extensively in the Complaint, the Supreme Court held unconstitutional a unique set of restrictions on the President's ability to remove members of the Public Company Accounting Oversight Board ("PCAOB"). However, neither the Supreme Court nor the lower courts on remand vacated the actions by the PCAOB that were alleged to cause the plaintiff's injury. Rather, the Court "reject[ed]" the plaintiff's argument that the removal restrictions rendered "all power and authority exercised by [the Board] in violation of the Constitution." *Id.* at 508 (internal quotation marks omitted). As the Court explained, it is not "the existence of the Board" that "violate[s] the separation of powers," but the particular removal restrictions in the statute. *Id.* at 508-09. "When confronting a constitutional flaw in a statute, [courts] try to limit the solution to the problem"; thus, the appropriate remedy for such a claim is simply to excise the problematic provisions so that they do not constrain the President's powers going forward. *Id.* at 508 (internal quotation marks omitted); *accord John Doe Co. v. CFPB*, 849 F.3d 1129, 1133 (D.C. Cir. 2017).

Thus, if Plaintiffs here were to succeed on their constitutional claim, the result would be an order striking the "cause" limitation from § 4512(b)(2) and altering the conditions under

which an FHFA Director might be removed by the President in the future. That would not help Plaintiffs, who complain not of any current or anticipated future action by FHFA but rather about entry into the Third Amendment four and a half years ago. Plaintiffs protest that they are suffering "ongoing injuries," Am. Compl. ¶ 144, PageID.260, but any such injuries stem from the historical adoption of the Third Amendment.

Even if vacatur of certain agency actions could in theory be a potential remedy for allegedly unconstitutional removal restrictions, vacatur would not be an appropriate remedy here for the additional reason that the action challenged here—entry into the Third Amendment—was not even an executive action. The theoretical underpinning for Count I is that "the Constitution vests the Executive power in the President," and that limits on the control of other officials who perform executive functions could hinder the President in performing his duty to "'take Care that the Laws be faithfully executed.'" Am. Compl. ¶ 135, PageID.257 (quoting U.S. Const. art. II, §§ 1, 3). As the *Collins* court held, however, "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." 2017 WL 2255564, at *5.

When government agencies like FHFA serve as conservators or receivers for financial institutions, they "step into the shoes" of those institutions. Thus, when acting on behalf of those institutions, they are not acting as the Government at all, let alone carrying out functions that are "Executive" in character. *Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017); *Meridian Investments, Inc. v. Fed. Home Loan Mortg. Corp.*, 855 F.3d 573, 579 (4th Cir. 2017). Here in particular, when the Conservator approved the Third Amendment, it was engaging in a business transaction on behalf of private entities, not carrying out the type of law enforcement or other executive governmental functions that the Constitution commits to the President's supervision.

The Amended Complaint alleges that "FHFA is subject to the Constitution's separation of powers when it acts as conservator" because it can "make decisions that bind third parties" and "does not act as a fiduciary." Am. Compl. ¶ 140, PageID.258-259. But whether an entity functions in a governmental and executive capacity does not turn on whether its decisions affect third parties or whether it acts as a fiduciary.

The D.C. Circuit's recent decision in *John Doe Co.* demonstrates why it matters that FHFA's entry into the Third Amendment was not a governmental executive action. There, the court held that claims challenging limitations on the President's ability to remove the CFPB Director could be a basis for invalidating an ongoing CFPB investigative request only if the act of "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; *see id.* at 1133 (standing requires showing that "only the Executive Branch can demand information from regulated businesses"); *accord Future Income Payments*, 2017 WL 2190069, at *9. Likewise here, to the extent that Plaintiffs' Article II claim could provide a possible basis for invalidating the Third Amendment at all, at a minimum such a theory would require that entry into stock purchase agreements and amendments be an activity exclusively confined to the Executive Branch. Because it is not, an order declaring HERA's for-cause removal provision unconstitutional would not invalidate the Third Amendment, redressability is lacking, and Plaintiffs do not have standing.

### B. HERA's Limitation on the President's Power to Remove a Senate-Confirmed FHFA Director Is Constitutional Under Longstanding Precedent

If Plaintiffs have standing, their constitutional challenge to FHFA's structure is nevertheless wholly without merit. The Court should dismiss it for failure to state a claim pursuant to well-established Supreme Court precedent.

### 1. FHFA's Structure Is Consistent With Longstanding Supreme Court Precedent Endorsing Independent Agencies

Over eighty years ago, the Supreme Court held in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), that Congress may "create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause." *Free Enter. Fund*, 561 U.S. at 483. In *Humphrey's Executor*, the Court "found it 'plain' that the Constitution did not give the President 'illimitable power of removal' over the officers of independent agencies." *Morrison v. Olson*, 487 U.S. 654, 687 (1988) (quoting *Humphrey's Ex'r*, 295 U.S. at 629). The Court has repeatedly reaffirmed this central principle, most recently in *Free Enterprise Fund* in 2010. *See Wiener v. United States*, 357 U.S. 349, 352 (1958); *Morrison*, 487 U.S. at 686-87; *Free Enter. Fund*, 561 U.S. at 483, 509. In the modern era, Congress has created dozens of independent agencies, performing a vast array of important functions, based on this judicially approved model. *CFPB v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 899 (S.D. Ind. 2015) (describing "the independent regulatory agency with enforcement power" as "a theme . . . that has been a recurring feature of the modern administrative state").

As the Southern District of Texas recently held in rejecting an identical claim by other Enterprise shareholders, "[v]iewed in light of this Supreme Court rubric, the structure of the FHFA does not violate the Constitution." 2017 WL 2255564, at *5. Congress created FHFA to regulate and supervise, among select other entities, Fannie Mae and Freddie Mac, financial institutions that play a vital role in housing finance. It has long been recognized that "[i]ndependence from presidential control is arguably important if agencies charged with regulating financial institutions . . . are to successfully fulfill their responsibilities; people will likely have greater confidence in financial institutions if they believe that the regulation of these institutions is immune from political influence." *Swan v. Clinton*, 100 F.3d 973, 983-84 (D.C.

Cir. 1996). Congress's decision that FHFA should be led by a Director removable by the President for cause serves those important interests and was well within the constitutional latitude provided to Congress by *Humphrey's Executor* and its progeny.

**2. Plaintiffs' Efforts to Manufacture an Exception to Supreme Court Precedent Endorsing Independent Agencies Are Unavailing**

Plaintiffs ask this Court to fashion from whole cloth a new exception to *Humphrey's Executor* by holding that it does not apply to agencies, like FHFA, headed by a single individual. *See* Am. Compl. ¶ 135, PageID.257. Numerous courts have rejected that argument. The *Collins* court rejected it in the context of an Enterprise shareholder claim identical to Count I. *See Collins*, 2017 WL 2255564, at *5. And four courts have rejected similar challenges to the constitutional structure of the Consumer Financial Protection Bureau ("CFPB"). *See CFPB v. Navient Corp.*, 2017 WL 3380530, at *9-19 (M.D. Pa. Aug. 4, 2017); *CFPB v. Future Income Payments, LLC*, 2017 WL 2190069, at *5-*9 (C.D. Cal. May 17, 2017); *ITT*, 219 F. Supp. at 890-99; *CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 2d 1082, 1086-92 (C.D. Cal. 2014).[3]

While *Humphrey's Executor* happened to involve an agency structured as a multi-member commission (the FTC), the number of commissioners played no part in the Court's constitutional analysis. *See* 295 U.S. at 626-32. As the *Collins* court emphasized, "the Supreme Court did not limit its decision in *Humphrey's Executor* to a multimember board rather than a single director." 2017 WL 2255564, at *6. The fact that the *Humphrey's Executor* Court did not

[3] In October 2016, a split panel of the D.C. Circuit held that the CFPB's structural aspects combined with its "unilateral authority to bring law enforcement actions against private citizens" violated the separation of powers. *See PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016), *reh'g en banc granted, order vacated* (Feb. 16, 2017). However, the D.C. Circuit vacated the panel order and granted rehearing en banc in February 2017, and heard oral argument en banc in May 2017. In the meantime, the D.C. Circuit is not treating the *PHH* panel opinion as operative and rejected a request by another litigant for relief based on the *PHH* decision. *John Doe Co.*, 849 F.3d at 1131-32.

rely on the multi-member nature of the FTC is telling because the Court had to distinguish its decision nine years earlier in *Myers v. United States*, 272 U.S. 52 (1926), which had held unconstitutional certain limitations on the President's ability to remove the Postmaster General, a single agency head. Had the Court perceived any constitutional significance to the distinction between a single head and multi-member commission, it would naturally have distinguished *Myers* on that basis. Instead, the *Humphrey's Executor* Court distinguished *Myers* solely by the character of the office, namely that the postmaster performed purely executive functions and there was no rationale for the independence of that position. 295 U.S. at 627-28.[4]

As the court observed in *Collins*, the relevant issue is "'whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty.'" 2017 WL 2255564, at *5 (quoting *Morrison*, 487 U.S. at 691). Here, because Plaintiffs claim not that the removal restriction is problematic by itself, but only combined with FHFA's single-director structure, Plaintiffs must show that tenure protection for a single agency head impedes the President's performance of his constitutional duties to a greater degree than if the same tenure protection were provided to multiple members of a commission.

Plaintiffs cannot make that showing. The notion that a President would find it more difficult to supervise a *single* individual removable for cause than a body composed of *numerous* individuals who are each removable for cause defies logic. As one court reasoned, "[i]t is no more difficult for the President to assure that the Director of the CFPB is competently

[4] The Supreme Court has since clarified that "the determination of whether the Constitution allows Congress to impose a 'good cause'-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.'" *Morrison*, 487 U.S. at 689; *Free Enters. Fund*, 561 U.S. at 494-95. Plaintiffs here do not argue that FHFA is outside *Humphrey's Executor* because FHFA (as regulator) performs executive duties, or, for that matter, for any reason other than having a single Director.

performing his statutory responsibilities than it was for the President to oversee the leadership of the FTC at the time of *Humphrey's Executor*." *Morgan Drexen*, 60 F. Supp. 3d at 1088. After all, "if the President had needed to fully revamp the leadership of the FTC at that time, he would have been required to [effect] five separate for cause removals, while only one is required in order to change the leadership of the CFPB." *Id.* Furthermore, "[w]ith a multi-member body, it is more difficult to assess or allocate responsibility among the members of the body for policy decisions or actions taken because decision making is made within the group and may be the product of compromise. In contrast, with a single director, it is very clear who made the decision." *Navient*, 2017 WL 3380530, at *17. The Complaint itself acknowledges that a "diffusion of power . . . carries with it a diffusion of accountability." Am. Compl. ¶ 139, PageID.258 (internal quotation marks omitted).

The Complaint surmises that "[i]ndependent agencies headed by multi-member boards are forced to account for multiple viewpoints, adopt compromises that result in less extreme decisions, and better resist capture by interest groups." Am. Compl. ¶ 21, PageID.202-203. However, such speculative pronouncements about the merits of collective decision-making are policy issues for Congress—not courts—to weigh. Congress could reasonably conclude, particularly when enacting a statute in a time of economic emergency, that a single head would be more conducive to the type of firm, immediate decisions and actions that would be committed to FHFA.

Plaintiffs contend that multi-member commissions are constitutionally preferable because "the President inevitably can influence the agency's decisions by appointing one or more commission members and selecting the chairperson." Am. Compl. ¶ 21, PageID.202-203. Far from being "inevitable," whether a President has such influence or not depends on the number of

commission members, the lengths of the commission members' terms, and how those terms are staggered. While it is theoretically possible for an FHFA Director to "remain in office during the entire four-year term of a President," *id.*, that is no different than the situation that would apply to a board composed of multiple members selected once every five years. For the vast majority of Presidents who will have an occasion to appoint an FHFA Director within a four-year term, that appointment will have a much more "immediate impact" than a mere chance to appoint one or two commissioners, because "the appointee, and the appointee alone, now heads the agency." *Navient*, 2017 WL 3380530, at *17.[5]

"At bottom," as the court in *Future Income Payments* explained, "whether to structure an independent agency as a multimember or director-led body depends on the proper weighing of the advantages and drawbacks of each structure. But neither the text of the Constitution nor any Supreme Court precedent supports drawing a constitutional distinction between multimember and director-led independent agencies, so the question is properly reserved for the political branches and the democratic process." *Future Income Payments*, 2017 WL 2190069, at *19.

### C. Statutory Removal Protection for an FHFA Director Does Not Become Unconstitutional When "Combined" With FHFA's Funding Mechanism or Exemptions From Judicial Review

In Count II, Plaintiffs argue as a fallback that if the FHFA Director's protection from removal without cause is constitutional in its own right (as it plainly is), that protection is nevertheless unconstitutional "when combined with other aspects of HERA," namely the funding

[5] Notably, Presidents will more often have an opportunity to appoint an FHFA Director than to appoint a majority of the FTC. *See Navient*, 2017 WL 3380530, at *17 & n.7 (calculating that only four out of seven presidential terms would include the ability to appoint three commissioners of the FTC, whereas four out of five presidential terms will include the ability to appoint a single agency director with a five-year term).

mechanism Congress adopted for FHFA and statutory exemptions of certain FHFA actions from judicial review. Am. Compl. ¶ 147, PageID.261. That is wrong. The "other aspects" add nothing. This is a classic situation of zero plus zero equals zero. Multiple courts have considered this "mosaic" theory of unconstitutionality in the context of the CFPB and have uniformly rejected it. *See Navient Corp.*, 2017 WL 3380530, at *9, *16; *ITT*, 219 F. Supp. 3d 894-99; *Morgan Drexen*, 60 F. Supp. 2d at 1086-91.

Plaintiffs complain that HERA "exempts FHFA from the appropriation process by permitting FHFA to self-fund through fees it assesses on the entities it regulates without any oversight from Congress." Am. Compl. ¶ 148, PageID.261 (citing 12 U.S.C. § 4516(f)(2)). But Congress frequently organizes agencies, particularly in the financial regulatory sector, to be funded through fees assessed on regulated entities. *See Navient*, 2017 WL 3380530, at *16 (collecting examples, including the Federal Reserve dating back over a century). This common mechanism presents no constitutional issue. "[T]he Constitution does not prohibit Congress from enacting funding structures for agencies that differ from the procedures prescribed by the ordinary appropriations process." *ITT*, 219 F. Supp. 3d at 896 (citing *AINS, Inc. v. United States*, 56 Fed. Cl. 522, 539 (2003)); *accord Morgan Drexen*, 650 F. Supp. 3d at 1089. Congress may choose "to loosen its own reins on public expenditure" and "not to finance a federal entity with appropriations." *Am. Fed'n of Gov't Emps., AFL-CIO, Local 1647 v. FLRA*, 388 F.3d 405, 409 (3d Cir. 2004).

Nor does Congress's decision to exempt certain FHFA actions from judicial review raise any constitutional concerns, either by itself or combined with other issues raised by Plaintiffs. It is well-established that "Congress does have the power to preclude judicial review of non-constitutional challenges to agency actions." *Campbell v. OPM*, 694 F.2d 305, 307 (3d Cir.

1982); *accord Morgan Drexen*, 60 F. Supp. 3d at 1091-92 n.5. Thus, the Court should dismiss Count II for failure to state a claim.[6]

## II. THE COURT SHOULD DISMISS THE APPOINTMENTS CLAUSE CLAIM (COUNT III)

Plaintiffs contend in Count III that the Third Amendment is invalid because at the time of its adoption, FHFA had an acting director who was not confirmed by the Senate. Count III fails as a matter of law because under longstanding precedent, subordinate agency officers may temporarily act as the head of an agency without the Senate confirmation required for permanent occupants of that office. Plaintiffs claim that Mr. DeMarco acted as Director for longer than "reasonable under the circumstances." But no court has ever found an Appointments Clause violation because an acting official's tenure lasted longer than "reasonable," such a claim implicates non-justiciable political questions, and the *de facto* officer doctrine bars Plaintiffs' four-a-half-years too late challenge in any event. If the Court nevertheless finds that the Appointments Clause limits acting officials to a "reasonable" period and reaches the issue of whether that limit was exceeded here, Mr. DeMarco's length of service as acting Director easily qualifies as reasonable under the circumstances.

### A. Mr. DeMarco Was Properly and Constitutionally Designated to Act as FHFA Director While That Office Was Vacant

The Appointments Clause provides that the President must nominate and the Senate must confirm all "principal officers" of the United States. U.S. Const. art. II, § 2, cl. 2. It has long been understood, however, that to prevent the responsibilities of such an office from "go[ing]

[6] Plaintiffs also mention within Count II their contention that Congress "fail[ed] to articulate any overarching policy that FHFA must pursue when it exercises its powers as conservator." Am. Compl. ¶ 148, PageID.261. That argument, which essentially rehearses Plaintiffs' Count IV (nondelegation), is without merit for the reasons discussed in Section III below. It does not become any stronger when "combined" with Plaintiffs' other meritless constitutional arguments.

unperformed if a vacancy arises and the President and Senate cannot promptly agree on a replacement," the President may "direct certain officials to temporarily carry out the duties of a vacant [principal] office *in an acting capacity*, without Senate confirmation." *SW Gen., Inc. v. NLRB*, 137 S. Ct. 929, 934 (2017) (emphasis added).

The Supreme Court settled the constitutionality of this approach long ago, holding that even though the Appointments Clause requires a full consul to be confirmed by the Senate, such confirmation was not required to enable the vice consul to perform those duties in an acting capacity: "Because the subordinate officer is charged with the performance of the duty of the superior for a limited time, and under special and temporary conditions, he is not thereby transformed into the superior and permanent official." *United States v. Eaton*, 169 U.S. 331, 343 (1898). Plaintiffs acknowledge that under this precedent, "[w]hen there is a vacancy in a position that must be filled by a principal officer, the Constitution permits an inferior officer to temporarily assume the responsibilities of the position in an acting capacity." Am. Compl. ¶ 155, PageID.263.

Congress has conferred such authority through two distinct and complementary routes. First, the Federal Vacancies Reform Act ("Vacancies Act"), 5 U.S.C. § 3345 *et seq*., generally authorizes the President to designate acting officers across government. Second, Congress sometimes includes specific acting officer provisions within agencies' organic statutes. FHFA's enabling statute contains such a provision in § 4512(f), which enables the President to designate one of FHFA's Deputy Directors to act temporarily as Director while that office is vacant. In some instances, Congress has imposed a time limit on how long an official can serve in an acting capacity. *See, e.g.*, Vacancies Act, 5 U.S.C. § 3346 (210 days, tolled while nomination pending,

and subject to renewal for a total potential period of almost two years). In others, such as § 4512(f), Congress opted *not* to impose any time limit.

Here, the President designated Mr. DeMarco to act as Director under § 4512(f), upon Mr. Lockhart's resignation. *See* Am. Compl. ¶ 56, PageID.218. Plaintiffs do not dispute that Mr. DeMarco qualified as someone the President could designate to act as Director under HERA or that the conditions for making such a designation were satisfied. The designation of Mr. DeMarco to act as Director was plainly consistent with both HERA and the Constitution.

### B. Plaintiffs Do Not State a Viable Claim Based on the Duration of the Vacancy and of Mr. DeMarco's Service as Acting Director

Plaintiffs nevertheless contend that as of the time Mr. DeMarco approved the Third Amendment, Mr. DeMarco had acted as director longer than "reasonable under the circumstances," which they maintain violated the Appointments Clause. Am. Compl. ¶ 158, PageID.264-265.[7] However, no court has ever held that an acting official's service violated the Appointments Clause on this basis, let alone invalidated past actions by such officials. There are multiple reasons why the Court should reject Plaintiffs' novel claim.

#### 1. Plaintiffs' Theory is Unprecedented and Non-Justiciable

The federal government has been replete with acting officers since its earliest days, *see SW General*, 137 S. Ct. at 935-36, yet no reported decision has invalidated agency action on the

[7] As an apparent alternative to "reasonable under the circumstances," Plaintiffs also suggest that two years could be viewed as a hard-and-fast limitation on the time an acting official can serve. *See* Am. Compl. ¶ 159, PageID.265. This is derived from the maximum amount of time it is possible for a recess appointee under the Recess Appointments Clause to serve. However, the Recess Appointments Clause is irrelevant because Mr. DeMarco acted as director under 12 U.S.C. § 4512(f), rather than being appointed by the President during a recess of the Senate. *See Designation of Acting Solicitor of Labor*, 2002 WL 34461082, at *3 (O.L.C. Nov. 15, 2002) (contrasting acting officials with recess appointees and explaining that the former are not subject to limits in the Recess Appointments Clause).

ground that an acting officer served longer than was "reasonable."[8] Plaintiffs derive their proposed "reasonable under the circumstances" standard from a footnote in a 2003 opinion by DOJ's Office of Legal Counsel. *See Designation of Acting Director of OMB*, 2003 WL 24151770, at *1 n.2, *cited in* Am. Compl. ¶ 157, PageID.264. But the context shows OLC was simply *contrasting* the *open-ended* nature of an acting OMB director's service (under a non-time-limited provision akin to §4512(f)) with the time-limited nature of an acting officer under the Vacancies Act.[9] Nothing in that footnote lends any credence to Plaintiffs' position that the Appointments Clause empowers courts to oust acting officers after a "reasonable" time, much less declare actions by such an officer void long after the fact. Indeed, OLC's function is to provide advice within the Executive Branch that may include policy or practical considerations; such advice does not establish judicial standards binding on courts.

Indeed, whether an acting official has stayed longer than "reasonable" raises political questions unsuited for judicial determination. Because an acting official is needed during a vacancy, saying that an acting official has stayed too long is the equivalent of saying that the President has taken too long to nominate and secure confirmation of a permanent appointee. In

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[8] With respect to acting officers whose authority derives from the Vacancies Act, Congress has provided that "any function or duty of a vacant officer" performed by a person not properly serving under the statute, including due to exceeding specific time limits prescribed by statute, "shall have no force or effect." 5 U.S.C. § 3348(d). However, that provision has no application to FHFA acting directors, who derive their authority from 12 U.S.C. § 4512(f). *See* 5 U.S.C. § 3347 (providing that statutory provisions, such as § 4512(f), that "authorize[] the President . . . to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity" supplement and are not controlled by the Federal Vacancies Reform Act).

[9] *See id.* ("An employee serving under the Vacancies Reform Act would be subject to the time limits in that statute, 5 U.S.C. § 3346, while an officer serving under [the OMB-specific acting director provision] would not be so limited and could serve as long as is reasonable under the circumstances.").

fact, the "reasonable under the circumstances" standard Plaintiffs advocate traces to OLC's recommendation that the President submit a nomination to fill a vacancy "[w]ithin a reasonable time." Status of the Acting Director, Office of Management and Budget, 1 Op. O.L.C. 287, 287 (1977). Plaintiffs concede that any such reasonableness determination would turn on, *inter alia*, "'particular factors affecting the President's choice'" of a permanent nominee, and "'the President's ability to devote attention to the matter.'" Am. Compl. ¶ 157, PageID.264 (quoting *Status of the Acting Director, OMB*, 1 Op. O.L.C. 287, 289-90 (1977)); *see Department of Energy—Appointment of Interim Officers—Department of Energy Organization Act*, 2 Op. O.L.C. 405, 410 (1978) (identifying the "difficulty of finding candidates" for the permanent office as a factor).

Those matters are beyond the judicial ken. The President's deliberations regarding his personnel choices, balancing of competing demands on his attention, and navigation of obstacles to Senate confirmation of his nominees are among the most delicate and privileged matters in government. Judicial exploration of those matters would raise profound separation-of-powers concerns of its own. *See, e.g.*, *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367 (2004). These are precisely the types of issues that are left to the political branches because of the lack of "judicially discoverable and manageable standards" for resolving them. *Zivotofsky ex rel. Zivotofksy v. Clinton*, 566 U.S. 189, 197 (2012).

Plaintiffs' speculation that leaving such issues for political resolution means "the President could abuse the appointments power by designating acting principal officers to serve indefinitely, thus frustrating the Senate's role in the selection of principal officers" (Am. Compl. ¶ 155, PageID.263) does not withstand scrutiny. For one thing, it contradicts Plaintiffs' own factual allegations about what transpired here. Plaintiffs assert that "the Obama Administration

publicly fought with Mr. DeMarco over housing policy and pressured him to step down." Am. Compl. ¶ 158, PageID.265; *see also* Am. Compl. ¶¶ 60-62, PageID.220-222 (describing "vehement policy disagreements" between Mr. DeMarco and the Administration). Those allegations belie Plaintiffs' suggestion that the President was using the acting director designation as a back-door way to perpetuate Mr. DeMarco's service while eluding Senate confirmation.

More generally, the tenure of most acting officers is limited by the *statutory* parameters of the Vacancies Act, *see supra* note 8, and nothing stops Congress from adding time limits to other statutes if it deems the Senate's advice and consent role to be frustrated. Further, "a number of practical and political reasons" discourage the use of acting officers "as a substitute for appointment by and with the advice and consent of the Senate." *Acting Officers*, 6 U.S. Op. O.L.C. at 119. For example, "[a]n attempt to circumvent the right of the Senate to participate in the appointment process is likely to result in political reprisals and repercussions," and the "stature" of an acting official "as a practical matter is often somewhat inferior," in the nature of "merely a caretaker without a mandate to take far-reaching measures." *Id.* at 121. These political checks and practical realities guard against any abuse without need for judicial intervention.

**2. Plaintiffs' Claim is Precluded by the De Facto Officer Doctrine**

Even if it did not present non-justiciable political questions, Plaintiffs' claim is barred by the *de facto* officer doctrine, which "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient." *Ryder v. United States*, 515 U.S. 177, 180 (1995). Such protection helps avoid the risk of "chaos" and "multiple and repetitious suits challenging

every action taken by every official whose claim to office could be open to question." *Id.* (internal quotation marks omitted).

The *de facto* officer doctrine is a common "cure[]" for "potential infirmities in the authority" of acting officers. *Acting Officers*, 6 Op. O.L.C. at 122. A "typical case of a de facto officer is one who has been properly appointed but continues to serve after his term of office has expired." *Id.*; *see Waite v. Santa Cruz*, 184 U.S. 302, 322-24 (1902); *EEOC v. Sears, Roebuck and Co.*, 650 F.2d 14, 17-18 (2d Cir. 1981); *United States v. Groupp*, 333 F. Supp. 242, 245-46 (D. Me. 1971). It follows that the *de facto* officer doctrine also covers claims, like Count III in this case, that an "initially valid designation of an acting official" not subject to any fixed term nevertheless was "vitiated by an excessive delay in the submission of a nomination." *Department of Energy*, 2 Op. O.L.C. at 411.

The *de facto* officer doctrine is not absolute. For example, the D.C. Circuit permits plaintiffs to challenge the actions of an invalidly serving officer if the plaintiffs (1) bring their action "at or around the time that the challenged government action is taken," and (2) "show that the agency or department involved has had reasonable notice under all the circumstances of the claimed defect in the official's title to office." *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 81 (D.C. Cir. 2015), *aff'd on other grounds*, 137 S. Ct. 929 (2017) (internal quotation marks omitted). Thus, the claim in *SW General* was allowed only because it was raised "in the administrative proceedings below" as "a defense to the enforcement action" and "exception to the ALJ decision" of which judicial review was sought. *Id.* at 82; *see also Andrade v. Lauer*, 729 F.2d 1475, 1500 (D.C. Cir. 1984) (*de facto* officer doctrine did not bar DOJ employees' Appointments Clause challenge to reduction-in-force because they sued the "day before the action under

attack" as well as "notified the [agency] of their claim of invalid appointment within the month preceding filing of this suit").

That exception, however, does not cover Count III. Far from bringing their claim at or around the time that the challenged action was taken as in *SW General* and *Andrade*, Plaintiffs here waited until June 1, 2017—nearly five years after the action at issue, and over three years after Mr. DeMarco left the agency. Indeed, this is the first time that Mr. DeMarco's power to act as Director has been challenged in over 17 earlier lawsuits on behalf of over 38 similarly situated shareholder plaintiffs challenging the Third Amendment since 2013.

**3. The President's Nomination Efforts and Duration of Mr. DeMarco's Acting Service Were Reasonable Under the Circumstances**

Should this Court reach whether the President's nomination efforts and the corollary duration of Mr. DeMarco's service were "reasonable under the circumstances," the Court should find that they were.

As in the case of due process challenges to governmental action, any assessment of the reasonableness of the President's efforts to fill a vacancy would have to be a flexible standard, "not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). After all, the rationale for having acting officials is that "[t]he constitutional process of Presidential appointment and Senate confirmation . . . can take time: The President may not promptly settle on a nominee to fill an office; the Senate may be unable, or unwilling, to speedily confirm the nominee once submitted." *SW General*, 137 S. Ct. at 935. As noted, Plaintiffs agree the analysis must take into account, among other considerations, "whether the President has sent a nomination to the Senate" and "particular factors affecting the President's choice . . . or the President's ability to devote attention to the matter." Am. Compl. ¶ 157, PageID.264 (citing 1 Op. O.L.C. at 289-90). Equally important are

"the difficulty of finding suitable candidates" for "complex and responsible positions," particularly in the face of "uncertainties created by delays in the enactment" of pending legislation. 2 Op. O.L.C. at 410. These factors all point toward a finding of reasonableness in this case.

When the vacancy arose in 2009, the country was reeling from recession and the Enterprises' (and FHFA's) very future was uncertain.[10] Despite those hurdles, President Obama was able to select and nominate an FHFA Director in the year after the vacancy arose, only to see that nomination rejected by the Senate in a highly polarized political environment. *See supra* at 3-4. When the President later submitted the nomination of the current FHFA Director, then a sitting Member of Congress, it took seven months and the historic abolition of the filibuster for that nomination to be approved by the narrowest of party-line margins. *See supra* at 5. Given this fractious climate, and Plaintiffs' own allegations that the President sparred with Mr. DeMarco over policy and thus had an incentive to replace him, *see, e.g.*, Am. Compl. ¶¶ 60-64, 158, PageID.220-223, 264-265, there is no basis to suspect the amount of time it took to fill the office was attributable to anything other than factors outside the President's control.

The amount of time Mr. DeMarco had served as acting Director as of the Third Amendment, moreover, is neither unprecedented nor unusual. Many acting officials and administrators have served for extended periods for a variety of reasons. For example, the former Office of Thrift Supervision once had an acting director for nearly four years; the Centers for Medicare and Medicaid Services have had an acting administrator more often than a permanent one; and the Social Security Administration has been headed by acting administrators

for four and a half years, since February 2013. During the 1990s, the Department of Justice had an acting head of the Criminal Division for over 30 months, and an acting Solicitor General for over 14 months.[11] Thus, the three years Mr. DeMarco had served as Acting Director as of August 2012 is not outside the range of times for which other subordinate officials have acted in senior posts. Based on all of these factors, if the Court reaches the issue, it should conclude that Mr. DeMarco's service as Acting Director as of August 2012 was reasonable under all the circumstances.

## III. THE COURT SHOULD DISMISS THE NONDELEGATION CLAIMS (COUNTS IV AND V)

Finally, Plaintiffs' Count IV alleges that Congress violated the nondelegation doctrine by improperly delegating "Legislative power" to FHFA as a government agency. Am. Compl. ¶¶ 162-69, PageID.266-268. In Count V, Plaintiffs alternatively allege that when FHFA acts as Conservator, it acts as a private entity—not the federal government—and that Congress improperly delegated to this private entity "Legislative or Executive power." Am. Compl. ¶¶ 170-77, PageID.268-271. Both claims fail as a matter of law because the powers FHFA as Conservator exercised by entering into the Third Amendment were neither legislative, executive, nor governmental at all in nature. To the extent FHFA might be deemed to have acted in a

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Footnote continued from previous page

[10] *See, e.g.*, N. Eric Weiss, Cong. Research Serv., Report No. R41822, *Proposals to Reform Fannie Mae and Freddie Mac in the 112th Congress* (2011) (counting over 20 bills addressing the fate of the Enterprises introduced in the 112th Congress alone).

[11] *See Doolin Sec. Sav. Bank v. OTS*, 139 F.3d 203, 205 (D.C. Cir. 1998) (OTS); https://www.cms.gov/About-CMS/Agency-Information/History/Downloads/Administrator-Tenure-Dates-and-Biographies-1965-—-2015.pdf (CMS); https://www.ssa.gov/history/commissioners.html (SSA); Morton Rosenberg, *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative*, CRS Report 98-892, at CRS-4 (Cong. Res. Serv., Nov. 2, 1998) (DOJ).

governmental capacity, moreover, HERA provides more than sufficient "intelligible principles" to avoid any nondelegation issue.

Under the conventional nondelegation doctrine, Congress generally cannot delegate legislative power to another branch of government. *See Mistretta v. United States*, 488 U.S. 361, 371 (1989). However, there is no nondelegation problem so long as Congress provides an "intelligible principle" to guide the agency's exercise of discretion. *Hachem v. Holder*, 656 F.3d 430, 439 (6th Cir. 2011). "The cases where Congress violates the nondelegation principle are few and far between." *Id.*; *see United States v. Whaley*, 577 F.3d 254, 263 (5th Cir. 2009) ("the limits on delegation are frequently stated, but rarely invoked: the Supreme Court has not struck down a statute on nondelegation grounds since 1935").

Under the private nondelegation doctrine, Congress generally cannot delegate sovereign legislative or executive power to a private entity. *See Pittston Co. v. United States*, 368 F.3d 385, 394-95 (4th Cir. 2004). Courts have found impermissible private nondelegations in rare instances when statutes authorized private companies to enact regulations that carried the force of law and were binding on the entire industry, including competitors. *See Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 673-77 (D.C. Cir. 2013), *rev'd on other grounds*, 135 S. Ct. 1225 (2015).

An essential prerequisite for either form of nondelegation claim is that the powers at issue are sovereign and governmental in nature. For example, in *Pittston*, the Fourth Circuit analyzed a claim that a statute empowering a coal industry pension fund "to invest the premiums it receives from coal operators" constituted an unconstitutional delegation to a private entity. 368 F.3d at 397. "[T]he central inquiry," the Fourth Circuit explained, was "whether the *function* of the Combined Fund in preserving and investing money assessed by statute is governmental in

nature." *Id.* at 398. Because that function was "not essentially governmental," there simply was no nondelegation problem. *Id.* at 397. Although *Pittston* involved a private nondelegation claim, the same analysis is dispositive of a claim that Congress improperly delegated its legislative powers to another branch: if the functions at issue are not governmental in nature, *a fortiori* they cannot be legislative in nature.

Here, as in *Pittston*, it is clear that the function of entering into the Third Amendment, a contract relating to the terms of preferred stock, was "not essentially governmental." *Id.* at 397. Rather, the "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." *Collins*, 2017 WL 2255564, at *5 (emphasis added); *see also supra* at 10-11. The Conservator's execution of the Third Amendment was an exercise of "FHFA's business judgment," not the type of legislative or executive function the Constitution commits to Congress or the President. *Perry Capital*, 864 F.3d at 615. The action in this case has nothing in common with the handful of cases in which courts have found it impermissible to give private companies the power to make laws binding on their competitors.

To the extent that the Conservator might be deemed to have functioned in a governmental capacity when it entered into the Third Amendment, Plaintiffs' nondelegation claim would fail because Congress provided intelligible principles to guide FHFA's discretion. It is well established that "Congress can seek assistance from coordinate branches" in carrying out the law, *United States v. Lawrence*, 735 F.3d 385, 419 (6th Cir. 2013), and "some amount of delegation is unavoidable." *Whaley*, 577 F.3d at 263. The requisite intelligible principle "can be broad," *id.* at 264, including to act in the "public interest." *See, e.g.*, *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943); *Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1475 (D.C. Cir. 1998).

In HERA, Congress empowered FHFA as Conservator "take such action as may be . . . appropriate to carry on the business of the [Enterprises] and preserve and conserve the[ir] assets and property." 12 U.S.C. § 4617(b)(2)(D)(ii). Additionally, HERA states the "purpose" of FHFA's appointment as conservator is to "reorganiz[e], rehabilitat[e], or wind[] up the affairs" of the Enterprises. 12 U.S.C. 4617(a)(2). Congress thus "empower[ed] FHFA to 'take such action' as may be necessary or appropriate to fulfill several goals." *Perry Capital*, 864 F.3d at 608. Congress also provided explicit guidance in the Enterprises' statutory charters, where it directed them, *inter alia*, to "provide stability in" and "ongoing assistance to the secondary market for residential mortgages" by increasing liquidity and improving investment capital, to "promote access to mortgage credit," and to "manage and liquidate federally owned mortgage portfolios." 12 U.S.C. § 1716 (Fannie Mae); *see also* 12 U.S.C. § 1451 note (similar for Freddie Mac). These statutory purposes and goals easily provide a sufficient "intelligible principle" to avoid any unconstitutional delegation of legislative power.

## CONCLUSION

For the foregoing reasons, the Court should dismiss this case.

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Respectfully submitted,

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