Nos. 17-578, 17-580 & 17-591

IN THE

Supreme Court of the United States

JOSEPH CACCIAPALLE, ET AL.
v.
FEDERAL HOUSING FINANCE AGENCY, ET AL.

PERRY CAPITAL LLC, ET AL.
v.
STEVEN T. MNUCHIN, ET AL.

FAIRHOLME FUNDS, INC., ET AL.
v.
FEDERAL HOUSING FINANCE AGENCY, ET AL.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICI CURIAE* LOUISE RAFTER, JOSEPHINE AND STEPHEN RATTIEN, AND PERSHING SQUARE CAPITAL MANAGEMENT, L.P. IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Amici Louise Rafter, Josephine Rattien, and Stephen Rattien are individuals, not corporations. Amicus Pershing Square Capital Management, L.P., does not have a parent company, and there is no publicly held company that owns 10% or more of its stock.

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INTEREST OF *AMICI CURIAE*

Amici Louise Rafter, Josephine and Stephen Rattien, and Pershing Square Capital Management, L.P., are common shareholders of Fannie Mae and Freddie Mac. Mrs. Rafter, a retired nurse, owns Fannie common stock. Mrs. Rattien, a retired psychiatric social worker and inner-city school counselor, and Dr. Rattien, a retired senior science and technology policy manager, jointly own Fannie common stock. Pershing Square is the largest common shareholder of Fannie and Freddie, with an approximate 10% stake in the outstanding common stock of each.[1]

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[1] Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for any party authored this brief in whole or in part, and that no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for amici notified all parties more than 10 days prior to filing this brief, and all have consented in writing to this filing.

SUMMARY OF ARGUMENT

When the Federal Housing Finance Agency (FHFA) was appointed conservator of Fannie Mae and Freddie Mac in 2008, its statutory authority was strictly limited: It was empowered to operate and control the Companies "as conservator." 12 U.S.C. § 4617. But instead of following that clear statutory mandate, the agency acted as an *anti*-conservator. In 2012, the agency followed the dictates of the Treasury Department to nationalize the Companies, obliterating the rights of their shareholders and expropriating the Companies' profits for the federal treasury. Fannie and Freddie are now bound to transfer to the government their *entire* net worth every quarter, for the rest of time.

The imposition of these Net Worth Sweeps is flatly contrary to the plain text of the authorizing statute, the universal understanding of conservatorship as a legal concept, and common sense. As the name suggests, the core duty of a conservator is to *conserve* the assets of a distressed company. A conservator cannot do the *opposite* by destroying and dissipating the company's assets, siphoning away all of its profits in perpetuity, and consigning the company forever to the brink of insolvency.

The agency's total expropriation of Fannie and Freddie's net worth cannot possibly be characterized as an exercise of its authority "as conservator." Instead of taking any action that could have preserved even the most meager scrap of potential shareholder value, the agency went out of its way to ensure that shareholders would be forever deprived of every last penny. The agency, at the direction of the White House

and Treasury, acted not to *conserve* the Companies' assets but instead to purloin them, by diverting all of their profits to fill the government's coffers.

If the lower court's unprecedented reading of FHFA's conservatorship authority is allowed to stand, it will have disastrous consequences not only for the shareholders who are immediately affected but also for financial markets more broadly. The impact will not be confined to Fannie and Freddie, because FHFA's authorizing statute is materially identical to that of FDIC and several other federal regulatory bodies. Accordingly, under the decision below, the federal government will now be empowered to permanently strip away and seize for itself the full net worth of any once-troubled financial institution that has been placed under temporary conservatorship. That type of extraordinary, unilateral power is far beyond—indeed, contrary to—anything Congress has ever authorized in allowing any federal agency to act as a "conservator." Authorizing this new power will destroy the market for rescue capital, as it will put potential investors on notice that all value in a distressed company can be lawlessly expropriated.

Such a radical expansion of federal power over the national economy should not be achieved by the executive branch overriding clear congressional mandates. It must be done, if at all, by the people's elected representatives in Congress. This Court's intervention is necessary both to police the separation of powers and to protect private property from the grasping hand of the federal government, which seeks to insulate its lawless conduct from any judicial review.

ARGUMENT

I. THE FEDERAL GOVERNMENT HAS LIMITED POWER TO OPERATE AND CONTROL FANNIE AND FREDDIE "AS CONSERVATOR"

1. Federal law grants FHFA limited power to operate and control Fannie and Freddie "as conservator or receiver." In every provision of the statute that grants the agency any authority over the Companies, the agency is explicitly constrained to exercise that power only "as conservator" or "as . . . receiver." *See* 12 U.S.C. § 4617(b)(2)(A), (B), (D), (E), (G), (J). Those are not empty labels, to be ignored or overridden at will by the executive branch. They instead convey a series of well-defined rights and duties based on centuries of legal tradition.

In the present case, everyone agrees that FHFA was appointed to serve as "conservator" for Fannie and Freddie—not as "receiver." Accordingly, the sum total of FHFA's authority over the Companies and their assets was to act as a "conservator"—and the term "conservator" has a well-established legal meaning. The most fundamental duty of a conservator is to *conserve* a company's assets, to act as a "guardian, protector, or preserver." *See* "Conservator," Black's Law Dictionary (10th ed. 2014). From time immemorial, the law has treated conservators as trustees. *See* Unif. Prob. Code § 5-418(a); *Elmco Props., Inc. v. Second Nat'l Fed. Sav. Ass'n*, 94 F.3d 914, 922 (4th Cir. 1996) ("[A] conservator's function is to restore the bank's solvency and preserve its assets."). Conservators, like trustees and guardians, "are bound to take the same care of the trust fund as a

discreet and prudent man would take of his own property, to manage it for the exclusive benefit of the *cestui que trust*, and to make no profit or advantage out of it for themselves." *Boynton v. Dyer*, 35 Mass. 1, 6 (1836). A conservator does not have a freestanding license to operate and control a company however it wishes. It cannot exploit the company for its own benefit or the benefit of third parties.

While the mere designation of FHFA as "conservator" establishes that the agency must exercise every delegated power over the Companies pursuant to an obligation to conserve their assets as a trustee, the specific enumeration of FHFA's powers further confirms this obligation. *Every* such specific enumeration of how the agency may operate or control the Companies confirms that it may exercise those powers only "as conservator." The agency inherited the ability to exercise all the "rights, titles, powers, and privileges" of the Companies "as conservator." 12 U.S.C. § 4617(b)(2)(A). It was empowered to "operate" the Companies "as conservator," and to "carry on [their] business" "as conservator." *Id.* § 4617(b)(2)(B), (D). It was further empowered to "transfer or sell any asset or liability" of the Companies "as conservator." *Id.* § 4617(b)(2)(G). And it was granted "incidental powers" to carry out its enumerated powers "as conservator." *Id.* § 4617(b)(2)(J).

2. Notwithstanding that the general and specific statutory authorizations make clear that FHFA can exercise its powers only as a "conservator," the decision below nonetheless held that the agency may exercise those powers in a manner contrary to the basic obligations of a conservator. The court based this anti-textual conclusion on the ground that the specific

grants of authority in § 4617(b)(2) say that FHFA "may" exercise its enumerated powers "as conservator," rather than "shall" exercise them "as conservator." The court reasoned that because the term "may" is only "permissive rather than mandatory," this means that the agency is not "mandated" to "preserve and conserve Fannie and Freddie's assets," but is authorized to *dissipate* the Companies' assets in order to serve "governmental interests" or the interests of the "taxpaying public[]" that are diametrically *opposed* to the Companies' interest. *Perry Capital v. Mnuchin*, 864 F.3d 591, 607-608 (D.C. Cir. 2017).

This reading makes no sense. The statute is phrased in terms of what the agency "may" do simply because it is a *grant* of statutory authority. *All* grants of statutory authority are expressed in terms of the authority the agency "may" exercise. Absent a grant of authority from Congress specifying what an agency "may" do, the agency may do nothing. *See, e.g., Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) ("It is elementary that our federal government is one of limited and enumerated powers," and thus " if there is no statute conferring authority, a federal agency has none."). Consequently, the statute's provision that FHFA "may, as conservator," operate and control the Companies means that it has a limited grant of authority to operate and control them *only* in the capacity of a conservator.

The statutory authority for FHFA to operate and control the Companies as a conservator in no way authorizes the agency to act in a different capacity, much less in a way that is *contrary* to its duties as a conservator. The use of "may" rather than "shall"

simply reflects the reality that Congress could not dictate the precise manner in which FHFA should discharge its conservatorship duties; it does not suggest that the agency is free to violate those duties. For example, it would have made no sense to mandate that the agency "shall" "as conservator . . . transfer or sell any asset or liability" of the Companies, since the conservator obviously needs flexibility to decide whether such sales or transfers are needed and prudent. Thus, stating that the agency "may, as conservator" sell or transfer assets or liabilities provides flexibility while still making clear that the agency is authorized to make sales or transfers only in its capacity "as conservator."

Accordingly, whether the agency is obliged to act as a conservator is in no way affected by whether the statutory authorization is expressed in mandatory or permissive terms, but turns on whether the agency is authorized to act "as conservator" or is given a broader authorization. As explained above, FHFA's authority is strictly limited to acting as a conservator—*i.e.*, to conserve the Companies' assets—and therefore the agency cannot exercise its powers in a manner that fails to abide by that duty. Both the designation itself and *every* specific grant of power that the statute gives the agency make clear that FHFA has the authority to act only "as conservator." 12 U.S.C. § 4617(b)(2)(A), (B), (D), (E), (G), (J). There is not a single sentence granting the agency any power to take any action on behalf of the Companies that is not qualified by the duty to act "as conservator." The lower court simply ignored this crucial feature of the text. Indeed, since the lower court's interpretation grants FHFA the same power it would enjoy if the "as conservator" language

was excised from the statute, the decision below commits the cardinal sin of rendering statutory text utterly meaningless. *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017) (applying the "surplusage canon—the presumption that each word Congress uses is there for a reason").

3. In a similar fashion, the decision below wholly misinterpreted the "incidental powers" provision of 12 U.S.C. § 4617(b)(2)(J). That provision states that FHFA "may, as conservator . . . take any action authorized by this section, which the Agency determines is in the best interests of the regulated entity or the Agency." The lower court took this to mean that the agency has no duty to preserve and protect the Companies' assets, but instead has a freestanding power to "act in its own best governmental interests, which may include the taxpaying public's interest." 864 F.3d at 608.

Once again, the lower court's reading ignores the qualification that the agency's incidental powers "may" be exercised only in the agency's capacity "as conservator." It also ignores the limitation that "any action" taken by the agency to serve its *own* interests must also be otherwise "authorized by this section," i.e., consistent with the agency's duties as conservator. This confirms that the agency's "incidental" powers are quite modest. For example, as long as selling a particular company asset serves the company's best interests, the agency can simultaneously benefit itself by purchasing the asset instead of offering the purchase to a third party at the same price. But this limited power to take into account the agency's own interests *consistent* with its duty as conservator does not authorize it to act *contrary* to that duty. And it is

not remotely plausible that Congress granted FHFA "*incidental* powers" to override and contradict the agency's express duty to act "as conservator." As this Court has recognized, Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001). Here, Congress would not have hidden the elephantine power to nationalize once-distressed companies in the mousehole of an "incidental powers" provision.

Moreover, even if FHFA had a freestanding power to serve "the best interests of . . . *the Agency*," that still would not authorize it to transfer Fannie and Freddie's net worth to benefit "the taxpaying public[]" or other "governmental" entities. FHFA has its own independent budget funded by a direct surcharge on Fannie and Freddie. 12 U.S.C. § 4516. Thus, siphoning off all of Fannie and Freddie's net worth to benefit the treasury or taxpayers cannot benefit "the Agency" in any way. Accordingly, imposing the Net Worth Sweeps cannot be justified by any authority FHFA may have to serve the interests of "the Agency," nor did the lower court make any attempt to explain how it could. 864 F.3d at 607.

4. If FHFA's conservatorship power is so expanded to authorize this type of *de facto* liquidation of Fannie and Freddie, it eviscerates the separate receivership process that the statute prescribes as the exclusive avenue for liquidation. Only as a receiver—not as a conservator—may FHFA place a company "in liquidation" by "winding up" its affairs. 12 U.S.C. § 4617(b)(3)(B). And yet that is precisely what the government acknowledged FHFA did to Fannie and

Freddie under its supposed "conservatorship" powers here. *See Fairholme* Petitioners' Appendix ("App.") 327a (stating that the Companies would "be wound down" by the Net Worth Sweeps).

This blurring of the line between conservatorship and receivership violates two very clear statutory constraints: On the front end, a company has a right to judicial review within 30 days of the start of a receivership that could result in liquidation. 12 U.S.C. § 4617(a)(5). But that right is entirely meaningless if a company is told that it is being placed in *conservatorship* for the purpose of preserving and conserving the company's assets, not liquidation. On the back end, moreover, the statute sets out a detailed process and priority scheme for a receiver to determine claims against a company in liquidation, again including a right to judicial review, thereby preserving shareholders' rights to any residual value. *Id.* § 4617(b)(2)(E), (b)(2)(K)(i), (b)(3), (c)(1)(D). But if FHFA can engage in a *de facto* liquidation by perpetually stripping a company of its entire net worth during a *conservatorship*, it can circumvent the statutory protections that Congress carefully crafted to accompany the liquidation process.

5. Finally, the decision below disregards the settled understanding of federal conservatorship powers under the precise same statutory language. FHFA's authorizing statute (HERA) was modeled essentially verbatim on an earlier statute (FIRREA) that authorizes FDIC to act "as conservator of distressed banks." In light of the lower court's reasoning, four textual similarities are especially noteworthy:

- Like FHFA, FDIC can be appointed either "as conservator or receiver," and can "liquidate" a bank only when it is acting "as receiver." 12 U.S.C. § 1821(c)(13)(B)(i).
- Like FHFA, FDIC is authorized "as conservator" to "operate" distressed banks and "conduct all [of their] business." *Id*. § 1821(d)(2)(B)(i).
- Like FHFA, FDIC as conservator "may" operate distressed banks to "put [them] in a sound and solvent condition," and "may" act to "preserve and conserve their assets." *Id*. § 1821(d)(2)(D).
- Like FHFA, FDIC has "incidental power" as conservator to take action that "the [FDIC] determines is in the best interests of the depository institution, its depositors, *or the [FDIC]*." *Id*. § 1821(d)(2)(J) (emphasis added).

Until now, this language has always been interpreted to mean that FDIC has a mandatory duty to *preserve and protect* the assets of banks when acting "as conservator." *See, e.g.*, *Bauer v. Sweeny*, 964 F.2d 305, 306 n.2 (4th Cir. 1992) ("In acting as a conservator," FDIC is "*directed*" to "preserve and conserve the assets and property of the failed savings institution.") (emphasis added). Nobody has ever read this language to authorize FDIC to act as an *anti*-conservator, with power to nationalize and expropriate all future profits of any bank that is placed into conservatorship. But that is the inevitable result of the decision below, if it is allowed to stand.

II. THE GOVERNMENT'S ACTION AS AN ANTI-CONSERVATOR IS AN EXTREME ABUSE OF POWER

1. FHFA's statutory duty to act as Fannie and Freddie's "conservator" instead of their *anti*-conservator is so obvious that the agency itself repeatedly, explicitly, and publicly recognized it—at least before it decided to violate that duty. In 2009, FHFA's director emphasized that "[a]s the conservator, FHFA's most important goal is to preserve the assets of Fannie Mae and Freddie Mac over the conservatorship period. That is our *statutory responsibility*." Statement of James B. Lockhart, III, Director, FHFA, 111th Cong. 11 (2009) (emphasis added). The agency likewise recognized in a subsequent rulemaking that "allowing capital distributions to deplete the entity's conservatorship assets *would be inconsistent with the agency's statutory goals*, as they would result in removing capital at a time when the Conservator is charged with *rehabilitating* the regulated entity." 76 Fed. Reg. 35724, 35727 (June 20, 2011) (emphases added). Soon thereafter, the agency's director told the Senate: "*By law*, the conservatorships are intended to rehabilitate the [Companies] as private firms." Letter from Edward J. DeMarco, Dir., FHFA, to Senate (Nov. 10, 2011) (emphasis added), *available at* http://www.fhfa.gov/Media/PublicAffairs/Documents/ExecCompLtr111011.pdf.

Yet when it became clear in 2012 that Fannie and Freddie had been rehabilitated and would generate sizeable profits again, the Obama Administration intervened. Driven by ideological hostility to the private ownership of the two Companies that played

such a central role in the national mortgage industry, senior officials in the White House and the Treasury Department hatched a plan to nationalize the Companies, keep them permanently shackled, and remove any prospect of their generating economic value for shareholders, while simultaneously sweeping the imminent and significant profits into the federal treasury. Although Congress clearly provided that the Companies should operate as private, for-profit enterprises (*see* 12 U.S.C. §§ 1453, 1718), executive officials viewed this policy as misguided. But instead of working with Congress to pass the legislation required to nationalize the Companies, they sought to achieve the same result by executive fiat through a radical reinterpretation of FHFA's powers as conservator. Instead of *conserving* the Companies' assets, they worked with the agency to reassign all of the Companies' future profits to the government. Under this arrangement, the Companies are now required to hand over their entire net worth to Treasury every fiscal quarter, in perpetuity, no matter how many times over they have repaid their debts to the government.

The Net Worth Sweeps obliterated the economic rights of the private shareholders and made the federal government the effective owner of Fannie and Freddie in everything but name: The government will now reap all the profits the Companies will ever earn. Because the Companies cannot recapitalize, they are kept constantly on the brink of insolvency, and thus their only way to fill any operating deficit is to draw on funds from Treasury. The Government thus owns all of the upside and all of the downside of the Companies' operations.

2. While the government has attempted to portray the Net Worth Sweeps as an effort to save Fannie and Freddie from a "death spiral" of debt, the historical facts belie that narrative. By the time the Net Worth Sweeps were imposed in 2012, the financial crisis had ended and the housing market had stabilized, and the Companies were on the verge of returning to booming profitability. The Companies each had a pre-existing credit line of over $100 billion that they could draw from Treasury if needed, but it was clear that they would have no need at any foreseeable time: According to documents in FHFA's possession, the Companies were about to enter a "golden" period of profitability, with over $50 billion in profits expected in the next year alone. App. 292a, 306-308a. Upon learning this news, the agency apparently did not even pause to consider whether it was consistent with its role "as conservator" to assign away all of the Company's profits forever, but instead acceded to a "renewed push" from the Treasury Department to implement the Net Worth Sweeps. App. 342a. As a result, by the end of 2017, the Companies will have paid Treasury over $283 billion, which is over $96 billion *more* than Treasury disbursed to them during the financial crisis. With these payments, the Companies have *overpaid* the full principal and interest they would have owed Treasury at the agreed upon 10 percent interest rate, and Treasury still stands to reap all of the billions of dollars in profits that the Companies will ever generate in the future.

The Net Worth Sweeps have nothing to do with conserving the assets or property of Fannie and Freddie, and everything to do with nationalizing the Companies and channeling their profits into the

government's own coffers. The clear goal was, in the private words of one senior White House official, to "eliminat[e] [the Companies'] ability to pay down principal (so they can't repay their debt and escape as it were)." App. 379a. Indeed, the same official confirmed that the Net Worth Sweeps were consciously designed to "ensur[e] that [the Companies] can't recapitalize," and to "close off the possibility that they ever go (pretend) private again." App. 378a, 375a. Among the benefits of this plan from the executive branch perspective, he emphasized, was obviating the need for "Congress to make a decision" about whether to nationalize the Companies, which entailed a "mighty high risk" of being voted down. App. 375a. Internal documents from the Treasury Department further confirm that the Sweeps were intentionally designed to serve "the Administration's commitment to ensure existing common equity holders will not have access to any positive earnings from [Fannie and Freddie] in the future." App. 323a. This act of deliberately cutting off a company's owners from any future profit is the antithesis of the statutory mandate to act "as conservator."

The Net Worth Sweeps thus represent an extreme abuse of power by an agency that first *admitted* its obvious duty to act as conservator, and then flagrantly *violated* that duty in order to serve the government's own financial and ideological interests. The scale of the abuse is staggering: it has already led to the unlawful expropriation of well over a hundred billion dollars, with untold billions more to come in the near future. Indeed, as the Net Worth Sweeps are set to continue *indefinitely*, they promise to beget even more lawless executive action by creating a self-refilling

slush fund without the political oversight and accountability that raising taxes or cutting spending requires.

Moreover, the decision below allowed the government to achieve this dramatic result while evading the key mechanisms of judicial review specifically mandated by Congress. By announcing that it would serve as a *conservator* of Fannie and Freddie, and then distorting its conservatorship powers to act as a de facto *liquidator*, FHFA deprived the Companies of any meaningful notice or opportunity to object to the risk of liquidation on the front end of the receivership process. And by refusing to go through the proper liquidation process, the agency also deprived shareholders of any judicially supervised distribution of assets under the statutory priority scheme on the back end.

To prevent this type of abuse, it is crucial for this Court to enforce two basic limits that the decision below ignored. First, the statutory anti-injunction bar precludes judicial review only when an agency is truly acting within its statutory powers *as conservator*. *See Coit Indep. Joint Venture v. Federal Sav. & Loan Ins. Corp.*, 489 U.S. 561, 572-79 (1989). And second, courts must strictly enforce the limits on federal conservatorship power that are plainly imposed by the statute and common sense. Otherwise, the government will have free reign both to *exceed* the limits that Congress imposed on it, and then to *evade* the judiciary's role in enforcing those limits.

III. THE GOVERNMENT'S ABUSE OF POWER HAS STAGGERING CONSEQUENCES

The abuse of power described above has enormous practical consequences for the private sector, now and in the future. Most immediately, Fannie and Freddie are privately-owned companies with billions of dollars in value that is rightfully owned by pensioners, mutual funds, and other investors. Many of these investors purchased Fannie and Freddie stock during the financial crisis in 2007 and 2008, when the Companies together raised $24.6 billion of new capital. But regardless of when the stock purchases occurred, they all were made on the expectation that the rule of law would prevail, and that the federal government did not have authority to arbitrarily seize the entire value of the stock under the guise of its conservatorship powers.

If the decision below is allowed to stand, federal agencies acting as conservators will be given radical new license to similarly nationalize a wide variety of distressed companies without being constrained by any principle of law or equity. The impact will not be limited to Fannie and Freddie, but will extend to every bank in the country under the jurisdiction of FDIC, which has statutory conservatorship powers that are materially identical to those at issue here. *See supra* pp. 11-12. This lawless new power will also extend to every credit union in the country under the identical conservatorship authority granted by the Federal Credit Union Act. *See* 12 U.S.C. § 1787(b)(2)(D)-(E). And it will extend even to such areas of the economy as commercial farming, where the Farm Credit Administration Board "may act as a conservator or

receiver" in certain circumstances. *See* 12 U.S.C. § 2277a-7.

This lawless expansion of federal conservatorship power will have a dramatic impact throughout capital markets, and especially in the realm of rescue capital. Until now, troubled financial institutions have not been entirely dependent on the federal government but have instead been able to rely on the availability of private capital to supply crucial liquidity when needed. But now, under the D.C. Circuit's radical new reading of the law, private investors will be far more reluctant to supply rescue capital to any entity that might be placed under conservatorship, which could result in the federal expropriation of *all* investment capital without any judicial review. At the very least, this will dramatically increase the cost of rescue capital by significantly inflating the risk premium. And in the context of large institutions whose economic value makes them an especially attractive target of federal expropriation, it may dry up rescue capital altogether.

Accordingly, a judicial blessing of the federal government's actions here would permit the effective nationalization of not only Fannie and Freddie, but the *entire industry* of rescue capital for regulated financial institutions across the country. Instead of serving as the backstop lender of last resort for these institutions, the federal government will quickly find itself the lender of *only* resort. Like burning down your own house to keep warm, exploiting rescue investors by seizing their capital is an opportunity that is unlikely to present itself more than once.

IV. THE CANON OF CONSTITUTIONAL AVOIDANCE REQUIRES REVERSAL OF THE DECISION BELOW

Even if FHFA's statutory authority to act "as conservator" could somehow be interpreted to empower the agency to act as an *anti*-conservator, that interpretation would be barred by the canon of constitutional avoidance. Because such an expansive reading would raise "serious constitutional difficulties," the statute "can and should be read to avoid these difficulties." *Coit*, 489 U.S. at 579; *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.") (Holmes, J.). Here, in particular, authorizing the Net Worth Sweeps would give rise to at least three "grave" constitutional doubts.

First, if the Net Worth Sweeps are not struck down on statutory grounds, they violate the Takings Clause. *See United States v. Sec. Indus. Bank*, 459 U.S. 70, 78 (1982) (construing Bankruptcy Act to avoid takings claims); *Waterview Mgmt. Co. v. FDIC*, 105 F.3d 696, 701 (D.C. Cir. 1997) (narrowly construing agency's statutory conservatorship authority to avoid "significant constitutional questions under the takings clause").

The most basic requirement of the Takings Clause is that the federal government cannot seize private property without just compensation. *See Lingle v. Chevron USA Inc.*, 544 U.S. 528, 537 (2005) ("a direct government appropriation . . . of private property" is a "per se" taking). That is true when the government

"takes your home," or "takes your car," or takes *all the profits of your private company* and channels them into the federal treasury in perpetuity. *Cf. Horne v. Department of Agriculture*, 135 S. Ct. 2419, 2426 (2015). It makes no difference if the government purports to be acting as a "conservator" when it seizes the company's profits for its own financial gain. Indeed, even when the government is acting as a *receiver*, with clear authority to *liquidate* a company, it cannot simply seize shareholders' residual property interests in the company without running afoul of the Takings Clause. *See, e.g.*, *First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279, 1288, 1296 (Fed. Cir. 1999).

In addition to being an obvious direct taking, the Net Worth Sweeps also qualify as a regulatory taking. At the outset, seizing all of Fannie and Freddie's profits in perpetuity is a "per se" regulatory taking because it wholly eliminates the value of shareholders' interest in the Companies. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1026 (1992). Moreover, even "regulated businesses" have "reasonable investment-backed expectations" that the government cannot violate at will. *Cienega Gardens v. United States*, 331 F.3d 1319, 1350 (Fed. Cir. 2003) (HUD-subsidized housing); *see also, e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 998 (1984). Here, it is more than reasonable for Fannie and Freddie (and their shareholders) to expect FHFA as conservator to follow its avowed "goal" and "responsibility" of preserving and protecting the Companies' assets instead of pilfering them. When the agency does the opposite, the "economic impact" on the Companies and their shareholders could scarcely be greater, and the

"character of the governmental action" could not be more expropriative. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

Second, it would violate the Due Process Clause if FHFA could deprive shareholders of their property interests by unilaterally disposing of a company's entire net worth without observing even the most rudimentary procedural safeguards that traditionally apply in liquidation proceedings. As Congress recognized when it enacted HERA, any proceeding that liquidates a company's entire net worth must afford at least two basic components of procedural protection: It must first provide the company with notice and an opportunity to object to the imposition of a receivership on the front end; and it must then provide some lawful distribution scheme with at least some minimal level of judicial review to ensure that assets are lawfully distributed upon liquidation at the back end. *See, e.g.*, *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950) ("[A]t a minimum," the deprivation of property rights must "be preceded by notice and opportunity for hearing appropriate to the nature of the case"). Indeed, Congress respected both of these rights in HERA when it required notice and an opportunity to object to the start of a receivership, and when it set forth a detailed priority scheme subject to judicial review in the liquidation process. *See* 12 U.S.C. § 4617(a)(5), (b)(5)-(9).

FHFA seeks to evade these basic protections. Instead of giving notice of *receivership* proceedings that could *liquidate* the Companies, the agency announced that they would be put into "conservatorship," where the agency pledged to fulfill its "statutory responsibility" to "preserve the[ir]

assets." 111th Cong. 11. As a result, even though there was a formal 30-day period when the Companies could have objected to the advertised *conservatorship*, they had no reason to object since there was no indication that they could be subject to *receivership* or *liquidation* while in conservatorship. Moreover, once FHFA and Treasury decided to "w[i]nd down" the Companies by seizing all of their net worth in perpetuity, App. 327a, it flagrantly disregarded the statutory priority scheme and the attendant right of judicial review. Instead of worrying about the legal niceties of how the Companies' assets should be distributed among creditors and shareholders, the government is simply dictating that *all* of the Companies' value should be assigned to the federal treasury for the rest of time. That type of arbitrary, unilateral, self-interested expropriation of billions of dollars of private shareholder value without any notice or opportunity for a hearing is the very epitome of a Due Process violation.

Third, endowing an executive agency with such boundless power over the national economy would raise serious concerns about the separation of powers. It is bad enough that FHFA is headed by a single director completely insulated from Presidential control, which by itself violates Article II. *See PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 18 (D.C. Cir. 2016) (Kavanaugh, J.), *reh'g en banc granted, order vacated* (Feb. 16, 2017). But the problem becomes even more intolerable if the agency is endowed with standardless discretion to operate either as a *conservator* or an *anti*-conservator. Such boundless authority violates the non-delegation doctrine.

In order to operate pursuant to a lawful delegation of authority, an agency must be guided by an "intelligible principle" to which Congress has "directed" the agency "to conform." *Dep't of Transp. v. Ass'n of Am. R.R.* 135 S. Ct. 1225, 1246 (2015) (Thomas, J., concurring) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928)). Here, the decision below erased any such intelligible principle when it held that the statute "d[oes] not even say that FHFA 'should' . . . preserve and conserve assets." 864 F.3d at 608. On this boundless reading of the statute, the agency's guiding principle is rendered entirely *un*intelligible, and there is virtually no action of any kind that would be outside its powers in operating a distressed company. The law would allow the agency to seize the company's assets to build highways, subsidize agriculture, or buy airplanes. The only guiding light would be the agency's own whim and caprice, as any obligation to maintain even a semblance of a traditional conservatorship could be blithely ignored.

Of course, the far more sensible reading is that the agency *is* bound by a very *clear* intelligible principle, which is rooted in hundreds of years of legal tradition: it is bound to act "as conservator," which requires it to preserve and protect the assets of its wards rather than looting them to engorge the federal treasury. That is the only reading that can be squared with the statutory text, and the only reading that can avoid the thicket of constitutional problems created by the decision below.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted,

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