Appeal No. 17-20364

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

v.

STEVEN T. MNUCHIN, SECRETARY, U.S. DEPARTMENT OF TREASURY;
DEPARTMENT OF THE TREASURY; FEDERAL HOUSING FINANCE AGENCY;
MELVIN L. WATT,
Defendants-Appellees.

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

PETITION FOR REHEARING EN BANC BY DEFENDANTS-APPELLEES FEDERAL HOUSING FINANCE AGENCY AND MELVIN L. WATT

Howard N. Cayne
Asim Varma
Robert J. Katerberg
Ian S. Hoffman
Dirk C. Phillips
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave. NW
Washington, DC 20001
(202) 942-5000

Counsel for Defendants-Appellees FHFA and Melvin L. Watt

CERTIFICATE OF INTERESTED PERSONS

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

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

Plaintiffs-Appellants	***Counsel for Plaintiffs-Appellants***
Patrick J. Collins Marcus J. Liotta William M. Hitchcock	Charles J. Cooper David H. Thompson Peter A. Patterson Brian W. Barnes COOPER & KIRK, PLLC Chad Flores BECK REDDEN LLP
Defendants-Appellees	***Counsel for Defendants-Appellees***
Steven T. Mnuchin United States Department of Treasury	Mark B. Stern Abby C. Wright Gerard J. Sinzdak Diane Kelleher Deepthy Kishore* Thomas D. Zimpleman* U.S. DEPARTMENT OF JUSTICE
Defendants-Appellees	***Counsel for Defendants-Appellees***
Melvin L. Watt Federal Housing Finance Agency	Howard N. Cayne Asim Varma Robert J. Katerberg Ian S. Hoffman Dirk C. Phillips ARNOLD & PORTER KAYE SCHOLER LLP

Other Persons and Entities
Federal National Mortgage Association ("Fannie Mae")
Federal Home Loan Mortgage Corporation ("Freddie Mac")

* Attorneys whose names are denoted with an asterisk entered appearances in the district court but have not entered appearances in the Fifth Circuit.

/s/ Howard N. Cayne
Howard N. Cayne

Counsel for Defendants-Appellees
FHFA and Melvin L. Watt

RULE 35(B)(1) STATEMENT

The panel's decision declaring the Federal Housing Finance Agency's ("FHFA") independent structure unconstitutional conflicts with multiple decisions of the Supreme Court, as well as a recent decision of the *en banc* D.C. Circuit upholding the constitutionality of the Consumer Financial Protection Bureau ("CFPB") against a similar separation-of-powers challenge. That alone is sufficient to warrant *en banc* review. Fed. R. App. P. 35(b)(1)(A). The need for review is amplified because the panel majority took this extraordinary action in a case where Plaintiffs plainly lack Article III standing, and based its decision in large part on arguments and theories Plaintiffs had not raised. The panel majority's approach is thus in tension with fundamental principles of constitutional avoidance and judicial restraint.

With regard to standing, the panel majority conflicts with multiple decisions of the Supreme Court and this Court emphasizing that traceability and redressability are indispensable to Article III standing. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Allen v. Wright*, 468 U.S. 737, 750-61 (1984); *Okpalobi v. Foster*, 244 F.3d 405, 424-29 (5th Cir. 2001) (en banc); *Henderson v. Stalder*, 287 F.3d 374, 381 (5th Cir. 2002).

As to the merits, the panel decision conflicts with decades of Supreme Court precedent upholding the constitutionality of independent agencies. *Humphrey's*

Ex'r v. United States, 295 U.S. 602 (1935); *see also Wiener v. United States*, 357 U.S. 349 (1958); *Morrison v. Olson*, 487 U.S. 654 (1988); *Bowsher v. Synar*, 487 U.S. 714 (1986); *Free Enters. Fund v. PCAOB*, 561 U.S. 477 (2010). It likewise conflicts squarely with the D.C. Circuit's recent decision involving the CFPB. *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc). On both standing and merits, it conflicts with a cogent district court decision upholding the FHFA's structure against the same challenge. *Bhatti v. FHFA*, 2018 WL 3336782 (D. Minn. July 6, 2018) (appeal docketed).

The "exceptional importance" of these questions speaks for itself. Fed. R. App. P. 35(b)(1)(B). The panel decision upends established understandings between the political branches and restricts Congress's latitude to design agency structures to best accomplish its objectives. Since establishing the Comptroller of the Currency in the Lincoln era, Congress has made financial regulators independent from politics by giving them protection from removal, thus promoting stability and public confidence in the economy. Congress also has sometimes determined that the exigent problems of financial regulation call for agency leadership vested in a single head, rather than multi-member commissions or boards. The panel decision appears to disable Congress from combining those features when creating an agency, a step no other appellate court has taken. This

creates a quintessential question of exceptional importance warranting *en banc* review.[1]

[1] Plaintiffs have petitioned for rehearing *en banc* with respect to the panel's rejection of their APA claims and its decision that invalidation of the Third Amendment is not part of the remedy for the constitutional claim, and the Court has requested that FHFA file a response, which is due September 13, 2018. In contrast to the issues raised by this Petition, those other issues are not appropriate for *en banc* review for reasons that will be explained in FHFA's forthcoming opposition.

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ISSUES PRESENTED

1. Whether Plaintiffs have Article III standing to bring their separation-of-powers claim.

2. Whether FHFA's structure violates Article II of the Constitution.

STATEMENT OF THE CASE

1. FHFA is an independent federal agency that regulates Fannie Mae and Freddie Mac (the "Enterprises") and the Federal Home Loan Banks. The Enterprises are government-sponsored enterprises chartered by Congress to provide liquidity to the mortgage market by purchasing residential loans from banks and other lenders. The Enterprises, which own or guarantee trillions of dollars of mortgages and mortgage-backed securities, play a vital role in housing finance and the U.S. economy.

Congress created FHFA in the midst of the 2008 financial crisis as part of the Housing and Economic Recovery Act ("HERA"). FHFA has a Director "appointed for a term of 5 years, unless removed before the end of such term for cause by the President." 12 U.S.C. § 4512(b)(2). Consistent with the prevailing model for federal financial regulators, FHFA is funded through assessments charged to the entities it regulates. *Id.* § 4516(a). Congress also established the Federal Housing Finance Oversight Board ("FHFOB"), comprised of the Director, SEC Chairman, and Secretaries of Treasury and Housing and Urban Development.

Id. § 4513a. The FHFOB meets at least quarterly and advises the Director on strategy and policy.

2. In recognition of the unfolding economic crisis, HERA also authorized FHFA to place an Enterprise in conservatorship. 12 U.S.C. § 4617(a)(2). As Conservator, FHFA steps into the shoes, and "operate[s]" and "take[s] over the assets," of the Enterprise. *Id.* § 4617(b)(2)(B)(i). HERA simultaneously authorized the Department of the Treasury to infuse funds into the Enterprises by purchasing their securities. *Id.* §§ 1455(*l*)(1)(A), 1719(g)(1)(A).

In September 2008, FHFA placed the Enterprises into conservatorships, and Treasury entered into preferred stock purchase agreements with the Enterprises pursuant to which it ultimately provided hundreds of billions of dollars necessary to ensure the Enterprises' continued solvency and the performance of their statutory missions. In return for this funding, Treasury received dividends and various other forms of consideration.

On August 17, 2012, Treasury and FHFA as Conservator of the Enterprises adopted an amendment (the "Third Amendment") to the stock agreements. The Third Amendment modified the formula for Treasury's dividends. Under the original agreements, Treasury was entitled to fixed dividends equal to 10% annually of the cumulative amount of funds Treasury had provided to each Enterprise under the Agreement. Under the Third Amendment, Treasury receives

a variable dividend equal to the Enterprise's net worth, less a capital buffer, at the end of each quarter. The new formula results in a larger dividend for Treasury in some quarters compared to the prior regime, a smaller dividend in others.

3. Since 2013, many Enterprise shareholders have sued challenging the Third Amendment as overly favorable to Treasury and harmful to the value of their stock. These suits, generally under the Administrative Procedure Act, uniformly failed. Op. 14-15.

In this case, filed in 2016, Plaintiffs similarly attack the Third Amendment as a giveaway to Treasury—"joint FHFA-Treasury action," ROA.515, that served "the Administration's plans" and was "an important policy goal" of Treasury, the White House, and the President's National Economic Council, ROA.15, 17-18, 55-56. Plaintiffs here made the same type of APA claims rejected in both prior and subsequent cases. ROA.81-88. But, tracking a then-just-issued D.C. Circuit panel opinion finding the CFPB's structure unconstitutional, *PHH Corp. v. CFPB*, 839 F.3d 1 (2016), *vacated en banc*, 881 F.3d 75 (D.C. Cir. 2018), Plaintiffs added a separation-of-powers claim. That claim asked the court to "vacate[] and set aside" the Third Amendment because it was "adopted by FHFA when it was headed by a single person who was not removable by the President at will." ROA.88-89. The district court dismissed all claims. ROA.946-961.

A divided panel of this Court affirmed in part, reversed in part, and remanded. Op. 53. Of relevance here, the panel reversed the district court's order rejecting the constitutional claim. The panel held that Plaintiffs had standing because Article III's requirements for separation-of-powers claims are "more relaxed" than in other contexts, Op. 16, 19, 24, and that five aspects of FHFA's structure, including the provisions for leadership by a single Director removable only for cause, "cumulatively offend the separation of powers," Op. 52.

However, the panel declined to grant Plaintiffs' requested relief of invalidating the Third Amendment. Rather, in line with Supreme Court precedent, the panel held that "[t]he appropriate remedy for the constitutional infirmity is to strike the language providing for good-cause removal from 12 U.S.C. § 4512(b)(2)." *Id.* In doing so, it "le[ft] intact the remainder of HERA and FHFA's past actions—including the Third Amendment." *Id.* at 53.

Chief Judge Stewart dissented from the constitutional holding, observing that the Supreme Court has struck down removal restrictions on only two occasions: where Congress conditioned removal on the Senate's advice and consent, and an "extreme variation on the traditional good-cause removal standard" where Congress interposed "two layers of for-cause removal protection." *Id.* at 55 (internal quotation marks omitted). Chief Judge Stewart adopted the *en banc* D.C.

Circuit's analysis in *PHH* and further observed that the distinction the majority perceived between the FSOC and FHFOB was misplaced.

REASONS FOR GRANTING THE PETITION

I. THE PANEL'S DECISION THAT PLAINTIFFS HAD STANDING CONFLICTS WITH SUPREME COURT AND CIRCUIT PRECEDENT

Plaintiffs lack Article III standing for their separation-of-powers claim. Traceability and redressability are both fundamentally lacking here for multiple reasons. Thus, the panel reached out for a constitutional issue it had no need—indeed, no constitutional authority—to decide.

1. The panel did not confront a particularly "glaring" standing problem: the lack of a "causal connection between their injury—a Third Amendment that (in Plaintiffs' view) is too favorable to the Executive Branch—and the lack of Executive Branch influence over FHFA." *Bhatti*, 2018 WL 3336782, at *4. The Third Amendment is "part of a contract between FHFA and Treasury," which is "an executive department that is fully under the President's control." *Id.* at *5. Thus, if the President did not believe the Third Amendment was good policy, he could simply have instructed the Treasury Secretary not to agree to it. But, paradoxically, Plaintiffs' central theme is that the Third Amendment is a giveaway to Treasury—"joint FHFA-Treasury action," ROA.515, that served "the Administration's plans" and was "an important policy goal" of Treasury, the White

House, and the President's National Economic Council, ROA.15, 17-18, 55-56. Plaintiffs thus lack any "coherent theory" for how the Third Amendment "could have resulted from the President having too *little* control over FHFA." *Bhatti*, 2018 WL 3336782, at *5. Accordingly, "[i]t simply makes no sense to argue that the Third Amendment is 'fairly traceable' to the lack of presidential control." *Id.*[2]

2. Standing is also lacking because in adopting the Third Amendment, FHFA as Conservator did not exercise the type of functions over which Article II mandates Presidential control. Indeed, "[w]hen an agency acts as conservator," this Court has held that the agency "does not exercise governmental functions." Op. 20; *see United States v. Beszborn*, 21 F.3d 62, 68 (5th Cir. 1994) (RTC as receiver stood as "private, non-governmental entity" whose actions did not implicate the Double Jeopardy Clause). The panel distinguished *Beszborn* on the basis that double jeopardy requires "*actions by a sovereign*," placing it "on an entirely different foundation" than the separation of powers. Op. 21. That distinction is difficult to follow because "the allocation of official power" is the

[2] The Third Amendment is also not traceable to the protection of a Senate-confirmed FHFA Director from removal at will because at the time of the Third Amendment FHFA was led by an Acting Director, a position that exists under a statutory provision that does not include for-cause removal protection. 12 U.S.C. § 4512(f). The panel held that the Acting Director nevertheless "is covered by the removal restriction" because of Congress's general intent that FHFA be an independent agency. Op. 19-20. But that analysis both disregards the text of the statute and is counter to the longstanding principle that courts should construe statutes to avoid constitutional issues, not create them.

central concern underlying separation-of-powers doctrine. *Clinton v. Jones*, 520 U.S. 681, 699 (1997). Because the action challenged here was not taken in a sovereign executive capacity, Plaintiffs lack standing to bring their separation-of-powers claim.

3. The panel decision itself exemplifies the most profound standing problem of all: lack of redressability. As the panel properly recognized, redressability hinges on "whether a plaintiff *personally* would benefit *in a tangible way* from the court's intervention." Op. 22 (first emphasis in original; second added). And the panel ultimately concluded, correctly, that the only relief it could award was "strik[ing] the language providing for good-cause removal" to "restor[e] Executive Branch oversight to FHFA," while "leav[ing] intact the remainder of HERA and the FHFA's past actions—including the Third Amendment." Op. 52-53. The panel's forward-looking relief provides no redress for the injury Plaintiffs alleged here—a historical transaction Plaintiffs claim improperly enriched Treasury and hurt their stock value. And "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83, 107 (1998).

The panel found that a separate, "*ongoing* injury" distinct from the Third Amendment would be redressed—an injury consisting of "being subjected to

enforcement or regulation by an unconstitutionally constituted body." Op. 23. But Plaintiffs' 190-paragraph complaint alleges no injury based on "enforcement" or "regulation" targeting Plaintiffs. Plaintiffs named FHFA solely "in its capacity as Conservator," ROA.8, and complained of a specific past injurious act: the August 2012 Third Amendment. Consistent with that singular focus, when the panel discussed the "injury-in-fact" that served as the basis for Plaintiffs' standing, it referred solely to "the expropriation of their rights" that the Third Amendment supposedly effected. Op. 16-17. "[I]t is not the province of an appellate court to hypothesize or speculate about the existence of an injury Plaintiff did not assert." *Huron v. Cobert*, 809 F.3d 1274, 1280 (D.C. Cir. 2016) (internal quotation marks omitted). And Article III does not permit "mixing [of] a stated injury" with "redressability of an entirely different injury." *HealthNow N.Y. Inc. v. N.Y.*, 448 F. Appx. 79, 81 (2d Cir. 2011); *accord Bishop v. Smith*, 760 F.3d 1070, 1093 (10th Cir. 2014).

Plaintiffs are not, in fact, regulated by FHFA. FHFA regulates the Enterprises, not their shareholders. Plaintiffs are thus much differently situated than the accounting-firm plaintiff in *Free Enterprise Fund*, which "was registered with the PCAOB and subject to its continuing jurisdiction, regulation, and investigation," including "reporting requirements and auditing standards." Op. 23 (citing *Free Enterprise Fund*, 561 U.S. at 487-88, 513). And redressability

requires more than "*shadow[s]* over the Shareholders' interests" or the "ongoing *potential* to…affect the Shareholders' economic rights." Op. 22 (emphasis added). Rather, as the panel itself acknowledged, redress must be both "tangible" and "likely, as opposed to merely speculative." *Id.* (internal quotation marks omitted).

Simply put, the panel did not hold Plaintiffs' allegations to the rigorous standards the Supreme Court's and this Court's jurisprudence demand. *See*, *e.g.*, *Lujan*, 504 U.S. at 561; *Allen*, 468 U.S. at 750-61; *Okpalobi*, 244 F.3d at 424-29; *Henderson*, 287 F.3d at 381. The panel considered standing for separation-of-powers claims more "relaxed." Op. 16, 19, 24. But Article III standing requirements are themselves grounded in separation-of-powers concerns, *Allen*, 468 U.S. at 750, and there is no separation-of-powers exception to standing. *See Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 264 (1991) (applying full traceability and redressability analysis to separation-of-powers claim); *Comm. for Monetary Reform v. Bd. of Gov. of Fed. Res. Sys.*, 766 F.2d 538, 542-43 (D.C. Cir. 1985) (same; finding no standing). The panel erred by reaching out to decide a novel constitutional issue when there was no basis under Article III to do so. This Court should rehear the case *en banc* to correct that error.

II. THE PANEL'S DECISION HOLDING FHFA'S STRUCTURE UNCONSTITUTIONAL CONFLICTS WITH SUPREME COURT PRECEDENT AND IS OF EXCEPTIONAL IMPORTANCE

If Plaintiffs have standing, their separation-of-powers claim nevertheless fails. It is long settled that Congress may create independent agencies run by officers removable only for cause. *See Free Enters. Fund*, 561 U.S. at 483 (citing *Humphrey's Ex'r*, 295 U.S. 602). Although there is an "outer boundary" on Congress's power—Congress may not arrogate to itself any part of the President's removal power, and may not excessively insulate officials with two layers of removal protection—"FHFA's structure does not reach that boundary" and "does not impinge on the President's oversight and removal authority." Op. 55 (Stewart, C.J., dissenting in part).

The panel acknowledged that "limiting the President to 'for cause' removal is not sufficient to trigger a separation-of-powers violation," but nevertheless held that the "cumulative effect" of "this and other independence-promoting mechanisms" produced a separation-of-powers violation. Op. 37-38, 49-51. That was incorrect. The "other independence-promoting mechanisms"—two of which were not even affirmatively relied upon by Plaintiffs—are common agency design features that have never before been held constitutionally problematic and do not, in fact, impair Presidential control. The panel's rationale that distinct, independently benign features can combine to create a violation is especially

problematic because it offers little guidance to Congress, agencies, and the public on what other combinations might be deemed to cross the line. The *en banc* Court should correct this wrong turn.

1. The first feature that the panel held "further insulates [FHFA] from presidential influence and oversight" is leadership by a single Director. Op. 38. But the constitutional distinction the panel draws between FHFA's structure and that of multi-member independent agencies is "untenable" and finds "no footing in precedent, historical practice, constitutional principle, or the logic of presidential removal power." *PHH*, 881 F.3d at 79-80.

The panel theorizes that a President can more effectively supervise multi-member agencies "through the power to designate the chairs of the agencies and to remove chairs at will from the chair position." Op. 38-39 (internal quotation marks omitted). But when the Supreme Court upheld the constitutionality of the FTC in *Humphrey's Executor* in 1935, the President lacked such power as to the FTC, 64 Stat. 1264, 1265 (1950), so Presidential control over chairmanship cannot have been a factor underlying that holding. The President's ability to appoint and remove chairs varies widely across different multi-member agencies, and before the panel decision, no court had ever suggested that the "existence, strength, or particular term of agency chairs" is "relevant to the constitutionality of an independent agency." *PHH*, 881 F.3d at 100.

The panel also noted that "[a] President may be stuck for years with [an] FHFA Director who was appointed by the prior President and who vehemently opposes the current President's agenda." Op. 39 (internal quotation marks omitted). But a President may similarly be stuck with a hostile majority of a multi-member agency. Any such entrenchment stems from the length and (for multi-member agencies) staggering of the officials' terms, not from any inherent distinction between single and multiple heads. Based on comparison with those parameters for the FTC, FHFA's single-director structure "actually permit[s] *more* presidential control over the agency's direction than would a multi-member commission." *Bhatti*, 2018 WL 3336782, at *7 (emphasis added).

2. As another "independence-promoting mechanism," the panel cited the fact that FHFA does not have a "statutorily mandated requirement of bipartisan leadership" like some multi-member agencies do. Op. 39-40. To the extent it has any significance, that distinction cuts the opposite way. When an agency has a bipartisan composition requirement, a President is forced to appoint members of the *opposition political party*. This requirement is far more likely to impede Presidential control of an agency than facilitate it.

3. The panel held that the President also "loses 'leverage' over the agency's activities" because FHFA is funded through assessments rather than congressional appropriations. Op. 40-41. But Plaintiffs did not raise FHFA's funding

mechanism in their complaint, and their brief to this Court only mentioned in passing that non-appropriated funding removes FHFA from "*Congressional* oversight." Appellants' Br. 19 (emphasis added). Indeed, any such "budgetary independence primarily affects Congress, which has the power of the purse; it does not intensify any effect on the President of the removal constraint." *PHH*, 881 F.3d at 96; *accord Bhatti*, 2018 WL 3336782, at *7. In any event, FHFA's funding mechanism follows the longstanding template for federal financial regulatory agencies, including the OCC, Federal Reserve, FDIC, NCUA, and CFPB, and Farm Credit Agency. *PHH*, 881 F.3d at 95; *see Bhatti*, 2018 WL 3336782, at *7. Until the panel decision, no court had ever perceived any Article II problem with that widespread model. The panel erred by striking down an act of Congress due in part to a basis no court has previously questioned and that Plaintiffs here did not even raise as an issue.

4. Lastly, the panel held that FHFA is excessively insulated from Presidential supervision because the FHFOB plays an advisory role and "cannot impose its will on the FHFA." Op. 41-43. This is another issue absent from both Plaintiffs' Complaint and their briefs to the panel. And no court until the panel decision had ever held that the constitutional separation of powers requires an oversight board that can veto or otherwise "impose its will" on an independent

agency. That, after all, would defeat the purpose of independence as recognized from *Humphrey's Executor* forward.

The panel majority reads the D.C. Circuit's *PHH* decision as turning on the presence of such a board overseeing the CFPB. Op. 41-43, 49. However, the *PHH* majority opinion mentioned that board only in passing to refute the suggestion that there is no "body of experts" relevant to the CFPB, not to offer it as a mechanism through which the President can impose his will. 881 F.3d at 98-99. Moreover, the CFPB oversight board "veto-power" emphasized by the panel covers only CFPB regulations threatening the "safety and soundness" or "stability" of the U.S. banking system, and did not apply to the agency action challenged in *PHH*. 12 U.S.C. § 5513. In short, the distinction between the FSOC and FHFOB cannot bear the weight the majority places on it, and provides no basis for reconciling *PHH* with the panel decision here. *See* Op. 56-57 (Stewart, C.J., dissenting) ("[t]he mandatory-versus-advisory oversight distinction…does not meaningfully alter the constitutional analysis in this case"). The D.C. Circuit and panel decisions are in fundamental conflict that this Court should resolve sitting *en banc*.[3]

[3] To the extent there are relevant distinctions between FHFA and CFPB, those distinctions cut the other way. FHFA's structure would be constitutional even under the *PHH* dissent's analysis, which turned on the "massive" and "enormous" scope of executive law enforcement power vested in the CFPB, including

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The exceptional importance of the constitutional issue in this case is difficult to overstate. The panel decision infringes Congress's constitutional prerogative to create agencies and design their structures to optimally address the myriad problems Congress confronts. As the panel notes, "[o]ver the past century, Congress has established dozens of independent agencies," Op. 26, a number of which have single heads with removal protection or share other features the panel found contributed to the unconstitutionality of FHFA's structure. *See, e.g.*, 12 U.S.C. § 2 (OCC); 42 U.S.C. § 902(a)(3) (Social Security Administration); 5 U.S.C. § 1211(b) (Office of Special Counsel); 12 U.S.C. § 5491 (CFPB). The divided panel decision throws the constitutional status of any number of agencies into doubt and opens the floodgates to novel claims by regulated entities that various combinations of design features, heretofore recognized as benign, cumulatively render those agencies unconstitutional. The *en banc* Court should review whether the panel decision was correct before those consequences ensue.

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enforcement of 19 consumer protection statutes against a vast swath of industry and "impos[ing] fines and penalties on private citizens," making the CFPB Director in the dissent's view "the single most powerful official in the entire U.S. Government, other than the President." 881 F.3d at 165, 171, 175 (Kavanaugh, J., dissenting). FHFA regulates several named institutions for safety and soundness, without comparably sweeping law-enforcement powers over general commerce.

CONCLUSION

The Court should grant rehearing *en banc* on the issues presented herein.

Dated: August 30, 2018

Respectfully Submitted,

/s/ Howard N. Cayne
Howard N. Cayne
Asim Varma
Robert J. Katerberg
Ian S. Hoffman
Dirk C. Phillips
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave. NW
Washington, DC 20001
(202) 942-5000

Counsel for Defendants-Appellees Federal Housing Finance Agency and Melvin L. Watt

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify the following:

This paper complies with the type-volume limit of Fed. R. App. P. 35(b)(2)(A) because it contains 3,892 words, excluding the parts exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

Dated: August 30, 2018

/s/ Howard N. Cayne
Howard N. Cayne

Counsel for Defendants-Appellees Federal Housing Finance Agency and Melvin L. Watt

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2018, I electronically filed the foregoing with the Court via the appellate CM/ECF system, and that copies were served on the following counsel of record by operation of the CM/ECF system on the same date:

Charles J. Cooper
David H. Thompson
Peter A. Patterson
Brian W. Barnes
COOPER & KIRK, PLLC
1523 New Hampshire Ave., NW
Washington, D.C. 20036
(202) 220-9600
ccooper@cooperkirk.com

Chad Flores
BECK REDDEN, LLP
1221 McKinney Street
1 Houston Center
Suite 4500
Houston, TX 77010
(713) 951-3700
cflores@beckredden.com

Counsel for Plaintiff-Appellants

Abby C. Wright
Gerard J. Sinzdak
Mark B. Stern
Civil Division, Appellate Staff
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
abby.wright@usdoj.gov
(202) 514-0663

Counsel for Defendants-Appellees Steven T. Mnuchin and the U.S. Department of Treasury

/s/ Howard N. Cayne
Howard N. Cayne

Counsel for Defendants-Appellees Federal Housing Finance Agency and Melvin L. Watt