No. 18-2506

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

ATIF F. BHATTI; TYLER D. WHITNEY; MICHAEL F. CARMODY,

Plaintiffs-Appellants

v.

FEDERAL HOUSING FINANCE AGENCY; MELVIN L. WATT, in his official capacity as Director of the Federal Housing Finance Agency; DEPARTMENT OF THE TREASURY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA (No. 17-2185)

BRIEF OF PLAINTIFFS-APPELLANTS

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SUMMARY OF THE CASE

When Congress established the Federal Housing Finance Agency ("FHFA"), it "created a monster by handing an agency breathtakingly broad powers and insulating the exercise of those powers from judicial review." *Saxton v. FHFA*, 2018 WL 4016851, at *7 (8th Cir. Aug. 23, 2018) (Stras, J., concurring). FHFA is more insulated from oversight by all three branches than any other federal agency in this nation's history: "The President can only remove the FHFA's director for cause; Congress cannot control its budget through the normal appropriations process; and the judiciary cannot interfere with the exercise of its powers or functions as conservator." *Id.* at *4 n.8. To make matters worse, for over four years this extraordinary agency was headed by an acting Director who was never nominated by the President or confirmed by the Senate as required by the Appointments Clause.

Plaintiffs are shareholders who lost their investments when FHFA nationalized Fannie and Freddie. They challenge the constitutionality of FHFA's structure, the lengthy tenure of its former acting Director, and Congress's delegation of power that allows the agency "to do almost anything when it comes to Fannie and Freddie." *Id.* at *4-5. The separation of powers does not permit such broad power to be concentrated in the hands of a wholly unaccountable administrative agency.

This case raises important and complex constitutional issues, and Plaintiffs request that the Court allocate 20 minutes to each side for oral argument.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. Plaintiffs have standing both because they were injured by the Net Worth Sweep and because as shareholders in Fannie and Freddie their property is subject to FHFA's ongoing regulation and control. The district court entered final judgment as to all claims in favor of the Defendants on July 9, 2018, and Plaintiffs filed a timely notice of appeal on July 10, 2018. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether shareholders whose property rights were nullified by FHFA's decision to impose the Net Worth Sweep and who are affected by FHFA's ongoing oversight of Fannie and Freddie have standing to assert claims that FHFA is unconstitutionally structured. *Collins v. Mnuchin*, 896 F.3d 640, 653-59 (5th Cir. 2018); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 512 n.12 (2010).

2. Whether statutory provisions that insulate FHFA from oversight by the President, Congress, and the courts violate the President's constitutional removal power and the separation of powers. *Collins*, 896 F.3d at 659-76; *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc); U.S. CONST. art. II, § 3; U.S. CONST. art. II, § 1, cl.1.

3. Whether the Net Worth Sweep must be vacated because it was imposed by FHFA when it was operating in violation of the separation of powers. *Bowsher v.*

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Synar, 478 U.S. 714, 736 (1986); *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2578 (2014).

4. Whether Mr. DeMarco's service as the acting Director of FHFA for more than two years without Senate confirmation or appointment under the Recess Appointments Clause violated the Constitution and requires vacatur of the Net Worth Sweep. *United States v. Eaton*, 169 U.S. 331 (1898); U.S. CONST. art. II, § 2, cl.2.

5. Whether 12 U.S.C. § 4617 violates the nondelegation doctrine by failing to articulate an intelligible principle to guide FHFA's exercise of discretion as conservator. *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 472 (2001); *Saxton v. FHFA*, 2018 WL 4016851 (8th Cir. Aug. 23, 2018); *United States v. Garfinkel*, 29 F.3d 451, 459 (8th Cir. 1994).

STATEMENT OF THE CASE

A. Congress Establishes FHFA as an Independent Agency Headed by a Single Director.

Fannie Mae and Freddie Mac are private, for-profit corporations that insure and securitize mortgages. From 1992 until 2008, the Companies were regulated by the Office of Federal Housing Enterprise Oversight ("OFHEO"). OFHEO was not an independent agency; its Director could be removed from office by the President for any reason. *See* Housing and Community Development Act of 1992 §§ 1311, 1312, 106 Stat. 3672 (Oct. 28, 1992); JA11-13.

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During the summer of 2008, Congress enacted the Housing and Economic Recovery Act ("HERA"), which established FHFA as the successor to OFHEO. Unlike its predecessor, FHFA is an "independent" agency, 12 U.S.C. § 4511(a); 44 U.S.C. § 3502(5), and it is headed by a Director who is only removable "for cause by the President," 12 U.S.C. § 4512(b)(2). FHFA is funded through assessments that are "not . . . construed to be Government or public funds or appropriated money." *Id.* § 4516(f)(2). As a result, FHFA is neither subject to presidential control nor constrained by the appropriations process.

In addition to giving FHFA supervisory regulatory powers over the Companies, HERA also empowered FHFA to appoint itself as the Companies' conservator under specified circumstances. *See* 12 U.S.C. § 4617(a). This Court recently interpreted FHFA's powers as conservator to permit the agency "to do almost anything when it comes to Fannie and Freddie." *Saxton*, 2018 WL 4016851, at *4-*5 (Stras, J., concurring); *see* 12 U.S.C. § 4617(b)(2).

B. FHFA Forces the Companies into Conservatorship and Signs the PSPAs on Their Behalf.

On September 6, 2008, FHFA exercised its power to place the Companies into conservatorship. In addition to establishing FHFA, HERA also gave Treasury temporary authority to invest in the Companies' securities. This authority could only be exercised with the Companies' consent, and it expired at the end of 2009. *See* 12 U.S.C. §§ 1455(*l*)(1)(A), 1455(*l*)(4), 1719(g)(1)(A), 1719(g)(4). Concurrent with

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FHFA's imposition of conservatorship, Treasury exercised this authority by entering agreements with FHFA to purchase equity in the Companies ("Preferred Stock Purchase Agreements" or "PSPAs"). The PSPAs allowed the Companies to draw up to $100 billion each from Treasury as needed to avoid a negative net worth—an amount that was subsequently increased to allow the Companies to draw unlimited sums from Treasury until the end of 2012, and thereafter capped at the amount drawn from 2010 through 2012, plus $200 billion per Company. JA20, 15.

In return for Treasury's funding commitment, FHFA agreed that the Companies would provide several forms of consideration. First, the PSPAs created a new class of securities with very favorable terms to Treasury, known as Senior Preferred Stock ("Government Stock"). For each Company, the Government Stock had an initial liquidation preference of $1 billion, an amount that would increase by one dollar for every dollar drawn on Treasury's funding commitment. JA13. The original PSPAs required the Companies to pay quarterly dividends on the Government Stock's liquidation preference. These dividends could be paid in cash, at an annual rate of 10%, or in kind, by increasing the liquidation preference by an annual amount of 12%. JA21-22. Paying the dividends in kind would not have reduced the amount available under Treasury's funding commitment. JA22.

Second, FHFA agreed that the Companies would issue warrants entitling Treasury to buy 79.9% of their common stock at a nominal price. The warrants were

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designed to provide upside to taxpayers if the Companies recovered, but this upside would be shared with the Companies' other shareholders. JA20-21. The PSPAs also provided for the Companies to pay Treasury a quarterly market-based periodic commitment fee, but the fee was never charged and could only be set at a market rate with agreement from the Companies. JA22-23.

C. Mr. DeMarco Serves as FHFA's Acting Director for Over Four Years.

As the Director of OFHEO when HERA became law, James Lockhart was automatically vested with the authority to "act" as FHFA's independent Director until a permanent Director could be appointed. *See* 12 U.S.C. § 4512(b)(5). Mr. Lockhart forced the Companies into conservatorship and signed the original PSPAs on their behalf in September 2008. JA24. On August 5, 2009, Mr. Lockhart announced that he would resign at the end of the month. *Id.*

HERA provides that "[i]n the event of the . . . resignation . . . of the Director, the President shall designate" one of FHFA's three Deputy Directors "to serve as acting Director until . . . the appointment of a successor" who is nominated by the President and confirmed by the Senate. 12 U.S.C. § 4512(f). Each of FHFA's Deputy Directors is appointed by FHFA's Director. *Id.* § 4512(c)-(e). In accordance with HERA, on August 25, 2009, President Obama designated Edward DeMarco to serve as FHFA's acting Director. JA24-25. At the time, Mr. DeMarco was FHFA's Senior Deputy Director for Housing Mission and Goals. *Id.*

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Acting agency heads normally serve only temporarily, during the time necessary for the President to nominate and the Senate to confirm someone to permanently fill the position. But it was not until 15 months after Director Lockhart's resignation, on November 12, 2010, when President Obama nominated Joseph A. Smith, Jr. to be FHFA's Director. *See* JA25; 156 CONG. REC. S7911 (Nov. 15, 2010). The Senate failed to confirm Mr. Smith, and on December 22, 2010, the nomination was returned to the President. JA25; 156 CONG. REC. S11071 (Dec. 22, 2010). President Obama did not again nominate someone to fill the vacancy created by Mr. Lockhart's resignation until May 2013, when he nominated Congressman Melvin L. Watt. After more than seven months, the Senate confirmed Mr. Watt on December 10, 2013. *See* JA27; 159 CONG. REC. S8593 (Dec. 10, 2013). Mr. Watt was sworn into office on January 6, 2014. JA25.

Mr. DeMarco undertook a policy aimed at winding down the Companies and doing so in a manner that guaranteed their private shareholders would lose all the value of their investments. *See* JA26. Despite Mr. DeMarco's commitment to operate the Companies for the exclusive financial benefit of the federal government, he resisted some of the Obama Administration's most significant housing finance policies. *See id.*

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D. Unwarranted Accounting Decisions Artificially Increase the Companies' Draws from Treasury, and FHFA Expropriates Plaintiffs' Investments by Imposing the Net Worth Sweep.

Under FHFA's supervision, the Companies were forced to dramatically write down the value of their assets and to incur substantial and unjustified non-cash accounting losses in the form of loan loss reserves and write-offs of deferred tax assets. JA27-28. As a result of these accounting decisions, the Companies made draws on Treasury's funding commitment that caused the liquidation preference on Treasury's Government Stock to swell to $189 billion. But based on the Companies' performance in the second quarter of 2012, it was apparent that the Companies' private shares still had value. JA28, 29.

On August 17, 2012, FHFA and Treasury amended the PSPAs to impose the Net Worth Sweep. The Net Worth Sweep replaces the PSPAs' prior dividend structure with one that requires Fannie and Freddie to pay Treasury their entire net worth on a quarterly basis, minus a small capital buffer. JA29-30. FHFA thus agreed to nationalize the Companies and expropriated not just their future earnings but also their retained capital, thereby depriving the Companies' private shareholders of all of their economic rights.

As FHFA expected, the Net Worth Sweep has resulted in massive and unprecedented payments to the government. Since the Companies first began paying dividends under the Net Worth Sweep during the first quarter of 2013, they have

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transferred to Treasury nearly $286 billion in purported dividends—$122 billion more than Treasury could have received under the original PSPAs. *See* FHFA, TABLE 2: DIVIDENDS ON ENTERPRISE DRAWS FROM TREASURY, https://goo.gl/QQpFDY. Altogether, Treasury has recouped over $95 billion more than it disbursed to the Companies. *See id.*; FHFA, TABLE 1: QUARTERLY DRAWS ON TREASURY COMMITMENTS TO FANNIE MAE AND FREDDIE MAC PER PSPA, https://goo.gl/MjVakc. Yet, FHFA insists that the outstanding liquidation preference remains firmly fixed at $189 billion and that the federal government has the right to all of the Companies' net worth in perpetuity. JA35.

E. Plaintiffs Challenge the Constitutionality of FHFA and the Net Worth Sweep.

Plaintiffs are Fannie and Freddie shareholders who sued, arguing that the agency is unconstitutionally structured, that Mr. DeMarco's lengthy tenure as the acting head of FHFA violated the Appointments Clause, and that the unbounded discretion given to FHFA when it acts as conservator violates the nondelegation doctrine. On July 6, 2018, the district court dismissed the complaint, ruling that all of Plaintiffs' claims fail as a matter of law. The district court set out its final judgment on July 9, 2018, and Plaintiffs filed a timely notice of appeal the next day.

SUMMARY OF ARGUMENT

1. This Court should follow a recent decision of the Fifth Circuit that held that shareholders have standing to challenge FHFA's structure and that this structure

offends the separation of powers. *Collins v. Mnuchin*, 896 F.3d 640 (5th Cir. 2018). FHFA's Director enjoys for-cause removal protection that when combined with other elements of the agency's structure—most notably the fact that it is headed by a single individual rather than a bipartisan commission—impermissibly interferes with the President's ability to discharge his constitutional duty to take care that the laws be faithfully executed. More troubling still, other aspects of FHFA's structure make it unresponsive not only to the President but also to Congress and the courts. No federal agency in our nation's history has ever been so fully insulated from influence by *all three* branches of government. Consistent with the remedy affirmed by the Supreme Court in *Bowsher v. Synar*, 478 U.S. 714, 736 (1986), the Court should vacate the Net Worth Sweep because it was imposed by FHFA at a time when the agency was operating in violation of the separation of powers.

2. The Appointments Clause prescribes that principal officers must normally be nominated by the President and confirmed by the Senate. If this allocation of responsibilities for appointments is to be preserved, the President cannot be allowed unilaterally to designate an individual to serve as an "acting" principal officer indefinitely. The Court should adopt a two-year constitutional ceiling for the tenures of such acting officials because that is the maximum length of time that someone may serve as a principal officer by appointment under the Recess Appointments Clause. Because Mr. DeMarco had served as the acting head of FHFA for three years

when he approved the Net Worth Sweep in August 2012, that decision must be vacated.

3. The nondelegation doctrine requires Congress to articulate an "intelligible principle" when it confers decisionmaking authority upon a federal agency. *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 472 (2001). Under this Court's interpretation of the statutory provisions authorizing FHFA to act as a conservator, there is no such intelligible principle and the agency can "do almost anything when it comes to Fannie and Freddie." *Saxton*, 2018 WL 4016851, at *4 (Stras, J., concurring). Accordingly, the statutory provisions conferring conservatorship power on FHFA are unconstitutional.

STANDARD OF REVIEW

The district court's decision to grant a motion to dismiss is reviewed de novo. *Dunbar v. Wells Fargo Bank*, 709 F.3d 1254, 1256 (8th Cir. 2013).

ARGUMENT

I. The Director's For-Cause Removal Protection Should Be Struck Down and the Net Worth Sweep Should Be Vacated Because FHFA's Leadership Structure Violates the Separation of Powers.

A. Plaintiffs Have Standing to Challenge FHFA's Structure.

As the Fifth Circuit recently explained in ruling that shareholders injured by the Net Worth Sweep had standing to challenge the constitutionality of FHFA's structure, in separation of powers cases "a party is not required to show that he has received less favorable treatment than he would have if the agency were lawfully

constituted." *Collins v. Mnuchin*, 896 F.3d 640, 657 (5th Cir. 2018) (quoting *Comm. for Monetary Reform v. Bd. of Governors of Fed. Reserve Sys.*, 766 F.2d 538, 543 (D.C. Cir. 1985)). Instead, Article III's injury-in-fact and causation requirements are satisfied when a plaintiff suffers a concrete injury caused by a decision an agency made while operating in a manner that offends the separation of powers. *Collins*, 896 F.3d at 654-57. That is plainly the case here, for Plaintiffs were divested of their property rights by FHFA's decision to impose the Net Worth Sweep at a time when the agency was wholly unaccountable to the President, Congress, and the courts.

The Fifth Circuit's standing analysis in *Collins* follows directly from the Supreme Court's decision in *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 512 n.12 (2010). In that case, rather than speculating about whether the PCAOB would have investigated the plaintiff had the PCAOB been subject to one rather than two layers of for-cause removal protection, the Court emphatically rejected the argument that the plaintiff's standing depended on a showing of what would have happened "in that counterfactual world." *Id.* at 512 n.12 (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 533 (1962) (plurality)).

There are two justifications for the standing analysis that courts consistently apply in separation of powers cases. The first is that in our constitutional scheme the separation of powers is "a 'prophylactic device' and structural safeguard rather than a remedy available only when a specific harm is identified." *Collins*, 896 F.3d at 657

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(quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995)). Due to the nature of the separation of powers, "it will often be difficult or impossible for someone subject to a wrongly designed scheme to show that the design—the structure—played a causal role in his loss." *Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000). Nevertheless, to preserve the division of authority that was the centerpiece of the Framers' plan for protecting individual liberty, courts consistently find that separation of powers plaintiffs have standing even where the alleged violation "appears to have done [the] party no direct harm." *Id.* at 1130 (collecting cases).

Second, the separation of powers places procedural rather than substantive limits on the government's actions, and " 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992). That is why "one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered." *Id.*; *see also, e.g.*, *Antoniu v. SEC*, 877 F.2d 721, 726 (8th Cir. 1989) (vacating SEC decision due to the participation of a biased commissioner in deliberations even though the

commissioner ultimately recused himself and did not vote); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993) (target of enforcement action had standing to argue that *nonvoting* members of the FEC were serving in violation of the Appointments Clause); *Wright v. O'Day*, 706 F.3d 769, 772 (6th Cir. 2013). Just as due process plaintiffs are not required to show that the government would have reached a different result had it provided the constitutionally required procedures, *see Goldberg v. Kelly*, 397 U.S. 254, 256 n.2 (1970), Plaintiffs here are not required to show that FHFA would have made a different decision had it been differently structured.

In ruling that Plaintiffs lack standing to challenge FHFA's structure, the district court sought to distinguish *Free Enterprise Fund* and many of the other precedents on the ground that they involved situations in which it was *uncertain* whether the violation of the separation of powers had caused the plaintiffs' injuries. Here, in contrast, the district court said there is "no doubt that the alleged constitutional violation (too little presidential control over FHFA) did *not* cause the alleged injury (an FHFA action that was too favorable to the President)." JA127. This distinction rests on a misunderstanding of the facts in *Free Enterprise Fund*, which concerned an obscure regulator's decision to investigate a tiny accounting firm in Nevada. There was no credible argument that the President would have intervened to protect this firm if the PCAOB had been subject to one rather than two

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layers of for-cause removal protection, yet the Supreme Court concluded that the firm had standing to argue that the PCAOB was unconstitutionally insulated from presidential oversight. *See also Nguyen v. United States*, 539 U.S. 69, 77-78 (2003) (vacating Ninth Circuit decision because one member of panel was non-Article III judge even though panel's decision was unanimous); *Glidden v. Zdanok*, 370 U.S. 530, 533 (1962) (petitioners had standing to argue that use of non-Article III judges was unconstitutional even though Court was "unable to say that either judge's participation even colorably denied the petitioners independent judicial hearings").

Moreover, even accepting the mistaken premise that separation of powers plaintiffs must show that the constitutional violation could have made a difference, Plaintiffs have satisfied that burden. The district court's determination to the contrary grossly oversimplifies the difficult political, financial, and policy tradeoffs that the Net Worth Sweep involved—tradeoffs that cannot be reduced to a simple question of amending the PSPAs to be "better" or "worse" from the President's perspective. To determine what would have happened had FHFA been subject to presidential oversight, the Court would need to decide how the President or those under his control would have weighed a range of considerations when acting unilaterally, not the least of which would have been the political risk inherent in preventing the Companies from rebuilding capital without public support from an independent financial regulator. *Cf. Free Enter. Fund*, 561 U.S. at 497 (Article II

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vests all executive power in the President so that he cannot "escape responsibility for his choices by pretending that they are not his own"). The Court should not speculate about what Treasury might have done had it not been able to hide behind an independent FHFA's support for the Net Worth Sweep.

The district court sought to buttress its standing analysis by suggesting that the President could "undo[ ] the Third Amendment *right now* by directing Treasury to decline to accept the quarterly dividend payments or to negotiate a deal that is more favorable to FHFA." JA126. But unilaterally declining to accept Net Worth Sweep dividends in exchange for nothing is not an option for Treasury, which cannot lawfully "modify existing contracts . . . or . . . waive contract rights vested in the government" absent "a compensatory benefit to the United States," Dep't of Airforce-Sewage Util. Contracts, B-189395, 1978 WL 9944, at *2 (Comp. Gen. Apr. 27, 1978); *see In re Barton*, B-276550, 1997 WL 786243 (Comp. Gen. Dec. 15, 1997); *Union Nat'l Bank v. Weaver*, 604 F.2d 543, 545 (7th Cir. 1979). Moreover, even if Treasury had the legal authority to reject further dividend payments without receiving anything in return, such a move would not return to the Companies the excess dividends Treasury has already collected under the Net Worth Sweep. Nor would such unilateral Treasury action restore Plaintiffs to their rightful position in the Companies' capital structure; under the Third Amendment, Treasury would still be the only shareholder that could ever receive dividends from the Companies. The

President's authority to direct Treasury to attempt further negotiations with an unconstitutionally independent FHFA likewise cannot defeat Plaintiffs' standing to argue that FHFA is unconstitutionally independent.

It is also relevant to the standing analysis that Plaintiffs' challenge does not focus solely on FHFA's independence from the President but more broadly concerns the near total absence of oversight of this agency by *all three* branches of the federal government. This aspect of Plaintiffs' challenge makes it especially inappropriate to allow the standing analysis to depend on speculation about what one of the branches would have done had it controlled the agency in August 2012.

Finally, Plaintiffs' injuries are redressable both because the Net Worth Sweep should be vacated for the reasons explained below, *infra* 25-32, and because Plaintiffs are entitled to an injunction barring FHFA from continuing to operate as an independent agency for the reasons explained by the Fifth Circuit in *Collins*. 896 F.3d at 657-59. Plaintiffs thus satisfy all requirements for Article III standing to challenge FHFA's structure.

B. The Constitutional Separation of Powers Does Not Permit FHFA To Operate as an Independent Agency Headed by a Single Director.

The lack of any meaningful check on FHFA's powers is "harrowing": "The President can only remove FHFA's director for cause; Congress cannot control its budget through the normal appropriations process; and the judiciary cannot interfere with the exercise of its powers and functions as conservator." *Saxton*, 2018 WL

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4016851, at *4 n.8 (Stras, J., concurring). In a thorough and carefully crafted opinion, the Fifth Circuit recently ruled that FHFA's structure is unconstitutional, and this Court should do the same. "FHFA is sui generis, and its unique constellation of insulating features offends the Constitution's separation of powers." *Collins*, 896 F.3d at 670.

Supreme Court precedent teaches that "Congress may not 'shelter the bureaucracy' to the point where executive officers are 'immune from Presidential oversight.'" *Id.* at 663 (quoting *Free Enterprise Fund*, 561 U.S. at 497). This important principle is grounded in the Constitution's text, which vests the Executive power in the President, who must "take Care that the Laws be faithfully executed." U.S. CONST. art. II, §§ 1, 3. Mutually reinforcing provisions of HERA violate this principle by making FHFA less accountable to the President than any other independent agency in our nation's history.

First, FHFA's Director may only be removed by the President for cause. 12 U.S.C. § 4512(b)(2). That might not be enough standing alone to violate the separation of powers under *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), but the Director's for-cause removal protection represents a significant limitation on the President's ability to influence FHFA that must be considered alongside other statutory provisions that further enhance FHFA's independence. *See Free Enterprise Fund*, 561 U.S. at 495. Indeed, the Director's for-cause removal

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protection is particularly potent because it is coupled with a statutory requirement that the President temporarily fill the vacancy created by any removal with one of the outgoing Director's three handpicked deputies. *See* 12 U.S.C. § 4512. The President's inability to install the Director of his choice until the Senate confirms a permanent successor "render[s] for-cause removal an impotent oversight mechanism." *Collins*, 896 F.3d 667 n.199.

Second, FHFA is not headed by a bipartisan commission or board but by a single individual who serves a five-year term. This feature of FHFA's structure distinguishes the agency from almost every other independent agency in our nation's history, and the anomalous structure "makes a difference." *Free Enterprise Fund*, 561 U.S. at 495. The President has unilateral authority to select the chair of most independent commissions, and the chair is an important position that often includes the ability to set the agency's agenda and influence its allocation of resources. *See Collins*, 896 F.3d at 667-68; *PHH Corp. v. CFPB*, 881 F.3d 75, 189 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting). The President inevitably has the ability to influence the deliberations of a commission with members who serve staggered terms by appointing one or more members. *See PHH*, 881 F.3d at 190 (Kavanaugh, J., dissenting). Many statutes establishing independent agencies expressly require bipartisan membership, thus guaranteeing that at least some members will belong to the President's party. *See, e.g.*, 15 U.S.C. § 41. Multi-member commissions also

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must deliberate and compromise in ways that reduce the risk that they will adopt extreme policies that are inconsistent with those of the President. Taken together, these features of agencies headed by bipartisan, multi-member commissions establish a floor beneath which presidential influence cannot fall.

FHFA's single-Director leadership structure eliminates this floor and makes possible something that could never occur with an agency headed by a bipartisan, multi-member commission: someone opposed to the President's policies exercising exclusive and long-term control over a significant component of the Executive Branch. The Oval Office is currently occupied by a Republican, but as of this writing FHFA is under the exclusive control of a Democratic appointee (Melvin Watt). Acting Director DeMarco, who signed the Third Amendment during the tenure of a Democratic President, attained his position because he was previously made Deputy Director by Republican-appointed FHFA Director James Lockhart. *See* 12 U.S.C. § 4512(f). In both instances, FHFA's structure reduced the incumbent President's influence to a nadir that could never be reached with a multi-member bipartisan commission. Moreover, this diminishment in presidential oversight can last for a lengthy period. Because FHFA's Director serves a five-year term, the President could spend four years in the White House without once having the opportunity to influence FHFA's decisions. The President must at all times have at least as much influence over an independent agency as was guaranteed with the bipartisan multi-

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member commission at issue in *Humphrey's Executor*. FHFA's structure reduces presidential influence beneath this constitutional minimum.

Other provisions of HERA impose still further limits on the President's ability to influence FHFA. Because FHFA is funded through assessments that are "not . . . construed to be Government or public funds or appropriated money," 12 U.S.C. § 4516(f)(2), it is not subject to the normal budgeting process that Presidents use to influence other independent agencies and cannot be threatened with a presidential veto of annual appropriations. *Collins*, 896 F.3d at 669; *see PHH*, 881 F.3d at 146-47 (Henderson, J., dissenting). FHFA enjoys independent litigating authority—a fact especially relevant to this case given the Department of Justice's position that similar features of the CFPB's structure are unconstitutional. *See* Br. of United States as Amicus Curiae, *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. Mar. 17, 2017). And unlike the CFPB, FHFA is not subject to oversight by a board of other Executive Branch officials with authority to veto its decisions. *See Collins*, 896 F.3d at 669-70.

In rejecting Plaintiffs' challenge to FHFA's structure, the district court heavily relied on the Supreme Court's decisions in *Humphrey's Executor* and *Morrison*,[1] but neither case concerned the troubling combination of independence-enhancing

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[1] Although *Humphrey's Executor* and *Morrison* are binding on this Court, Plaintiffs respectfully preserve the argument that they were wrongly decided.

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features at issue here. The independent FTC upheld in *Humphrey's Executor* was a bipartisan, multimember "body of experts" with its own internal checks. 295 U.S. at 624; *see Collins*, 896 F.3d at 671; *PHH*, 881 F.3d at 169-70 (Kavanaugh, J., dissenting). The FTC is also subject to influence by the President through the normal appropriations process. *See Collins*, 896 F.3d at 672. FHFA, in contrast, is "a unitary inexpert partisan agency that reports to no one" and has its own independent source of funding. *See PHH Corp.*, 881 F.3d at 151 (Henderson, J., dissenting).

The district court also erred in relying on *Humphrey's Executor* because the underlying rationale for that decision does not apply to an agency headed by a single individual. The Court in *Humphrey's Executor* emphasized that the limited exception it was recognizing to the President's removal power permitted an independent agency that would "be nonpartisan," "act with entire impartiality," and apply "the trained judgment of a body of experts appointed by law and informed by experience." 295 U.S. 602, 624 (1935) (quotation marks omitted). In other words, independence from the President was a cost justified by the benefits of a commission that is able to non-politically apply expertise derived from the experience and continuity that come from having members from different political parties who serve staggered terms. Because these benefits are unavailable when an agency is headed by a single individual, the rationale for *Humphrey's Executor* does not apply to FHFA.

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Nor does the extent of FHFA's unchecked powers resemble those of the independent counsel whose authority the Supreme Court upheld in *Morrison*. The independent counsel was an inferior officer who had only "limited jurisdiction" for defined investigations, 487 U.S. 654, 691 (1988); *see also id.* at 671-72, and "lack[ed] policymaking or significant administrative authority," *id.* at 691. The independent counsel was also generally required to follow Department of Justice policy. *Id.* at 696. FHFA's Director, in contrast, is a principal officer with broad regulatory power over the Nation's multi-trillion-dollar housing finance system. *See* 12 U.S.C. § 4526. Both the scope of FHFA's powers and the extent to which the President is unable to influence the agency make this case very different from *Morrison*. *See Collins*, 896 F.3d at 665, 672.

The conclusion that FHFA's structure violates the separation of powers is further reinforced by the lack of historical precedent for this agency. "In separation of powers cases, the Supreme Court has repeatedly emphasized the significance of historical practice," and FHFA's single-Director structure "represents a gross departure from settled historical practice." *PHH*, 881 F.3d at 166 (Kavanaugh, J., dissenting); *see also id.* at 173-79. Plaintiffs are aware of only two instances in which Congress authorized a single individual to head an independent agency before the creation of FHFA: the Office of Special Counsel and the Social Security Administration. The Office of Special Counsel "has a narrow jurisdiction" mainly

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involving government personnel rules, its current structure was only established in 1978, and the Reagan and Carter Administrations both argued against the current structure on separation of powers grounds. *Id.* at 175. The Social Security Administration was headed by a multi-member board until 1994, and when it was restructured, President Clinton issued a signing statement arguing that the change was constitutionally problematic. *Id.* at 174-75. Moreover, both agencies must look to Congress for annual appropriations and lack independent litigating authority. *See* Kirti Datla & Richard Revesz, *Deconstructing Independent Agencies*, 98 CORNELL L. REV. 769, 800 (2013). Because the structures of these agencies are of recent vintage, have been constitutionally contested by the Executive Branch, and do not go as far as HERA in inhibiting presidential oversight, they do not demonstrate a "longstanding practice" that would support FHFA. *See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014).

Furthermore, an independent agency headed by a single Director poses a serious threat to the individual liberty that the separation of powers safeguards. As Judge Kavanaugh has explained, "[t]he basic constitutional concern with independent agencies is that the agencies are unchecked by the President, the official who is accountable to the people and who is made responsible by Article II for the exercise of executive power." *PHH*, 881 F.3d at 183 (Kavanaugh, J., dissenting). Accordingly, in the absence of presidential control, the multi-member structure of

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independent agencies acts as a critical substitute check on the excesses of any individual independent agency head—a check that helps to prevent arbitrary decisionmaking and abuse of power, and thereby to protect individual liberty. Multi-member independent agencies better protect individual liberty because they do not concentrate power in the hands of any one unelected individual, must necessarily account for multiple viewpoints, tend to make decisions that are less extreme, and better resist capture by interest groups. *Id.* at 183-86.

Although FHFA's structure violates the separation of powers without regard to the agency's relative importance in national life, there can be no serious dispute that it wields vast power over a major sector of the nation's economy. As FHFA's former longtime acting Director has written, "the entire housing system . . . rel[ies] almost entirely on [FHFA's] decisions." JA15.

Moreover, the character of the powers FHFA exercises within its domain makes its structure even more constitutionally problematic. Under this Court's interpretation of HERA, "Congress came close to handing a blank check to FHFA" and authorized the agency "to do almost anything when it comes to Fannie and Freddie." *Saxton*, 2018 WL 4016851, at *4-*5 (Stras, J., concurring). The "exceptionally broad statutory language" is coupled with provisions that restrict judicial review of FHFA's actions. *Id.* at *5; *see* 12 U.S.C. § 4617(f); *id.* § 4617(b)(5)(E); *id.* § 4617(b)(11)(D); *id.* § 4623(d). Notably, these restrictions on

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judicial review give FHFA as conservator *carte blanche* to violate any federal statute other than HERA. *See Nat'l Trust for Historic Preservation v. FDIC*, 21 F.3d 469, 471-72 (D.C. Cir. 1994) (Wald, J., concurring). These features of HERA, together with FHFA's exemption from the appropriations process, make the agency immune from meaningful oversight by not only the President but also Congress and the courts.

In the absence of meaningful congressional oversight and judicial review, presidential control is an even more important safeguard against the threat that arbitrary agency decisionmaking poses to individual liberty. The separation of powers does not permit a single, unsupervised government official to exercise broadly defined powers with no guidance from Congress, no prospect of review by the courts, and no accountability to the elected President.

C. FHFA's Unconstitutional Structure Requires Vacatur of the Net Worth Sweep.

1. Vacatur Is the Appropriate Remedy for a Final Agency Action Taken in Violation of the Separation of Powers.

If the Court determines that FHFA is unconstitutionally structured, it must, at a minimum, strike down the Director's for-cause removal protection and vacate the Net Worth Sweep so that FHFA may reconsider that decision once it is no longer operating in a manner that violates the separation of powers. Any lesser remedy would fail to cure the constitutional taint of FHFA's decision to impose the Net

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Worth Sweep at a time when it was unlawfully insulated from oversight by all three branches of government. As the Department of Justice has acknowledged in other litigation, a "second proceeding [is] necessary" when an agency official is "unconstitutionally insulated from presidential control at the time of the initial proceeding." Brief of the SEC at 37, *Laccetti v. SEC*, No. 16-1368 (D.C. Cir. May 5, 2017).

To be sure, the Fifth Circuit declined to vacate the Net Worth Sweep in *Collins*, awarding only prospective relief for the constitutional violation. 896 F.3d at 675. But the Fifth Circuit's remedial holding is at odds with *Bowsher v. Synar*, 478 U.S. 714, 736 (1986), a case in which the Supreme Court affirmed a lower court's decision to set aside a final decision by an official who was unconstitutionally insulated from presidential oversight. *Bowsher* concerned provisions of the Gramm-Rudman-Hollings Act under which the Comptroller General released an annual budget report, which the President was in turn required automatically to implement by ordering the sequestration of specified funds in the federal budget. The Comptroller General released his first budget report under the Act on January 21, 1986, and President Reagan issued the mandated sequestration order on February 1, 1986. Order on Emergency Deficit Control Measures for Fiscal Year 1986, https://goo.gl/xKBnmf. A union sued because its retired members stood to lose cost of living adjustments to their pensions, arguing that the process was unconstitutional

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because the Comptroller General was removable by Congress and not the President. A three-judge district court that included then-Judge Scalia agreed and entered a judgment that not only prospectively enjoined use of this process but also declared "that the presidential sequestration order issued on February 1, 1986 pursuant to the unconstitutional automatic deficit reduction process be, and hereby is, declared without legal force and effect." Addendum 49; *see Synar v. United States*, 626 F. Supp. 1374, 1378, 1394-1404 (D.D.C. 1986). The Supreme Court upheld that backward-looking remedy, stating in the penultimate sentence of its opinion that "the judgment and order of the District Court are affirmed." *Bowsher*, 478 U.S. at 736. The judgment in *Bowsher* shows that, contrary to FHFA's position and the Fifth Circuit's ruling, vacatur is the appropriate remedy when a litigant with standing challenges the final decision of an official who is unconstitutionally unaccountable to the President.

Further support for the same remedy can be found in the many cases in which courts have vacated past decisions of officials who served in violation of the Appointments Clause. *E.g.*, *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018); *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014); *see Relco Locomotives, Inc. v. NLRB*, No. 13-2722 (8th Cir. July 1, 2014) (vacating NRLB decision in light of *Noel Canning*); *IBC, Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1334 (D.C. Cir. 2012); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993). Courts have identified

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two rationales for vacatur in the Appointments Clause context, and both apply with equal force here.

First, as the Supreme Court explained just last term, courts should deploy remedies that "create incentives" for litigants to vindicate the Constitution's structural provisions. *Lucia*, 138 S. Ct. at 2055 & n.5. "A key 'constitutional means' vested in the President—perhaps *the* constitutional means"—of ensuring that the Executive Branch maintains " '[a] dependence on the people' " is assigning to the elected President " 'the power of appointing, overseeing, and controlling those who execute the laws.' " *Free Enterprise Fund*, 561 U.S. 501 (quoting The Federalist No. 51 (J. Madison)). The Framers' vision was that the procedures the Constitution mandates for appointments and removals would work together to protect the individual and safeguard democratic accountability, and as a practical matter vacatur of past unconstitutional actions is needed if courts are to police unconstitutional encroachments on the President's removal power.

Second, as the D.C. Circuit has explained, the acts of an official who serves in violation of the separation of powers are "void *ab initio*." *Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013), *aff'd*, 134 S. Ct. 2550 (2014). The Constitution mandates certain procedures that must be followed for a federal official to act. Among those procedures are the requirements that certain senior officials be appointed in the manner specified by the Appointments Clause and subject to a

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minimum degree of oversight by the President. When these procedures are not followed, the official's actions are *ultra vires* and subject to vacatur.

The cases cited by the Fifth Circuit in *Collins* do not support a contrary conclusion. In contrast to *Bowsher*, in which a final action had already occurred by the time the district court entered its judgment, *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 508-09 (2010), and *John Doe Co. v. CFPB*, 849 F.3d 1129, 1133 (D.C. Cir. 2017), both concerned *ongoing* agency investigations. Vacatur in those cases was unnecessary because the final enforcement decision of an agency operating in compliance with the separation of powers ratifies an earlier constitutionally flawed decision to begin an investigation or bring charges. *See FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708-09 (D.C. Cir. 1996) (declining to dismiss civil enforcement action first brought by unconstitutionally composed FEC because enforcement action was later ratified by constitutionally restructured agency). And in *Buckley v. Valeo*, 424 U.S. 1, 142 (1976), and *Citizens for Abatement of Aircraft Noise, Inc. v. Metropolitan Wash. Airports Auth.*, 917 F.2d 48, 57 (D.C. Cir. 1990), the courts granted the plaintiffs all the relief they sought, according *de facto* validity only to past agency actions that the plaintiffs did not challenge. *See NRA Political Victory Fund*, 6 F.3d at 828 ("[W]e are aware of no theory that would permit us to declare the Commission's structure unconstitutional without providing relief to the

appellants in this case.”). *Buckley*’s remedial holding, moreover, was limited to its facts in *Ryder v. United States*, 515 U.S. 177, 184 (1995).

In the proceedings below, FHFA also sought to avoid vacatur of the Net Worth Sweep by conflating two distinct issues: (1) whether a *past* action FHFA took while operating unconstitutionally should be vacated; and (2) whether the Director’s for-cause removal protection is severable such that FHFA should be allowed to operate *in the future* after being stripped of its independence. There are compelling arguments that the Director’s for-cause removal protection is not severable. *See PHH*, 881 F.3d at 160-64 (Henderson, J., dissenting). The unconstitutionality of FHFA’s structure derives from the combination of several features, and there is no principled basis on which the Court could strike some of these features while allowing others to stand. Indeed, it is doubtful that striking the Director’s for-cause removal protection would be sufficient to cure the constitutional violation without also striking the provisions of HERA that restrict who the President may select to replace the removed Director—provisions pursuant to which Mr. DeMarco was appointed. *See* 12 U.S.C. § 4512. Moreover, stripping FHFA of its independence from the President without subjecting the agency to the normal appropriations process would shift the balance of power between the branches with respect to FHFA in a way that Congress plainly did not intend. Furthermore, HERA does not include a severability clause. But even if the Court concludes that the provisions of HERA

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that unconstitutionally insulate FHFA from oversight by all three branches of government are severable, Plaintiffs are entitled to vacatur of the Net Worth Sweep so that this decision may be reconsidered by the agency once it is operating in a manner that satisfies constitutional requirements.

2. The Net Worth Sweep Can Be Vacated Without Requiring Treasury to Return Any Money to the Companies or Disrupting FHFA's Operations.

Although the district court did not decide what remedy would be appropriate if Plaintiffs prevail in challenging FHFA's structure, it expressed concern about the practical effects of any ruling that would vacate the Net Worth Sweep and call FHFA's other past actions into question. JA152. This Court must follow *Bowsher* without regard to such considerations, but in any event the district court's concerns were misplaced for several reasons.

First, if FHFA had never imposed the Net Worth Sweep and the Companies continued to pay cash dividends under the arrangement that preceded the Third Amendment, the Companies would as of this writing have paid approximately $122 billion less in dividends on Treasury's senior preferred stock. *See* FHFA, TABLE 2: DIVIDENDS ON ENTERPRISE DRAWS FROM TREASURY, https://goo.gl/QQpFDY. The Court has broad discretion in how it orders vacatur to be implemented, but Plaintiffs' preferred approach is for the Court to order Defendants to treat the excess Net Worth Sweep dividends as having paid down a portion of the liquidation preference on

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Treasury's senior preferred stock at the time each payment was made. *Cf. America's Cmty. Bankers v. FDIC*, 200 F.3d 822, 831 (D.C. Cir. 2000) (recognizing court's authority to order FDIC to treat past excess payments by banks as offsetting subsequent government assessments). Under this approach, both Companies would have fully redeemed Treasury's senior preferred stock by the end of the third quarter of 2018. Vacating the Net Worth Sweep in this way would only require accounting entries on the books of Treasury and the Companies; no money would change hands. Furthermore, even after this remedy, Treasury would still hold warrants to purchase 79.9% of the Companies' common stock at a nominal price—warrants that Treasury acquired as part of the original PSPAs. *See* JA20-21.

Second, FHFA would be far from the first federal agency to have its actions over an extended period called into question due to a violation of the separation of powers, and in the past agencies have sought to deal with the fallout of such rulings through ratification. Once the NLRB obtained a proper quorum as required by *Noel Canning*, it purported to issue a blanket ratification of its prior administrative, personnel, and procurement decisions, Minute of Board Action (July 18, 2014), https://goo.gl/iFp9Re, and individually reconsidered its pending adjudications, *e.g.*, *Don Chavas, LLC*, 361 NLRB No. 10, at *3 (Aug. 8, 2014); *see also* 78 Fed. Reg. 53734-02 (Aug. 30, 2013) (ratifying decisions by CFPB Director whose prior service was unconstitutional under reasoning of *Noel Canning*). The FEC took the same

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approach after the D.C. Circuit vacated a final enforcement decision in *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 826-27 (D.C. Cir. 1993), because it was unconstitutionally structured. After the Commission reconstituted itself to comply with the separation of powers, it purported to ratify its prior actions—including its regulations, Ratification of Regulations, 58 Fed. Reg. 59640 (Nov. 10, 1993), and its advisory opinions, *see* Policy Statement on Advisory Opinion Precedent, 58 Fed. Reg. 59642 (Nov. 10, 1993). As these examples suggest, FHFA might be able to use ratification to limit the broader practical effects of a ruling in Plaintiffs' favor.

Third, to the extent that FHFA did not or could not proactively ratify its past decisions after being constitutionally restructured, the agency's past decisions would still only be subject to challenge by plaintiffs with Article III standing. Furthermore, a range of defenses would cabin the types of past FHFA actions subject to vacatur, including the statute of limitations, res judicata, and exhaustion of administrative remedies. *See NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 798 (8th Cir. 2013). Although none of those defenses is available to FHFA here, they would do much to limit the broader practical effects of a ruling in Plaintiffs' favor.

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II. FHFA Was Constituted in Violation of the Appointments Clause When It Imposed the Net Worth Sweep.

A. Mr. DeMarco's Tenure as Acting Director Violated the Appointments Clause.

1. The Appointments Clause provides an independent reason for vacating the Net Worth Sweep. It provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" all officers of the United States. U.S. CONST. art. II, § 2, cl.2. The Constitution permits only two exceptions to this rule: First, Congress may "vest the Appointment of such *inferior* Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.* (emphasis added). Second, the President "shall have Power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session." U.S. CONST. art. II, § 2, cl.3.

FHFA has never disputed that its Director is a *principal* officer of the United States who must therefore either be nominated by the President and confirmed by the Senate or receive a temporary presidential commission during the recess of the Senate. Likewise, it is undisputed that Mr. DeMarco had neither been confirmed by the Senate nor received a temporary commission during a recess of the Senate at the time he approved the Net Worth Sweep.

In the proceedings below, FHFA nevertheless argued that Mr. DeMarco had authority to exercise powers ordinarily reserved to principal officers by virtue of 12 U.S.C. § 4512(f), which empowers the President, upon the resignation of the Director of FHFA, to designate one of three Deputy Directors to serve as "acting Director until . . . the appointment of a successor." The President exercised his statutory power to designate then-Deputy Director DeMarco as acting Director after Mr. Lockhart resigned from his transitional post in August 2009. Given the absence of an "acting director" exception to the Appointments Clause in the text of the Constitution, the question arises how Mr. DeMarco could constitutionally exercise the powers of the Director.

The Supreme Court has provided some guidance on that question in the context of another category of officers who require Senate confirmation: consuls. In *United States v. Eaton*, 169 U.S. 331 (1898), the Court held that a "vice consul" could "be charged with the duty of temporarily performing the functions of the consular office" for ten months. *Id.* at 343. Allowing that Article II requires consuls to be nominated by the President and confirmed by the Senate, the Court concluded that "the word 'consul' therein does not embrace a subordinate and temporary officer like that of vice consul." *Id.* "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 remained an "inferior Officer." *Id.* (emphases added).

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The Supreme Court reaffirmed this temporal dimension to the Appointments Clause in *Morrison v. Olson*, 487 U.S. 654 (1988), in which it identified several factors that distinguish inferior from principal officers. *Id.* at 671-72. They were: the degree to which the officer is subject to supervision by another officer; the scope and nature of the duties assigned to the officer; the scope and nature of the officer's jurisdiction; and the limitations on the officer's tenure. *Id*. The Court reiterated the relevance of those factors in *Edmond v. United States*, 520 U.S. 651, 661 (1997).

Under *Morrison* and *Edmond*, an acting Director can claim classification as an "inferior" officer under only one circumstance: if he serves "for a limited time" and under "temporary conditions." *Eaton*, 169 U.S. at 343. As with many "acting" positions, including the position of vice consul in *Eaton*, the degree of supervision and the scope and nature of the officer's duties and jurisdiction do not distinguish the position of the acting Director from that of the principal officer whose shoes the acting Director fills. It follows that an "acting" position may not be occupied *indefinitely* by a person who has not been appointed to that office "by and with the Advice and Consent of the Senate"; instead, one who exercises the powers of a principal officer in an acting capacity may only do so on a "temporary" and "limited" basis. *Id.*

The structure of the Constitution reinforces this conclusion. Article II provides a reticulated scheme for selecting officers of the United States: one that balances

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pragmatic considerations like exigency and efficiency with institutional ones like accountability and deliberation. *See Noel Canning*, 134 S. Ct. at 2558-59; *see also Edmond*, 520 U.S. at 663. It requires the President to solicit and receive the Senate's approval for the most important appointments but permits Congress to authorize unilateral action in the selection of officers who exercise less power by virtue of the subordinate, limited, or temporary nature of their responsibilities. *See Edmond*, 520 U.S. at 660. It also permits the President to meet public need by filling vacancies while the Senate is in recess, but it once again reinforces the importance of Senate input by placing strict time limits on these "recess appointments."

It would be strange for this densely woven fabric to include a loophole through which the President might introduce permanent, unilateral appointments to the most powerful offices in the Executive Branch. Yet that is the upshot of the district court's decision: that unless Congress enacts legislation limiting the tenure of acting principal officers, courts are powerless to stop the President from designating acting principal officers to serve indefinitely, thereby frustrating the Senate's constitutional role. Merely labeling an officer as an "acting" agency head while permitting him to serve indefinitely does not render him "inferior." "[T]he structural protections of the Appointments Clause can[not] be avoided based on such trivial distinctions." *NLRB v. SW Gen.*, 137 S. Ct. 929, 946 n.1 (2017) (Thomas, J., concurring).

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2. Having established that acting appointments must be temporary, the question remains: how long is too long? The answer is that in all circumstances an acting principal's tenure must be less than two years. This constitutional ceiling derives from the Recess Appointments Clause, which provides that even when necessitated by the most exigent of circumstances—a recess of the Senate that necessarily prevents appointment "by and with the Advice and Consent of the Senate"—a unilateral appointment by the President may not exceed the length of the period from the start of the recess until the end of the Senate's next session. U.S. CONST. art. II, § 2. During the first nearly 150 years of this Republic, the maximum period for which someone could hold a recess appointment was usually shorter than one year. *Noel Canning*, 134 S. Ct. at 2579-83 (app'x A). That period must in any case be less than two years. U.S. CONST. amend. XX, § 2; *see Noel Canning*, 134 S. Ct. at 2597 (Scalia, J., concurring in the judgment). Because Mr. DeMarco had served for more than two years at the time FHFA approved the Net Worth Sweep, he held his office in violation of the Appointments Clause, and the Net Worth Sweep is therefore void.

The district court rejected the argument for a two-year ceiling on the ground that when the President makes a recess appoint he has "unlimited authority" to appoint anyone of his choosing, with the "*sole* limit on this extraordinary authority" being the temporal restraint imposed by the Constitution itself. JA142-43. In

contrast, the district court said, "Congress has the power to control the President's choice of acting officers" by enacting statutes that limit who the President may select and for how long they may serve. JA143. The problem with this analysis is that it completely ignores the Supreme Court's holding in *Noel Canning* that the Senate may prevent the President from making recess appointments by holding pro forma sessions once every ten days. 134 S. Ct. at 2574. Indeed, the body the Constitution charges with providing advice and consent for principal officers can far more easily defend itself against abuses of the Recess Appointments Clause than the presidential appointment power at issue here. Only one Senator is needed to hold a pro forma session of the Senate, but enacting legislation limiting the President's ability to select an "acting" agency head requires concurrence by both houses of Congress and either a veto-proof legislative majority or the signature of the President himself.

Moreover, the fact that in HERA Congress chose not to place any *statutory* limit on the tenure of an acting Director is irrelevant to whether the length of Mr. DeMarco's service violated the Appointments Clause. "The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment." *New York v. United States*, 505 U.S. 144, 182 (1992). Because "[t]he structural principles secured by the separation of powers protect the individual" and not merely the branches themselves, *Bond v. United States*, 564 U.S. 211, 222 (2011), Congress

cannot enact legislation that forfeits the Senate's constitutional role in the selection of principal officers.

The district court was also mistaken to the extent that its rejection of a two-year maximum tenure for acting principal officers rested on the political question doctrine. The Supreme Court's decision in *United States v. Munoz-Flores*, 495 U.S. 385, 393 (1990) is clear: "the fact that one institution of Government has mechanisms available to guard against incursions into its power by other governmental institutions does not require that the Judiciary remove itself from the controversy by labeling the issue a political question." The two-year maximum Plaintiffs propose is grounded in the Constitution's text and can be readily administered by the courts without the need for policy determinations of the sort normally committed to the discretion of the political branches. *See Baker v. Carr*, 369 U.S. 186, 217 (1962). The Court should adopt this standard and hold that Mr. DeMarco's lengthy tenure violated the Appointments Clause.

3. Even in the absence of a fixed constitutional ceiling, however, Mr. DeMarco's tenure would violate the Appointments Clause. The Office of Legal Counsel ("OLC") has opined that someone may serve as an acting principal officer without Senate confirmation only for "as long as is reasonable under the circumstances." Designation of Acting Director of OMB, 2003 WL 24151770, at *1 n.2 (June 12, 2003); *see also Status of the Acting Director, Office of Management*

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and Budget, 1 Op. O.L.C. 287, 287 (1977). In determining how long is "reasonable under the circumstances," OLC identified the following considerations as "pertinent": "the specific functions being performed by the [acting officer]; the manner in which the vacancy was created (death, long-planned resignation, etc.); the time when the vacancy was created (*e.g.*, whether near the beginning or the end of a session of the Senate); whether the President has sent a nomination to the Senate; and particular factors affecting the President's choice (*e.g.*, a desire to appraise the work of an Acting Director) or the President's ability to devote attention to the matter." *Id.* at 290. It is also relevant whether there is a statutory time limit on the tenure of the principal officer whose position is being filled on a temporary basis. *SW Gen.*, 137 S. Ct. at 946 n.1 (Thomas, J. concurring).

Every single "pertinent consideration" militates in favor of the conclusion that Mr. DeMarco's tenure was, by the fall of 2012, unreasonable under the circumstances: *First*, Mr. DeMarco exercised the full powers of the Director of FHFA, 12 U.S.C. § 4512(f), the head of an independent federal agency, without *anyone's* supervision—even the President's—from August 2009 until January 2014.

Second, the vacancy Mr. DeMarco filled was created by Mr. Lockhart's voluntary resignation after holding the post for thirteen months under a transitional provision of HERA that made the outgoing Director of OFHEO the head of the

agency until a permanent Director could be nominated and confirmed. 12 U.S.C. § 4512(b)(5).

Third, President Obama did not send a nomination for Director of FHFA to the Senate until November 2010, and when he did, the Senate refused to act on it. By the time the Net Worth Sweep was approved, that nomination had been dead for nearly two years.

Fourth, whatever factors might have influenced President Obama's choice when he appointed Mr. DeMarco—such as the need for quick action in response to an ongoing crisis—those factors no longer held by the time Mr. DeMarco approved the Net Worth Sweep three years later. The financial crisis had passed and Fannie and Freddie were massively profitable.

Fifth, there appears to be no claim that, in the three years between Mr. DeMarco's appointment and the approval of the Net Worth Sweep, President Obama did not have the time or attention to devote to the question who should serve as Director of one of the most powerful (and independent) agencies in the country.

Sixth, Mr. DeMarco served four years and four months in an office limited by statute to a 5-year term. "There was thus nothing 'special and temporary' about [his] appointment." *SW Gen.*, 137 S. Ct. at 946 n.1 (Thomas, J., concurring) (quoting *Eaton*, 169 U.S. at 343).

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4. Furthermore, as Justice Thomas has explained, the Constitution does not permit the President to *appoint* an acting principal officer. *See SW Gen., Inc.*, 137 S. Ct. at 945-49 (Thomas, J. concurring). Except during a recess of the Senate, the President may not appoint principal officers without the advice and consent of the Senate. For this additional reason, Mr. DeMarco's service as acting Director violated the Appointments Clause.

B. The Reasonableness of Mr. DeMarco's Tenure Is Justiciable.

The district court ruled that whether an acting officer's tenure is "reasonable under the circumstances" is a non-justiciable political question. JA135-42. The Court need not reach that question because Mr. DeMarco's tenure had exceeded the two-year constitutional ceiling when he approved the Net Worth Sweep, and Plaintiffs' assertion of this ceiling does not implicate the political question doctrine. *See supra* 40. Indeed, the district court's concern about the administrability of judicial inquiry into the reasonableness of an acting officer's tenure is further reason to apply the two-year ceiling proposed above—not to dismiss Plaintiffs' Appointments Clause claim as nonjusticiable. *Cf. Noel Canning*, 134 S. Ct. at 2593-94 (Scalia, J., concurring in the judgment) (invoking political question doctrine and arguing that Court should have adopted a clearer rule that would have construed President's recess appointments power even more narrowly).

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In any event, courts are fully capable of deciding whether the length of an acting principal officer's tenure violates the Appointments Clause and have long adjudicated similar questions. FHFA's defense of Mr. DeMarco's exercise of the Director's powers—that he acted as an inferior officer—invokes a constitutional line that is "far from clear." *Morrison*, 487 U.S. at 671. Yet courts have repeatedly decided whether an officer is inferior, including by considering the duration of the officer's tenure. *See, e.g.*, *id.*; *Edmond*, 520 U.S. at 666; *Eaton*, 169 U.S. at 343. True, in both *Morrison* and *Edmond*, whether the offices in question were "limited in tenure" was not the sole factor the Court considered. *See* JA140-41. But in taking length of tenure into account rather than dismissing those suits on political question grounds, the Court recognized by necessary implication that disputes over the duration of an officer's tenure under the Appointments Clause are justiciable.

The district court sought to further distinguish the Appointments Clause cases in which the Supreme Court has taken length of tenure into account by emphasizing that none of those cases involved an "after-the-fact assessment of the reasonableness of a particular officer's tenure." JA141. But this purported distinction misconceives OLC's "reasonable under the circumstances" standard, under which an acting agency head becomes a principal officer when the President and Senate unreasonably delay the selection of someone to permanently fill the post. The question is whether Mr. DeMarco's continued service as acting Director was

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reasonable when he approved the Net Worth Sweep in August 2012, and answering that question does not require the Court to consider subsequent events that were not known at that time.

Moreover, in *Noel Canning* the Supreme Court rejected an argument very similar to the one the district court embraced. *Noel Canning* held that a recess of "less than 10 days is presumptively too short to fall within the Clause." 134 S. Ct. at 2567. Not only was the Court willing to draw a line in the absence of an express numerical threshold in the Constitution, but it also allowed that courts might have to adjudicate whether "unusual circumstance[s]," including "a national catastrophe . . . that renders the Senate unavailable but calls for an urgent response," would permit an exception to this presumptive rule. *Id.* And as though speaking directly to the justifications FHFA proffered in the district court for Mr. DeMarco's all-but-unprecedented tenure as an acting officer, the Court observed that "[i]t should go without saying . . . that political opposition in the Senate would not qualify as an unusual circumstance." *Id.* The types of judgments this precedent makes or invites courts to make are indistinguishable from the judgment whether an acting principal officer's tenure is "reasonable under the circumstances."

To be clear: that is the *only* judgment this Court must make. The Court need not decide whether the President waited too long to nominate a successor or whether the Senate was unreasonable in rejecting his first nomination. A practical

consequence of Article II is that certain offices may remain vacant when the constitutional requirements for an appointment cannot be satisfied. A desire to avoid those consequences cannot relieve the Court of its responsibility to give effect to those constitutional requirements when the case before it requires it to do so. *See Olympic Fed. Sav. and Loan Ass'n v. Director, OTS*, 732 F. Supp. 1183, 1196 (D.D.C. 1990). The political question doctrine does not permit courts to "avoid their responsibility merely because the issues have political implications." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (quotation marks omitted).

C. The De Facto Officer Doctrine Cannot Salvage the Net Worth Sweep.

The district court was also mistaken when it ruled in the alternative that Plaintiffs' Appointments Clause challenge is barred by the de facto officer doctrine. JA148-52. Because Plaintiffs challenge Mr. DeMarco's *constitutional* authority to impose the Net Worth Sweep, the de facto officer doctrine has no application here. As the district court acknowledged, "[s]everal Supreme Court cases contain language supporting this view." JA148.

The de facto officer doctrine operates only where the challenge is based on a "merely technical" defect in the incumbent's title to the office. *Nguyen v. United States*, 539 US. 69, 77. (2003). In *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), for example, the Court held that parties could raise Article III challenges to the trial judges who decided their cases. Writing for a plurality, Justice Harlan noted first that

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the de facto officer doctrine did not apply "when the statute claimed to restrict authority is not merely technical but embodies a strong policy concerning the proper administration of judicial business," *id.* at 535-36, and held that "[a] fortiori is this so when the challenge is based upon nonfrivolous constitutional grounds," *id.* at 536; *see United States v. Wrigley*, 520 F.2d 362, 366 n.8 (8th Cir. 1975) (implying through citation to *Glidden* that this decision substantially narrowed the de facto officer doctrine).

The rule enunciated in *Glidden* and *Nguyen* is not limited to challenges to the power of judicial officers. The district court observed that "[t]he overturning of a lower-court judgment is a routine outcome of judicial review," JA149, but the same could be said for judicial review of administrative decisions like the Net Worth Sweep. Nor do freestanding "concerns of finality and the orderly functioning of government" apply with greater force here than with a challenge to the legal authority of a judge. JA150. Indeed, as the doctrine of res judicata underscores, finality is of *greater* importance where judicial rulings are concerned. Yet even in that context, non-technical, and especially constitutional, violations are not protected by the de facto officer doctrine "even though the defect was not raised in a timely manner." *Nguyen*, 539 U.S. at 78; *accord Wrenn v. District of Columbia*, 808 F.3d 81, 84 (D.C. Cir. 2015).

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Application of the de facto officer doctrine to Plaintiffs' Appointments Clause claim would also lead to the anomalous result that a challenge based on FHFA's violation of the Constitution would be dismissed as untimely despite having been filed within the applicable statute of limitations for challenging the same administrative action on statutory grounds. *See* 28 U.S.C. § 2401(a). That would be a particularly incongruous result because the de facto officer doctrine does not normally apply when an agency acts in violation of *statutory* limits on the tenure of an acting officer. 5 U.S.C. § 3348(d); *SW Gen., Inc.*, 137 S. Ct. at 938 n.2. No lesser remedy is merited when an acting officer's tenure violates the Constitution.

Finally, the district court went seriously astray in relying on the remedial analysis in *Buckley v. Valeo*, 424 U.S. 1, 142 (1976). In *Ryder*, the Supreme Court expressed doubt about whether *Buckley* had applied the de facto officer doctrine in the first place and limited *Buckley*'s remedial holding to its facts. 515 U.S. at 184. Moreover, "in *Buckley*, the constitutional challenge raised by the plaintiffs was decided in their favor, and the declaratory and injunctive relief they sought was awarded to them." *Id.* at 183. Thus, even if the relevant portion of *Buckley* were still good law, it would not provide a basis for withholding all relief here.

III. FHFA Violated the Nondelegation Doctrine When It Imposed the Net Worth Sweep.

A. This Court recently joined several of its sister circuits in rejecting APA challenges to the Net Worth Sweep by interpreting HERA to confer upon FHFA

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“breathtakingly broad powers” that amount to “a blank check” allowing the agency “to do almost anything when it comes to Fannie and Freddie.” *Saxton v. FHFA*, 2018 WL 4016851, at *4, *5, *7 (8th Cir. Aug. 23, 2018) (Stras, J., concurring). In so ruling, the Court left open the question whether FHFA’s statutory powers are so broad that they run afoul of the nondelegation doctrine, which requires Congress to “lay down by legislative act an intelligible principle” when it confers decisionmaking authority upon a federal agency. *Whitman v. American Trucking Ass’n*, 531 U.S. 457, 472 (2001); *see Saxton*, 2018 WL 4016851, at *3 (majority op.). This appeal presents the nondelegation issue that *Saxton* left open, and the Court should strike down the unbounded statutory powers conferred upon FHFA.

In *Saxton*, this Court held that HERA “permits FHFA, but does not compel it in any judicially enforceable sense, to preserve and conserve Fannie’s and Freddie’s assets and to return the companies to private operation.” 2018 WL 4016851, at *3 (quoting *Perry Capital v. Mnuchin*, 864 F.3d 591, 607 (D.C. Cir. 2017)). But in the absence of a mandatory duty to preserve and conserve assets, “FHFA is left without any intelligible principle to guide its discretion as conservator.” *Collins*, 896 F.3d at 689 (Willett, J., dissenting). Put another way, under HERA as this Court has interpreted it, there is no “outer limit to FHFA’s statutory powers.” *Perry Capital*, 864 F.3d at 642 (Brown, J., dissenting). This unconstrained authority to pursue *any* ends that FHFA chooses violates the nondelegation doctrine.

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The conclusion that HERA violates the nondelegation doctrine is reinforced by the statute's restrictions on judicial review. *See, e.g.*, 12 U.S.C. § 4617(f). The availability of judicial review "is a factor weighing in favor of upholding a statute against a nondelegation challenge." *United States v. Garfinkel*, 29 F.3d 451, 459 (8th Cir. 1994). That factor is not present here. Rather, under this Court's interpretation of HERA, "Congress . . . created a monster by handing an agency breathtakingly broad powers and insulating the exercise of those powers from judicial review." *Saxton*, 2018 WL 4016851, at *7 (Stras, J., concurring).

In rejecting Plaintiffs' nondelegation claim, the district court relied on HERA's statement that FHFA "may" take actions to "put [the Companies] in a sound and solvent condition" and "preserve and conserve [their] assets and property." 12 U.S.C. § 4617(b)(2)(D). But *Saxton* forecloses this basis for dismissing Plaintiffs' nondelegation claim; pursuit of these ends cannot simultaneously be optional and provide the agency with the constitutionally required guidance from Congress. The same is true for the ends FHFA *may* but is not required to pursue under 12 U.S.C. § 4617(a)(2). Nor is there any warrant for the district court's suggestion that HERA's delegation of power is constitutional because FHFA is required to submit "detailed annual reports to Congress." JA159. Congress must "lay down *by legislative act* an intelligible principle," *Whitman*, 531 U.S. at 472 (emphasis added), and simply collecting information from the agency cannot satisfy this mandate.

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B. The district court was also wrong to reject Plaintiffs' non-delegation claim on the alternative ground that when FHFA acts as the Companies' "conservator" its actions are not attributable to the government. JA153-56. Whether a federal conservator "should be treated as the United States depends on the context," *Auction Co. of America v. FDIC*, 132 F.3d 746, 748 (D.C. Cir. 1997), and the context here is FHFA's decision to expropriate Plaintiffs' investments for the benefit of the government. Confronted with similar allegations that as receiver the FDIC had retained a failed bank's liquidation surplus for itself rather than distributing the surplus to shareholders, the Federal Circuit held that the FDIC could be sued *in its receivership capacity* for a Fifth Amendment taking. *Slattery v. United States*, 583 F.3d 800, 826-29 (Fed. Cir. 2009). The Federal Circuit observed that "whether the FDIC as receiver is 'the government' depends on the context of the claim" and allowed the constitutional claim to go forward because the facts before it were "unlike the standard receivership situation in which the receiver is enforcing the rights or defending claims and paying the bills of the seized bank." *Id.* at 827-28. *Slattery* teaches that expropriations of private property to benefit the public fisc are governmental, and the district court was wrong to conclude that the outcome of that case depended on an earlier promise the FDIC had made in its regulatory capacity. *See* JA155-56. The fact that, outside the expropriation context, courts sometimes treat conservators and receivers as private entities does not support a different

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conclusion. *See United States v. Beszborn*, 21 F.3d 62, 68 (5th Cir. 1994) (federal receiver's suit for civil penalties did not implicate the Double Jeopardy Clause because penalties collected would "not go to the United States Treasury" but instead "benefit all stockholders and creditors of the bank").

Several additional aspects of FHFA's decision to impose the Net Worth Sweep show that this was an exercise of governmental power. *Saxton* ruled that by entering into a contract with Treasury, FHFA had the power to suspend the application of provisions of the APA and HERA that would have otherwise restricted Treasury's legal authority to invest in the Companies. 2018 WL 4016851, at *4. The power to alter the rights and obligations of a federal agency is inherently governmental. Moreover, corporation law did not give the Companies' private management the power to enter into a contract like the Net Worth Sweep, *see Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993), so FHFA's actions cannot be treated as an exercise of powers it merely inherited from the Companies. Whatever Congress's authority to "expand conservatorship and similar powers without transforming conservators into agents of the government," JA155, it cannot suspend the Constitution by simply slapping the label "conservator" onto an agency that seizes property to enrich the government.

The district court's conclusion that FHFA did not approve the Net Worth Sweep in a governmental capacity is also contrary to the position FHFA urged in

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persuading this and other federal courts to reject APA challenges to the Net Worth Sweep. FHFA told the D.C. Circuit that "HERA expressly permits the Conservator to consider its own best interests—including, for example to promote the public interest." Brief of Appellees FHFA at 36, *Perry Capital, LLC v. Mnuchin*, No. 14-5243 (D.C. Cir. Mar. 7, 2016). This Court embraced that understanding in *Saxton*. Having successfully obtained dismissal of other suits by arguing that FHFA as conservator has governmental interests that it lawfully advanced when it imposed the Net Worth Sweep, FHFA should be judicially estopped from arguing the opposite here. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

C. If the Court concludes that FHFA acted as a private entity when it imposed the Net Worth Sweep, Congress's delegation of authority violated the private nondelegation doctrine. Under that doctrine, Congress 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). The district court dismissed this claim on the ground that FHFA did not exercise any governmental power when it imposed the Net Worth Sweep, but the district court was wrong for the reasons explained above.

D. Finally, Plaintiffs seek declaratory and injunctive relief not only against FHFA but also Treasury because Treasury is a party to the Net Worth Sweep. As a party to the unlawful agreement, Treasury is a proper defendant. *See In re United*

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States ex rel. Hall, 825 F. Supp. 1422, 1428 (D. Minn. 1993). The district court was wrong to the extent that its opinion can be read to suggest otherwise.

CONCLUSION

The Court should reverse the district court's decision.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 12,999 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionately spaced typeface using the 2016 version of Microsoft Word in 14-point Times New Roman font.

As required by Eighth Cir. R. 28A(h), this brief and the addendum have been scanned for viruses and are virus-free.

/s/ Charles J. Cooper
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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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