IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WAZEE STREET OPPORTUNITIES FUND IV LP, *et al.*, Plaintiffs, v. THE FEDERAL HOUSING FINANCE AGENCY, *et al.*, Defendants.	Civil Action No. 2:18-cv-3478-NIQA

MOTION TO DISMISS BY THE U.S. DEPARTMENT OF THE TREASURY

Defendant the U.S. Department of the Treasury ("Treasury") hereby respectfully moves to dismiss with prejudice Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The grounds in support of this motion are set forth in the accompanying Memorandum of Law, which is incorporated herein by reference.

Dated: November 16, 2018

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

DIANE KELLEHER
Assistant Branch Director

/s/ R. Charlie Merritt
R. CHARLIE MERRITT
Trial Attorney (VA Bar No. 89400)
U.S. Department of Justice
Civil Division, Federal Programs Branch
919 East Main Street, Suite 1900
Richmond, VA 23219
(202) 616-8098
robert.c.merritt@usdoj.gov

Counsel for the U.S.
Department of the Treasury

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INTRODUCTION

During and after the financial crisis, the U.S. Department of the Treasury ("Treasury") committed hundreds of billions of dollars to ensure the solvency of the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") (collectively, "the GSEs" or "the enterprises"). Seeking to avert the catastrophic impact that the GSEs' collapse would have had on the housing market, Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"), which created the Federal Housing Finance Agency ("FHFA"), empowered it to act as conservator or receiver of the GSEs, and authorized Treasury to purchase securities issued by the GSEs. Under HERA, Treasury eventually infused $191.5 billion into the GSEs, with an additional pledged commitment of $254 billion. "That $200 billion-plus lifeline is what saved the [GSEs]—none of the institutional stockholders were willing to infuse that kind of capital during desperate economic times." *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 613 (D.C. Cir. 2017).

Nevertheless, Plaintiffs, shareholders in the enterprises, have filed suit in an effort to overturn the Third Amendment to the Preferred Stock Purchase Agreements (the "Third Amendment") between Treasury and FHFA, which replaced the GSEs' obligation to pay Treasury quarterly dividends at a fixed rate with a variable dividend equal to the amount, if any, by which the enterprises' net worth exceeds a capital buffer. This suit, however, is just the latest in a long line of challenges by GSE shareholders to the Third Amendment. The first wave of suits challenged the Third Amendment directly, arguing that it was unlawful on its own terms under HERA and the Administrative Procedure Act ("APA"). Courts have uniformly rejected such claims, primarily on the ground that they are barred by HERA's anti-injunction provisions, 12 U.S.C. § 4617(f). *See Perry Capital*, 864 F.3d at 615-16; *Robinson v. FHFA*, 876 F.3d 220, 228

(6th Cir. 2017); *Roberts v. FHFA*, 889 F.3d 397, 410 (7th Cir. 2018); *Saxton v. FHFA*, 901 F.3d 954, 956 (8th Cir. 2018); *Jacobs v. FHFA*, No. 17-3794, 2018 WL 5931515, at *1 (3d Cir. Nov. 14, 2018); *see also Collins v. Mnuchin*, 896 F.3d 640, 652-53 (5th Cir. 2018) (per curiam), *vacated, pending reh'g en banc* (5th Cir. Nov. 12, 2018).

As these adverse decisions piled up, GSE shareholder plaintiffs began asserting collateral attacks against the Third Amendment by alleging that various infirmities in the structure of FHFA and the appointment of its Director require the Court to set aside the Third Amendment. Plaintiffs' Complaint falls within this second wave of suits, alleging that the Third Amendment must be set aside (i) because HERA provides that FHFA's permanent Director is removable only for cause, (ii) because Edward DeMarco, who signed the Third Amendment, had served too long as Acting Director of FHFA, and (iii) because HERA is an unconstitutional delegation of legislative or executive power. Two district courts and a Fifth Circuit panel have already concluded that these allegations provide no basis for setting aside the Third Amendment. *See Collins*, 896 F.3d at 675-76; *Bhatti v. FHFA*, No. 17-cv-2185 (PJS/HB), 2018 WL 3336782 (July 6, 2018), *appeal docketed*, No. 18-2506 (8th Cir. July 16, 2018). This Court should reach the same conclusion.

Under HERA, FHFA as conservator succeeded to "all rights, titles, powers, and privileges of the [GSEs], and of any stockholder" with respect to the GSEs and their assets. 12 U.S.C. § 4617(b)(2)(A)(i). This provision "plainly transfers [to the FHFA the] shareholders' ability to bring derivative suits on behalf of" the GSEs. *Perry Capital*, 864 F.3d at 623 (alteration in original) (citation omitted). Plaintiffs' claims here are derivative – they assert injury to the GSEs and only derivatively as shareholders, and seek recovery that would accrue in the first instance to the GSEs. Accordingly, this action falls squarely within the transfer-of-shareholder-rights provision and is thus barred.

Even assuming Plaintiffs' constitutional challenges to the Third Amendment were not barred by HERA's transfer-of-shareholder-rights provision, Plaintiffs' claims plainly fail because FHFA, acting as conservator, does not exercise executive authority, but rather steps into the shoes of the GSEs, which are private entities. Although Plaintiffs are correct that the FHFA Director *as regulator* must be removable at will, that provides no cause to invalidate the Third Amendment, an action taken by FHFA *as conservator*. Plaintiffs' Appointments Clause and non-delegation claims fail for the same reason and are in any event meritless. Moreover, regardless of their merit, Plaintiffs' claims provide no basis for this Court to reach back six years and selectively invalidate a single action – the Third Amendment – of the many that FHFA's Acting Director took while allegedly serving in violation of the Constitution. The Court should dismiss this suit in its entirety.

BACKGROUND

I. FANNIE MAE AND FREDDIE MAC

Fannie Mae and Freddie Mac are government-sponsored enterprises, chartered by Congress, that provide liquidity to the mortgage market by purchasing residential loans from banks and other lenders, thereby facilitating the ability of lenders to make additional loans. *See* Compl. ¶ 11. These entities, which own or guarantee trillions of dollars of residential mortgages and mortgage-backed securities, have played a key role in housing finance and the United States economy. *Perry Capital*, 864 F.3d at 599.

II. THE 2008 HOUSING CRISIS AND HERA

"[I]n 2008, the United States economy fell into a severe recession, in large part due to a sharp decline in the national housing market. Fannie Mae and Freddie Mac suffered a precipitous drop in the value of their mortgage portfolios, pushing the Companies to the brink of default." *Id.* In response to the developing financial crisis, in July 2008, Congress passed HERA, Pub. L. No.

110-289, 122 Stat. 2654. Compl. ¶ 14. HERA created FHFA, an independent federal agency, to supervise and regulate Fannie Mae, Freddie Mac, and the Federal Home Loan Banks. 12 U.S.C. § 4501 *et seq*.; Compl. ¶ 14. FHFA is headed by a single director nominated by the President and confirmed by the Senate. 12 U.S.C. § 4512(a), (b)(1). The Director serves a five-year term and may be removed only for cause. 12 U.S.C. § 4512(b)(2). If the Director vacates the office before the five-year term ends, the President may designate one of three deputy directors to serve as Acting Director until a new Director can be confirmed. *Id.* § 4512(f).

HERA also granted the Director of FHFA discretionary authority to appoint FHFA "conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity." 12 U.S.C. § 4617(a) (2). The statute provides that, upon its appointment as the conservator or receiver, FHFA would "immediately succeed to . . . rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." *Id.* § 4617(b)(2)(A). The statute accords the conservator the power to "operate" and "conduct all business" of the enterprises, *id.* § 4617(b)(2)(B), including the power to take such action as may be "appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity," *id.* § 4617(b)(2)(D), and to "transfer or sell" any of the enterprises' assets or liabilities, *id.* § 4617(b)(2)(G). HERA contains an anti-injunction provision, which provides that "[e]xcept as provided in this section or at the request of the Director, no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver." *Id.* § 4617(f).

HERA also amended the statutory charters of the enterprises to grant the Secretary of the Treasury the authority to purchase "any obligations and other securities" issued by the enterprises

"on such terms and conditions as the Secretary may determine and in such amounts as the Secretary may determine," provided that Treasury and the enterprises reached a "mutual agreement" for such a purchase. *See* 12 U.S.C. § 1719(g)(1)(A) (Fannie Mae); § 1455(*l*)(1)(A) (Freddie Mac). Treasury was required to determine, prior to exercising this purchase authority, that the purchase was necessary to "provide stability to the financial markets," "prevent disruptions" in mortgage financing, and "protect the taxpayer." *Id.* § 1719(g)(1)(B) (Fannie Mae); § 1455(*l*)(1)(B) (Freddie Mac). This purchase authority would expire on December 31, 2009, *id.* § 1719(g)(4); § 1455(*l*)(4), but the statute expressly recited that Treasury would retain the power to exercise its rights with respect to previously-purchased securities after that sunset date, *id.* § 1719(g)(2)(D); § 1455(*l*)(2)(D).

III. CONSERVATORSHIP AND TREASURY'S SENIOR PREFERRED STOCK PURCHASE AGREEMENTS WITH THE GSES

On September 6, 2008, the Director of FHFA placed Fannie Mae and Freddie Mac into conservatorship. Compl. ¶ 16. In connection with the placement of the enterprises in conservatorship, Treasury used its authority "to promptly invest billions of dollars in Fannie and Freddie to keep them from defaulting. Fannie and Freddie had been 'unable to access [private] capital markets' to shore up their financial condition, 'and the only way they could [raise capital] was with Treasury support.'" *Perry Capital*, 864 F.3d at 601 (alterations in original) (citation omitted). Treasury entered into Senior Preferred Stock Purchase Agreements (the "PSPAs") with each enterprise, through FHFA. Under the PSPAs, Treasury committed to advance funds to each enterprise for each calendar quarter in which the enterprise's liabilities exceeded its assets, in accordance with generally accepted accounting principles, so as to maintain the solvency (*i.e.*, positive net worth) of the enterprise. If a draw was needed, FHFA submitted a request to Treasury to allow the enterprise to draw on the funds committed under its PSPA. Treasury would then

provide funds sufficient to eliminate any net worth deficit. *See* Ex. A, Fannie Mae PSPA §§ 2.1, 2.2; Freddie Mac PSPA §§ 2.1, 2.2 (cited in, *e.g.*, Compl. ¶ 21).[1] As of June 2012, the GSEs had drawn $187.5 billion from Treasury. *See Perry Capital*, 864 F.3d at 601. Under HERA, both enterprises enter mandatory receivership, and their assets must be liquidated, if they maintain a negative net worth for 60 days. *See* 12 U.S.C. § 4617(a)(4)(A) (FHFA must place the enterprise in receivership if the obligations of the enterprise exceed its assets for 60 calendar days).

In exchange for the capital commitment and infusions that it provided to the enterprises, Treasury received senior preferred stock with a liquidation preference,[2] warrants to purchase 79.9 percent of each enterprise's common stock, and commitment fees. Compl. ¶ 21; Fannie Mae PSPA §§ 3.1–3.4; Freddie Mac PSPA §§ 3.1–3.4. The face value of the liquidation preference on Treasury's senior preferred stock was $1 billion from each enterprise, and it increased dollar-for-dollar as either Fannie Mae or Freddie Mac drew on its PSPA funding capacity. Fannie Mae PSPA § 3.3; Freddie Mac PSPA § 3.3. Treasury received no additional shares of stock when the enterprises made draws under the PSPAs. *See* Fannie Mae PSPA § 3.1, Freddie Mac PSPA § 3.1. Currently, Treasury has a combined liquidation preference of $189.5 billion for the two enterprises. (This reflects approximately $187.5 billion in draws, plus the initial $2 billion in liquidation preference.) *See* Compl. ¶¶ 21, 40.

Treasury also received quarterly dividends on the liquidation preference of its senior

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[1] On a motion to dismiss, a court may consider documents relied upon in the complaint without converting the motion to dismiss into a motion for summary judgment. *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (noting that a "'document *integral to or explicitly relied* upon in the complaint' may be considered 'without converting the motion [to dismiss] into one for summary judgment'" (alterations in original) (citation omitted)).

[2] A liquidation preference is "[a] preferred shareholder's right, once the corporation is liquidated, to receive a specified distribution before common shareholders receive anything." Black's Law Dictionary 1298 (9th ed. 2009).

preferred stock. Compl. ¶ 21. Prior to the Third Amendment, the GSEs paid dividends at an annual rate of ten percent of their respective liquidation preferences. Ex. B, Fannie Mae Senior Preferred Stock Certificate § 5; Freddie Mac Senior Preferred Stock Certificate § 5 (cited in Compl. ¶ 21). (The quarterly dividend payment thus amounted to 2.5% of the liquidation preference.) Treasury would provide funds to the enterprises to cure both enterprises' negative net worth, which was caused in part by the payment of dividends to Treasury. *See* Compl. ¶ 26.

The original PSPAs also restricted dividend payments to all shareholders who were subordinate to Treasury in the capital structure. Fannie Mae PSPA § 5.1; Freddie Mac PSPA § 5.1. Under these agreements, the enterprises cannot pay or declare a dividend to subordinate shareholders without the prior written consent of Treasury so long as Treasury's preferred stock is unredeemed. *Id.* Nor can the enterprises "set aside any amount for any such purpose" without the prior written consent of Treasury. *Id.*

The original PSPAs further required the enterprises to pay a periodic commitment fee to Treasury beginning on March 31, 2010. Fannie Mae PSPA §§ 3.1, 3.2; Freddie Mac PSPA §§ 3.1, 3.2. The periodic commitment fee "is intended to fully compensate [Treasury] for the support provided by the ongoing Commitment following December 31, 2009." *Id.* The amount of the fee for this continuing indefinite commitment of taxpayer funds was to be "determined with reference to the market value of the Commitment as then in effect," as mutually agreed between Treasury and the enterprises, in consultation with the Chair of the Federal Reserve. *Id.* Treasury's rights under the PSPAs – senior preferred stock with accompanying dividend rights, warrants to purchase common stock, and periodic commitment fees – reflected the significant commitment taxpayers had made to the enterprises.

On August 17, 2012, Treasury and FHFA, acting as conservator for the GSEs, entered into

the Third Amendment to the PSPAs. Compl. ¶ 36. The amendment eliminated the 10 percent fixed annual dividend in favor of a quarterly variable dividend in the amount (if any) of the GSEs' positive net worth, minus a capital reserve. Ex. C, Third Amendment to Amended and Restated Fannie Mae PSPA, § 3 (Aug. 17, 2012); Third Amendment to Amended and Restated Freddie Mac PSPA, § 3 (Aug. 17, 2012) (cited in Compl. ¶ 36). If the GSEs have a negative net worth, they pay no dividend. *Id*. Since the execution of the Third Amendment, the enterprises have not drawn funds from Treasury to pay dividends to Treasury. The Third Amendment also suspended the periodic commitment fee that each enterprise would otherwise owe to the taxpayers for the remaining funding available to the GSEs for so long as the variable dividend remains in effect. *Id.*

LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In reviewing such a motion, the court must take the well-pleaded facts as true but is "not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Dismissal is appropriate under Rule 12(b)(6) if a complaint does not "contain sufficient factual matter, accepted as true," to state a plausible claim for relief as a matter of law. *Gelman v. State Farm Mut. Auto. Ins. Co.*, 583 F.3d 187, 190 (3d Cir. 2009) (citation omitted).

ARGUMENT

I. HERA'S TRANSFER-OF-SHAREHOLDER-RIGHTS PROVISION BARS PLAINTIFFS' CLAIMS

Plaintiffs' claims against both Treasury and FHFA are barred by HERA's transfer-of-shareholder-rights provision, 12 U.S.C. § 4617(b)(2)(A)(i) (also referred to as HERA's Succession Clause), which provides that FHFA "shall, as conservator or receiver, and by operation of law,

immediately succeed to . . . all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity[.]" The provision "plainly transfers [to the FHFA the] shareholders' ability to bring derivative suits." *Perry Capital*, 864 F.3d at 623 (quoting *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012)). As the Seventh Circuit explained in *Roberts*, 889 F.3d at 409, shareholder claims challenging the adoption of the Third Amendment on the ground that it was the result of "mismanagement" and resulted in a "depletion of corporate assets through overpayment" are derivative claims, and they are therefore barred. *See also Saxton v. FHFA*, 245 F. Supp. 3d 1063, 1072-73 (N.D. Iowa 2017) (holding claims challenging the Third Amendment to be derivative).

That plaintiffs bring constitutional claims is of no moment: whether a claim is direct or derivative turns on the nature of the plaintiff's injury and the relief sought; it does not depend on the source of law on which a shareholder plaintiff relies.

A. Plaintiffs' Claims are Derivative

"A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). Thus, legal harms committed against a corporation give rise to claims belonging to the corporation itself, and shareholder suits seeking to enforce those claims are derivative. *See, e.g.*, *First Annapolis Bancorp, Inc. v. United States*, 644 F.3d 1367, 1373 (Fed. Cir. 2011). This principle is reflected in the shareholder standing rule, also known as the derivative injury rule, which prevents shareholders from suing over injuries to the corporation. *Franchise Tax Bd. of Cal. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990) (shareholder standing rule "is a longstanding equitable restriction that generally prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons

other than good-faith business judgment"); *see also In re Kaplan*, 143 F.3d 807, 811-12 (3d Cir. 1998) (Alito, J.) ("The derivative injury rule holds that a shareholder . . . may not sue for personal injuries that result directly from injuries to the corporation.").

In a derivative suit, any recovery flows to the corporate treasury; in a direct suit, it flows to the individual plaintiff-shareholder. The determination whether a federal-law claim is direct or derivative is governed by federal law. *See* 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1821 (2017); *cf. Rifkin v. Bear Stearns & Co.*, 248 F.3d 628, 631 (7th Cir. 2001) ("[S]tanding to bring a federal claim in federal court is exclusively a question of federal law."). Where standing turns on the "allocation of governing power within [a] corporation," however, federal law often looks to state-law principles. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991); *Starr Int'l Co. v. United States*, 856 F.3d 953, 965-66 (Fed. Cir. 2017).[3]

The principles for distinguishing direct from derivative claims are well-established and consistent across federal and state law. The analysis turns on: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)." *Roberts*, 889 F.3d at 409 (quoting *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004)); *see also Potthoff v. Morin*, 245 F.3d 710, 716-17 (8th Cir. 2001) ("[A]ctions to enforce

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[3] "Fannie Mae is governed by its federal charter and federal law. *See* 12 U.S.C. § 1716 *et seq.*; *id.* at § 1451 *et.* [*sic*] *seq.*; 12 C.F.R. § 1710.10(a). For issues not addressed by the charter or federal law, Fannie Mae may follow applicable corporate law of Delaware so long as that law is not inconsistent with federal law. 12 C.F.R. § 1710.10(b)." *Edwards v. Deloitte & Touche, LLP*, No. 16-cv-21221, 2017 WL 1291994, at *6 (S.D. Fla. Jan. 18, 2017). Freddie Mac, similarly, is governed by its federal charter and federal law, *see* 12 U.S.C. § 1451 *et seq.*, but may follow Virginia corporate law so long as it is not inconsistent with federal law. Virginia has not adopted the *Tooley* test for direct and derivative claims, but also distinguishes between direct injuries to the shareholder and injuries to the corporation. *See Remora Invs., LLC. v. Orr*, 673 S.E.2d 845, 848 (Va. 2009).

corporate rights or redress injuries to the corporation cannot be maintained by a stockholder in his own name . . . even though the injury to the corporation may incidentally result in the depreciation or destruction of the value of the stock. . . . . [A shareholder's] claim can survive only if he has alleged that he personally has suffered a direct, nonderivative injury." (citation omitted)). A claim is "direct" when "the duty breached was owed to the stockholder" and the stockholder "can prevail without showing an injury to the corporation." *Tooley*, 845 A.2d at 1039. A claim is "derivative" if the harm to the shareholder is the byproduct of some injury to the corporate body as a whole. *Id.*; *see also, e.g.*, *In re Kaplan*, 143 F.3d at 811-12; *Potthoff*, 245 F.3d at 716.

Plaintiffs ask that the Third Amendment be declared invalid and enjoined, so that future increases in net worth would be retained by the GSEs, and also requests that the dividends Treasury has already received be returned to the GSEs. Compl. Prayer for Relief (1)-(3). Such an order would not benefit Plaintiffs directly. The relief sought would enrich the GSEs and supposedly make Plaintiffs' stock in the GSEs more valuable. Similarly, the harm that Plaintiffs allege – the assertedly improper transfer of the GSEs' net worth to Treasury – was suffered by the GSEs. *See, e.g.*, Compl. ¶¶ 36-39 (alleging, *inter alia*, that under the Third Amendment, "regardless of how much money the Companies send to Treasury, all of the Senior Preferred Stock will remain outstanding, and Treasury will continue to take all of *the Companies*' net worth" (emphasis added)).

In relevant respects, these claims parallel the claims at issue in *Starr International Co.*, in which the Federal Circuit held that a shareholder challenge to the terms of the government's bailout of the American International Group (AIG) asserted a derivative claim belonging to the corporation. 856 F.3d at 963-73. The AIG shareholders argued that the terms of the government's bailout, which required AIG to issue stock to the government in exchange for an $85 billion loan,

were unlawful and constituted an illegal exaction of the corporation's and the shareholders' economic interests. *See id.* at 959, 961. The Federal Circuit held that the AIG shareholders' claims were "quintessentially" derivative because they were "dependent on an injury to the corporation [(the alleged loss in value from the unlawful loan)], and any remedy [(the unwinding of the loan)] would flow to AIG." *Id.* at 967 (citation omitted). The same is true here; Plaintiffs' claims are "dependent on an injury" to the enterprises and "any remedy would flow" to the enterprises. *Id.*

That the Third Amendment will allegedly cause Plaintiffs indirect harm as shareholders, such as a decline in the value of their shares or a reduced likelihood of future dividends or liquidation payouts, does not transform those claims into direct claims. *See, e.g.*, *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 732 (3d Cir. 1970) ("A stockholder of a corporation does not acquire standing to maintain an action in his own right, as a shareholder, when the alleged injury is inflicted upon the corporation and the only injury to the shareholder is the indirect harm which consists in the diminution in value of his corporate shares resulting from the impairment of corporate assets."); *Gaff v. FDIC*, 814 F.2d 311, 318 (6th Cir. 1987) (plaintiff's claim that "his shares in the failed bank became totally worthless as a result of the defendants' conduct" described a derivative injury because "a diminution in the value of stock is merely indirect harm to a shareholder and does not bestow upon a shareholder the standing to bring a direct cause of action"); *Tooley*, 845 A.2d at 1037 (a claim is derivative where "the *indirect* injury to the stockholders arising out of the harm to the corporation comes about solely by virtue of their stockholdings").

B. The Shareholder Succession Clause Applies to Constitutional Claims

The above analysis is not affected by the fact that Plaintiffs assert constitutional claims. Courts have uniformly rejected the contention that the shareholder standing doctrine depends on the nature of the claim asserted. *See, e.g., Sinclair v. Hawke*, 314 F.3d 934, 939 (8th Cir. 2003)

(applying shareholder standing rule to dismiss First and Fifth Amendment claims, as well as federal statutory civil rights claims); *Pagán v. Calderón*, 448 F.3d 16, 28-29 (1st Cir. 2006) (shareholders lacked standing to pursue substantive due process and equal protection claims because they failed to allege that they "sustained a particularized, nonderivative injury" separate from any injury to the corporation.); *Duran v. City of Corpus Christi*, 240 F. App'x 639, 642–43 (5th Cir. 2007) (per curiam) (concluding that "only the corporation [had] standing to seek redress" for an alleged First Amendment violation).

As explained above, whether a claim is direct or derivative turns on the nature of Plaintiffs' injury and the relief sought; it does not depend on whether the source of the claimed injury was a statutory violation or a constitutional one. Here, though Plaintiffs assert constitutional claims, they do not allege any direct injury as the result of the violation of any personal constitutional right; in other words, they do not assert any constitutional claims that belong to *them*, as shareholders, rather than to the GSEs. Because Plaintiffs allege injury based on harm to the GSEs and seek relief that will accrue, if at all, first to the GSEs before any individual shareholder, their claims are derivative and barred by HERA's shareholder succession provision.

II. HERA'S FOR-CAUSE REMOVAL PROVISION DOES NOT REQUIRE THAT THE THIRD AMENDMENT BE SET ASIDE

The President's executive power "includes, as a general matter, the authority to remove those who assist him in carrying out his duties" to faithfully execute the laws. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 513-14 (2010). "Without such power, the President could not be held fully accountable" for how executive power is exercised, and "[s]uch diffusion of authority 'would greatly diminish the intended and necessary responsibility of the chief magistrate himself.'" *Id.* at 514 (quoting *The Federalist No. 70*, at 478 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)). Thus, as a general rule, the President must have the ability to remove

principal officers, like the Director of FHFA, at will. *Id.* at 513-14. As discussed below, however, even though HERA's requirement that the FHFA Director be removable for cause violates this principle, there is no basis to set aside the Third Amendment.

A. FHFA's Execution of the Third Amendment Does Not Implicate the Separation of Powers

As an initial matter, the question of whether HERA's provision limiting the President's authority to remove FHFA's permanent Director violates separation-of-powers principles is not presented here because "FHFA was not exercising governmental power when it agreed to the Third Amendment." *Bhatti*, 2018 WL 3336782, at *15. When determining whether an agency should be treated as a governmental actor, courts have long recognized the distinction between an agency acting as conservator and an agency acting as regulator. *See United States v. Beszborn*, 21 F.3d 62, 68 (5th Cir. 1994); *see also Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017); *County of Sonoma v. FHFA*, 710 F.3d 987, 993-94 (9th Cir. 2013). In *Beszborn*, for example, the Fifth Circuit recognized that the Resolution Trust Corporation (RTC) had a "non-governmental function in the initial stages of reorganization of a financial institution," but also performed regulatory functions. 21 F.3d at 68. When operating as government regulator, RTC was subject to various constitutional constraints; the same was not true when it acted as conservator or receiver.

The actions that FHFA takes as conservator, unlike its regulatory actions, do not implicate the separation of powers because a conservator does not exercise executive power. FHFA "stands in the shoes of the [enterprise]" and any actions it takes are "private, [and] non-governmental" actions. *Beszborn*, 21 F.3d at 68; *Collins*, 896 F.3d at 656. In agreeing to the Third Amendment, FHFA undertook the "quintessential conservatorship tasks" of "[r]enegotiating dividend agreements, managing heavy debt and other financial obligations, and ensuring ongoing access to vital yet hard-to-come-by capital." *Perry Capital*, 864 F.3d at 607. Such tasks are the hallmarks

of a private financial manager. *See Bhatti*, 2018 WL 3336782, at *15 ("The Third Amendment is simply a contractual arrangement that FHFA entered into on behalf of two private entities" and constitutes "the types of activities that any conservator would typically undertake, not exercises of governmental power"); *cf. Jacobs*, 2018 WL 5931515, at *4 ("The Third Amendment is in essence a renegotiation of an existing lending agreement," which "is a traditional power of corporate officers or directors" that FHFA, "as conservator, inherits"). They bear no resemblance to the regulatory activities and enforcement actions that characterize the exercise of Executive power. *See Free Enter. Fund*, 561 U.S. at 508.

Because the actions FHFA takes as conservator are not governmental actions, the President's inability to remove the conservator's top manager except for cause does not sufficiently impinge on "the functioning of the Executive Branch," *Morrison v. Olson*, 487 U.S. 654, 691 (1988), to run afoul of Article II of the Constitution, and there is no cause to set aside the Third Amendment.

In any event, Plaintiffs' separation-of-powers challenge to the Third Amendment fails for another independent reason: when FHFA as conservator agreed to the Third Amendment, it was headed by an Acting Director. Under 12 U.S.C. § 4512(f), the President may designate one of three deputy directors of FHFA to act as Director "[i]n the event of the death, resignation, sickness, or absence of the Director." *See* 12 U.S.C. § 4512(f). The for-cause removal restriction that Plaintiffs challenge here applies by its plain terms only to FHFA's permanent Director, who is "appointed by the President, by and with the advice and consent of the Senate." *Id.* § 4512(b). No such for-cause limitation exists with respect to the Acting Director of FHFA.

And there is no reason to interpret section 4512(b)(2)'s for-cause removal restriction as applying to a person serving as Acting Director. "[W]here Congress includes particular language

in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). Congress established the position of Director of FHFA and provided for an Acting Director in the *same* statutory section. *See* 12 U.S.C. § 4512(a), (f). In doing so, Congress included a for-cause removal restriction for the former, but not the latter. As is plain from the text, the Acting Director does not become the Director, but instead merely exercises the functions and duties of the Director without taking on the for-cause removal protection.

Principles of constitutional avoidance also counsel against construing the statute to limit the President's authority to revoke the designation of the Acting Director. As noted above, the provision creating the Acting Director position, 12 U.S.C. § 4512(f), contains no such limitation. But even if that provision were ambiguous, "federal statutes are to be construed so as to avoid serious doubts as to their constitutionality" where "it is fairly possible to interpret the statute in a manner that renders it constitutionally valid." *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 762 (1988); *see also Swan v. Clinton*, 100 F.3d 973, 983-88 (D.C. Cir. 1996) (holding that the President could remove at will a National Credit Union Administration Board member serving after his term's expiration pursuant to a holdover provision, notwithstanding any within-term statutory removal restrictions, in part because continued removal protection "might be pushing the constitutional envelope to the edge"). It is more than "fairly possible" to interpret § 4512(f) as allowing the President to revoke the designation of the FHFA's Acting Director at will, thus avoiding any doubt as to its constitutionality.

B. Even Though HERA's For-Cause Removal Provision is Unconstitutional, the Proper Remedy Does Not Include Setting Aside the Third Amendment

Because Plaintiffs challenge an action FHFA took as conservator of the GSEs and because

FHFA took that action while headed by an Acting Director, the question of whether the for-cause limitation that HERA places on the President's ability to remove a congressionally confirmed director acting in a regulatory capacity is not presented here. Were this Court to reach that question, however, it should hold that FHFA, acting as regulator of the GSEs and Federal Home Loan Banks, is unconstitutionally structured.

The President's executive power "includes, as a general matter, the authority to remove those who assist him in carrying out his duties" to faithfully execute the laws. *Free Enter. Fund*, 561 U.S. at 513-14. The President therefore must have the ability to remove principal officers, like the Director of FHFA, at will. *Id.* at 513-14. HERA's for-cause removal provision "impair[s] the President's ability to fulfill his Article II obligations." *Collins*, 896 F.3d at 674.

As Plaintiffs correctly assert, Compl. ¶ 79, the exception from *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), does not apply to this case. In *Humphrey's Executor*, the Supreme Court created a narrow exception to the general rule in upholding a provision establishing that Federal Trade Commission (FTC) commissioners could be removed only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 620 (quoting 15 U.S.C. § 41 (1934)). The Court's conclusion "depend[ed] upon the character of the office" – namely, that, in the Court's view at the time, the FTC commissioners were not "purely executive officers," *id.* at 631-32, because they "act[ed] in part quasi legislatively and in part quasi judicially," *id.* at 628; *accord Free Enter. Fund*, 561 U.S. at 493. In particular, the FTC acted as a continuing deliberative body, composed of several members with staggered terms to maintain institutional expertise and promote a measure of stability that would not be immediately undermined by political vicissitudes. *See Humphrey's Executor*, 295 U.S. at 624-25.

As the United States argued in its brief (*available at* 2017 WL 1035617) in *PHH Corp. v.*

CFPB, 881 F.3d 75 (D.C. Cir. 2018) (en banc) – which addressed the similar question of whether for-cause removal protection for the single Director of the CFPB violates the separation of powers – in its opposition to rehearing in *Collins v. Mnuchin*, No. 17-20364 (5th Cir. Sept. 13, 2018), and in its appellate brief in *Bhatti v. FHFA*, No. 18-2506 (8th Cir. Nov. 13, 2018), the Supreme Court's decision in *Humphrey's Executor* depended fundamentally on the nature of the FTC as a multi-member body. In contrast, a single-headed agency lacks the critical structural attributes as a "quasi-legislative," "quasi-judicial" body that have been thought to justify "independent" status for multi-member regulatory commissions. The difference between multi-member and single-headed agencies is constitutionally significant for several reasons.

First, *Humphrey's Executor* is a "limited" exception to the "general" rule that the President must have at-will removal authority over principal officers. *Free Enter. Fund*, 561 U.S. at 495, 513. As the structural rationale for *Humphrey's Executor* does not apply to single-headed agencies, the intrusion into executive power that it countenanced for multi-member agencies cannot be justified. Second, because a single agency head is unchecked by the constraints of group decision-making among members appointed by different Presidents, there is a greater risk that an "independent" agency headed by a single person will engage in extreme departures from the President's executive policy. *PHH*, 881 F.3d at 188 (Kavanaugh, J., dissenting). Third, unlike multi-member independent commissions, single-headed independent agencies like FHFA are a relatively novel innovation. In the separation-of-powers context, "the lack of historical precedent" for a new structure is "[p]erhaps the most telling indication of [a] severe constitutional problem." *Free Enter. Fund*, 561 U.S. at 505 (citation omitted).

Finally, there would be no rational limiting principle if *Humphrey's Executor* were extended beyond multi-member boards to single-headed agencies like FHFA. The rationale for

the continued assumption of constitutionality regarding for cause removal for multi-headed bodies reflects their structure rather than their purpose. As the Supreme Court has noted, "it is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." *Morrison*, 487 U.S. at 689 n.28 (1988); *see also Bowsher v. Synar*, 478 U.S. 714, 749 (1986) (Stevens, J., concurring in judgment) ("[O]ur cases demonstrate [that] a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned."). Indeed, given "[t]he difficulty of defining such categories of 'executive' or 'quasi-legislative' officials," *Morrison*, 487 U.S. at 689 n.28, extending the narrow *Humphrey's Executor* exception for multi-member commissions to single agency heads like the FHFA Director could threaten to swallow Article II's general rule even for Cabinet officers like the Secretary of the Treasury or Labor.

As explained above, however, this merits question is not presented here because FHFA was not acting in its regulatory capacity when it entered into the Third Amendment. But even if it was, it is still not the case that the appropriate remedy would include setting aside the Third Amendment. Instead, the proper remedy would merely be to sever the for-cause removal provision from HERA. *See Collins*, 896 F.3d at 675-76; *see also Free Enter. Fund*, 561 U.S. at 508-09; *PHH, Corp. v. CFPB*, 839 F.3d 1, 37-38 (D.C. Cir. 2016), *rev'd,* 881 F.3d 75 (2018) (en banc).[4]

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[4] Plaintiffs provide no basis for limiting their remedial theory to the Third Amendment. If the Third Amendment is invalid because it was entered into by a conservator removable only for cause, so is the original PSPA and the first two amendments to that agreement. And it cannot seriously be disputed that shareholders directly benefitted from Treasury's purchase of preferred stock in 2008 and the infusion into the enterprises of billions of dollars in capital not available from private investors. *See Perry Capital*, 864 F.3d at 601.

III. THE APPOINTMENTS CLAUSE DOES NOT REQUIRE THAT THE THIRD AMENDMENT BE SET ASIDE

The Appointments Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States." U.S. Const. art. II, § 2, cl. 2. Congress may, however, "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.* Both principal and inferior officers exercise "significant authority pursuant to the laws of the United States." *Edmond v. United States*, 520 U.S. 651, 662 (1997) (citation omitted). The Supreme Court has not, however, "set forth an exclusive criterion for distinguishing between" the two. *Id*. at 661.

Plaintiffs here recognize that an inferior officer, "who need not be nominated and confirmed, may *temporarily* assume the responsibilities of a principal officer." Compl. ¶ 95; *see also NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 934 (2017) (noting that the President may "direct certain officials to temporarily carry out the duties of a vacant PAS [Presidential appointment and Senate confirmation] office in an acting capacity, without Senate confirmation"). But they contend that such an individual can serve in the capacity of "an acting principal officer" for, "at most, two years." Compl. ¶ 95. Plaintiffs thus assert that it was "unconstitutional" for Edward DeMarco to "serv[e] as an acting principal officer for more than two years," *id*. ¶ 96, a period of time that had expired by the time of the Third Amendment, *see id*. ¶¶ 64-67. This argument finds no support in the text of the Appointments Clause or any statute, and Plaintiffs fail to show how the Third Amendment is implicated by their novel theory.

Plaintiffs' request for the invalidation of the Third Amendment on the basis of Edward DeMarco's appointment is flawed for the same reason their separation-of-powers removal claim is flawed: because FHFA was acting as conservator when it entered into the Third Amendment,

it was not carrying out a governmental function or exercising executive authority. The head of FHFA is therefore not acting as a principal (or even inferior) officer when FHFA undertakes actions in its conservator capacity, including when FHFA entered into the Third Amendment. Plaintiffs point to nothing in law or logic that would require the head of FHFA, when acting as a conservator, to be subject to Presidential appointment and Senate confirmation. Indeed, Congress could have permitted FHFA to select a private entity to be the GSEs' conservator. *See infra* p. 24-25. Even assuming, therefore, that Plaintiffs were correct that Acting Director DeMarco's appointment became constitutionally invalid prior to the signing of the Third Amendment, that would not provide cause to set aside the Third Amendment. That Congress chose to use the same person to act as both the head of FHFA as regulator and as the conservator of Fannie Mae and Freddie Mac does not mean that an invalid appointment for the head of FHFA as regulator renders invalid the actions taken by FHFA as conservator.

And even on its own terms, Plaintiffs' Appointments Clause challenge fails. Their primary contention is that DeMarco had served too long in his "temporary" capacity as Acting Director at the time of the Third Amendment. *See* Compl. ¶¶ 95-96. Plaintiffs provide no support for this contention. 12 U.S.C. § 4512(f), the provision authorizing the designation of an FHFA Deputy Director, imposes no express limitation on how long an individual may serve as Acting Director of FHFA. When Congress wants to impose a fixed limit on the tenure of individuals serving in an acting capacity, it has done so expressly. For example, the Federal Vacancies Reform Act (FVRA) places specific time limits on how long an individual may serve in an acting position. *See* 5 U.S.C. §§ 3345, 3346.

Nor does the Appointments Clause or any other provision of the Constitution place any express limit on the length of time during which an individual may be designated to act as Director.

Plaintiffs purport to locate such a limitation in the Recess Appointments Clause, Compl. ¶ 95, but this argument cannot withstand even cursory examination. The temporal limitation for recess appointees flows *directly* from the text of the Constitution, which provides that recess appointments last until the next session of Congress, which, by definition, is less than two years from the time of any recess appointment. *See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2574-79 (2014) (allowing intra-session appointments and thus appointments early in the two-year period, which creates the possibility of recess appointments lasting nearly two years). Because this case does not concern a recess appointment, the two-year effective limitation on recess appointments under the Constitution's express terms simply does not apply here. *See Bhatti*, 2018 WL 3336782, at *11 (finding, in response to identical argument raised by GSE shareholder plaintiffs that "recess appointees are not analogous to acting officers" and that the proposed two-year cap on acting officers' tenure "finds no support in the Constitution").[5]

Plaintiffs also vaguely suggest that HERA is unconstitutional to the extent it authorizes the President to "appoint an acting principal officer" (as opposed to providing for "the occupant of a specific inferior office" to, by operation of law, "become an acting principal officer"). Compl. ¶ 97. Plaintiffs do not identify which Appointments Clause principle this provision of HERA violates. In any event, the court in *Bhatti* rejected a similar argument, concluding that, "[g]iven that the Appointments Clause permits Congress to vest the appointment of inferior officers in the President alone, there is nothing unconstitutional about allowing the President to choose an acting

[5] Aside from the Recess Appointments Clause's two-year limitation period, Plaintiffs proposes no standard for assessing the "limits" that Plaintiffs assert the Appointments Clause places on "the period during which someone who has not been nominated and confirmed can serve as an acting principal officer." Compl. ¶ 95. In the absence of any "judicially discoverable and manageable standards" to apply, *Baker v. Carr*, 369 U.S. 186, 217 (1962), the determination of whether "an otherwise validly appointed acting officer has served for 'too long' is a non-justiciable political question." *Bhatti*, 2018 WL 3336782, at *8.

director." 2018 WL 3336782, at *11.

In any event, as was the case with Plaintiffs' Presidential removal power argument, even if their Appointments Clause argument were correct on the merits, the remedy for the violation they assert would not be to invalidate the Third Amendment. *See Bhatti*, 2018 WL 3336782, at *13-14. In arguing to the contrary, Plaintiffs necessarily presume that the remedy for a violation of the Appointments Clause is, in every circumstance, the invalidation of all the acts performed by the officer. But this is not so. Even if Plaintiffs raise their challenge to these past acts within the applicable statute of limitations, equitable factors must be considered. For example, the doctrine of laches was "developed by courts of equity to protect defendants against unreasonable, prejudicial delay in commencing suit," which can cause "unjust hardship to the defendant." *In re Bressman*, 874 F.3d 142, 149 (3d Cir. 2017) (citations omitted). Although statutes of limitations similarly protect against stale claims, "[l]aches, as an equitable doctrine, differs from the statute of limitations in that it offers the courts more flexibility, eschewing mechanical rules." *Waddell v. Small Tube Prods., Inc.*, 799 F.2d 69, 79 (3d Cir. 1986); *see also Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 806 (8th Cir. 1979) ("While courts may benefit from legislative determinations of when delay becomes unreasonable and prejudice may be presumed, undue deference to this judgment may result in a dereliction of the duty to examine all aspects of the equities affecting each case.").

Here, Plaintiffs waited nearly *five years* to complain of conduct that they say violated both the Constitution and their rights as shareholders. Plaintiffs have made no claim that they were unaware of the Third Amendment at the time it was entered into, and, indeed, as noted above, numerous other shareholders filed suit challenging the Third Amendment in the immediate years following its adoption. The Court in *Bhatti* concluded that a substantively identical complaint

filed in June 2017 could "by no stretch be considered 'timely,'" much less equitable from a broader perspective. *Bhatti*, 2018 WL 3336782, at *14. That finding rings even truer here, where Plaintiffs waited an additional year before filing suit.

And Plaintiffs' delay has prejudiced both the government and third parties. Like previous GSE shareholder plaintiffs asserting identical claims, Plaintiffs "are attempting to unwind the actions of an executive agency going back more than five years – actions of national (indeed, international) significance that have been the basis of trillions of dollars' worth of economic activity. There is simply no way to put the parties back into the positions they occupied in August 2012." *Bhatti*, 2018 WL 3336782, at *14. Plaintiffs' failure to challenge the Third Amendment for nearly five years permitted the development of serious reliance interests on the part of third parties and allowed the Acting Director to take additional actions that would be subject to invalidation under Plaintiffs' theory. Those actions—and the reliance interests that developed—should not be casually set aside on the basis of Plaintiffs' belated challenge to the Third Amendment.

IV. PLAINTIFFS' NON-DELEGATION CLAIMS FAIL

Plaintiffs further err in their contention that the government's interpretation of HERA as providing broad discretion to FHFA, encompassing the ability to enter into the Third Amendment violates either the non-delegation doctrine, *see* Compl. ¶¶ 100-104, or the "private nondelegation doctrine," *id.* ¶¶ 106-110. As discussed, FHFA acting as conservator does not exercise governmental power, executive or otherwise, and instead steps into the shoes of the GSEs. HERA cannot violate any non-delegation doctrine insofar as FHFA as conservator is not exercising governmental authority. *See Bhatti*, 2018 WL 3336782, at *16 (because "FHFA's actions as conservator are *not* governmental in nature," "the private non-delegation doctrine is not

implicated"). Nor is there any basis to conclude that a statute authorizing a conservator for a private entity violates Plaintiffs' cited non-delegation doctrines. Such statutes are consistent with longstanding historical practice. Federal regulators appointed private entities to be conservators and receivers of troubled financial institutions until the advent of the FDIC, and may continue to appoint private entities as receivers for banks that are not federally insured. *See* 12 U.S.C. § 191; 12 C.F.R. § 51.2; *see also* FDIC, *Managing the Crisis*: *The FDIC and RTC Experience* 212-13 (1998), https://go.usa.gov/xPvMs.

Moreover, Plaintiffs' legislative non-delegation argument is insubstantial on its own terms. Congress may delegate authority to the executive branch to implement enacted legislation, so long as it provides the agency with an "intelligible principle." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). To provide an intelligible principle, Congress must "clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946). "On only two occasions has the [Supreme] Court invalidated legislation based on the nondelegation doctrine, and both occurred in 1935." *United States v. Cooper*, 750 F.3d 263, 268 (3d Cir. 2014). As this Court has recognized, "[t]he Supreme Court has 'upheld, . . . without deviation, Congress' ability to delegate power under broad standards.'" *United States v. Berberena*, 694 F.3d 514, 523 (3d Cir. 2012) (quoting *Mistretta*, 488 U.S. at 373); *see also, e.g.*, *Yakus v. United States*, 321 U.S. 414, 420 (1944) (upholding delegation to administrator to set prices that "will be generally fair and equitable"); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943) (upholding delegation to agency to regulate broadcast licenses in the "public interest").

HERA easily satisfies this standard because Congress has therein "delineate[d] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Am.*

Power & Light, 329 U.S. at 105. HERA establishes that FHFA will apply the policies set forth in the statute; explains that the purpose of appointing a conservator is to "reorganiz[e], rehabilitat[e], or wind[] up the affairs" of the enterprises, 12 U.S.C. § 4617(a)(2); authorizes the conservator to act in "the best interests of the regulated entity or the Agency," *id.* § 4617(b)(2)(J)(ii); and supplies a list of powers that FHFA may use as conservator to achieve the conservatorship's goals, thereby providing additional guidance to and limitations on FHFA's exercise of its discretion. *See Bhatti*, 2018 WL 3336782, at *17 (finding that these provisions of HERA are "more than sufficient to meet the 'intelligible principle' standard"). That Congress delegated this authority to FHFA only in the limited circumstance where it is appointed conservator or receiver of one of three entities (Fannie Mae, Freddie Mac, or a Federal Home Loan Bank, *see* 12 U.S.C. § 4502(20)), reinforces the validity of that delegation. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001) ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."); *see also Fahey* v. *Mallonee*, 332 U.S. 245, 248-50 (Jackson, J.) (1947).

V. PLAINTIFFS FAIL TO ALLEGE THAT TREASURY ENGAGED IN ANY ACTIONABLE CONDUCT

In any event, Plaintiffs' claims against Treasury fail for the fundamental reason that Plaintiffs do not allege that Treasury engaged in any actionable conduct. Plaintiffs focus entirely on the structure and legal authority of FHFA, not Treasury. Tellingly, none of the five counts in Plaintiffs' Complaint even mention Treasury in the operative paragraphs. (This despite the fact that each claim is captioned as supposedly being "against . . . Treasury," *see, e.g.*, Compl. at 28, Count I.)

- Count I alleges that, "by vesting FHFA's leadership in a single director rather than a multi-member board and eliminating the President's power to remove the director

at will, HERA violates the President's constitutional removal authority." *Id.* ¶ 80. This count does not challenge any action or legal authority applicable to Treasury, which is, in any event, an Executive Branch department headed by a Secretary who serves at the pleasure of the President. 31 U.S.C. § 301(b).

- Count II alleges that HERA violates the separation of powers because FHFA allegedly is "insulated from supervision and control by the President," Compl. ¶ 89, because Congress "has no ability to direct or supervise" FHFA, *id.*, and, because of HERA's limitations on judicial review, "courts [are] powerless to ensure that FHFA exercises its authorities in a lawful manner," *id.* ¶ 90. Again, however, this count relates to oversight of FHFA, not Treasury. Treasury is subject to presidential oversight as an Executive Branch agency, *see* 31 U.S.C. § 301, and its budget is established by annual Congressional appropriations. *See, e.g.*, Consolidated Appropriations Act of 2017, Pub. L. 115-31, 131 Stat. 135, Div. E., Title I.
- Count III alleges that the duration of Edward DeMarco's service as Acting Director of FHFA violated of the Appointments Clause. Compl. ¶¶ 94-98. This count also does not mention Treasury or explain how Treasury is implicated in the challenged conduct. At the time of the Third Amendment, the Secretary of the Treasury was Timothy F. Geithner, who had been confirmed to the position on January 26, 2009. *See, e.g.*, U.S. Dep't of the Treasury, Timothy F. Geithner https://www.treasury.gov/about/history/Pages/tgeithner.aspx (las visited Nov. 16, 2018). Further, the Complaint specifically pleads that Treasury could not direct or control Mr. DeMarco's actions. *See* Compl. ¶¶ 68-69.
- Count IV alleges that HERA violates the non-delegation doctrine because HERA

"does not provide any intelligible principle that informs the agency when and how to exercise" its authority as conservator, or its authority as the successor to the GSEs' directors, officers, and shareholders. Compl. ¶¶ 101-102.[6] This count concerns FHFA's authority as conservator under Section 4617 of HERA; it does not cite, or otherwise discuss, Treasury's authority under HERA, codified at 12 U.S.C. §§ 1455(l) and 1719(g), to invest in securities and other obligations of the GSEs, let alone plausibly allege that Treasury's authority violates the non-delegation doctrine.

- Count V, which alleges HERA has unconstitutionally delegated executive power to a private entity because FHFA, as conservator of the GSEs, is not a governmental actor for constitutional purposes, Compl. ¶¶ 106-110, similarly does not implicate Treasury's authority under HERA. Nor could it; Treasury is indisputably a government actor for constitutional purposes.

Plaintiffs have thus not established any legal claim against Treasury. *See Williamson v. City of Philadelphia*, 169 F. Supp. 3d 630, 633 (E.D. Pa. 2016) (to survive a motion to dismiss, a "complaint must set forth 'direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory'" (citation omitted)).

CONCLUSION

For the reasons stated in the foregoing brief, the Court should dismiss with prejudice Plaintiff's Complaint.

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[6] Plaintiffs appear to be at great pains to avoid arguing that HERA actually created a non-delegation problem. Instead, it is HERA "as interpreted by FHFA," Compl. ¶ 101, that gives rise to the problem. We are aware of no precedent holding that federal courts, in construing limitations on their own authority to impose particular remedies, and federal agencies can collectively create an unconstitutional non-delegation.

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Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

DIANE KELLEHER
Assistant Branch Director

/s/ *R. Charlie Merritt*
R. CHARLIE MERRITT
Trial Attorney (VA Bar No. 89400)
U.S. Department of Justice
Civil Division, Federal Programs Branch
919 East Main Street, Suite 1900
Richmond, VA 23219
(202) 616-8098
robert.c.merritt@usdoj.gov

Counsel for the U.S.
Department of the Treasury