No. 17-20364

In the United States Court of Appeals for the Fifth Circuit

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

v.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS, No. 4:16-cv-03113

SUPPLEMENTAL EN BANC BRIEF OF PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

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

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Attorneys whose names are denoted with an asterisk entered appearances in the district court but have not entered appearances in the Fifth Circuit. Plaintiffs originally named Jacob J. Lew in his official capacity as Secretary of the Treasury as a defendant in this case. Secretary Mnuchin was substituted for Secretary Lew pursuant to Federal Rule of Civil Procedure 25(d). In addition to the named parties listed above, all Fannie Mae and Freddie Mac shareholders have a financial interest in the outcome of this case.

Dated: December 12, 2018

s/ Charles J. Cooper
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INTRODUCTION

The Federal Housing Finance Agency ("FHFA") is more insulated from oversight by all three branches of the federal government than any other federal agency in our 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." *Saxton v. FHFA*, 901 F.3d 954, 960 n.8 (8th Cir. 2018) (Stras, J., concurring). The "unique constellation of insulating features" that define this agency would have been unrecognizable and offensive to the Framers, and the panel was correct to hold that its structure "offends the Constitution's separation of powers." *Collins v. Mnuchin*, 896 F.3d 640, 670 (5th Cir. 2018).

Plaintiffs are entitled to backward-looking relief. Courts have consistently vacated past actions taken in violation of the separation of powers, as demonstrated by *Synar v. United States*, 626 F. Supp. 1374 (D.D.C. 1986), and *Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013). In both cases, the Supreme Court affirmed. *Bowsher v. Synar*, 478 U.S. 714, 736 (1986); *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). FHFA's argument for a lesser remedy in this case rests on a misreading of *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 508 (2010), and at bottom calls for a return to the practice of prospective constitutional decisionmaking that the Supreme Court repudiated in *Harper v. Virginia Department of Taxation*,

509 U.S. 86 (1993).

It has been aptly said that in establishing FHFA "Congress . . . created a monster by handing an agency breathtakingly broad powers and insulating the exercise of those powers from judicial review." *Saxton*, 901 F.3d at 963 (Stras, J., concurring). But Congress does not bear all of the blame, for the courts that have interpreted FHFA's statutory powers to date have accepted FHFA's invitation to rewrite the statute and ignore its plain text; in the process, the courts have awarded FHFA even more power than Congress conferred.

FHFA's decision to nationalize Fannie and Freddie was doubly unlawful: an action that exceeded the statutory authority of an unconstitutional agency. This Court should heed Congress's unambiguous command in the Administrative Procedure Act that courts "shall . . . set aside" such illegal agency conduct. 5 U.S.C. § 706.

ARGUMENT

I. The Panel Correctly Held that FHFA Is Unconstitutionally Structured.

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

As the panel explained, in a separation of powers case like this one "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*, 896 F.3d at 657 (quoting *Committee for Monetary Reform v. Board of Governors of Fed. Reserve Sys.*, 766 F.2d 538, 543 (D.C. Cir. 1985)). Instead, Article III's causation requirement is

satisfied when a separation of powers plaintiff suffers a concrete injury caused by a decision an agency made while operating in a manner that offends the Constitution. *Id.* at 654-57. In other litigation concerning the Net Worth Sweep, the Department of Justice has agreed, explaining that shareholders are "not required to show that FHFA would have made a different decision had it been differently structured in order to demonstrate standing to raise their claim that FHFA is unconstitutionally structured." Brief for the Treasury Department at 26 n.3, *Bhatti v. FHFA*, 2018 WL 6039571, No. 18-2506 (8th Cir. Nov. 13, 2018) (quotation marks omitted) (citing *Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000)).

The panel's standing analysis follows directly from the Supreme Court's decision in *Free Enterprise Fund*, 561 U.S. at 512 n.12. 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 rejected the argument that 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 this approach. First, 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.*, *Wright v. O'Day*, 706 F.3d 769, 772 (6th Cir. 2013); *Antoniu v. SEC*, 877 F.2d 721, 726 (8th Cir. 1989); *cf. Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993). To show causation in a case about procedural rights, "the plaintiff must establish that the injury is fairly traceable to the proposed government action or inaction," *Sierra Club v. Glickman*, 156 F.3d 606, 613 (5th Cir. 1998)—not that the procedural violation changed the ultimate decision the agency made.

Second, 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 (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*, 204 F.3d at 1131. Nevertheless, to preserve the division of authority that was the centerpiece of the Framers' plan for protecting individual liberty, courts

consistently conclude 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).

It is also relevant to the standing analysis that the constitutional problem with FHFA's structure derives not solely from the agency's independence from the President but more broadly is a function of the near total absence of oversight of this agency by *all three* branches of the federal government. This aspect of the constitutional issue 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.

FHFA has attempted 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, FHFA contends that there is no doubt that the Net Worth Sweep would have been imposed even if the President had controlled FHFA. This argument 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 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. *Free Enterprise Fund* is just one of numerous cases in which plaintiffs invoking the separation of powers or other procedural safeguards were held to have standing even though there was no plausible argument that the violation changed the outcome of the decision being challenged. *See, e.g.*, *Nguyen v. United States*, 539 U.S. 69, 77-78 (2003) (vacating Ninth Circuit decision because one member of three-judge panel was non-Article III judge even though panel's decision was unanimous); *Zdanok*, 370 U.S. at 533 (plurality) (petitioners had standing to argue that non-Article III judges lacked authority to hear their cases even though Court was "unable to say that either judge's participation even colorably denied the petitioners independent judicial hearings"); *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).

Moreover, even accepting the mistaken premise that plaintiffs' standing requires a showing that the constitutional violation could have made a difference, Plaintiffs still have standing. FHFA's arguments to the contrary grossly oversimplify 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. As a political

matter, the Administration might not have been willing to run the risks inherent in draining all of the capital out of Fannie and Freddie without the public blessing of an independent financial regulator. *See* ROA.16 (recounting public statement by FHFA on day Net Worth Sweep was announced that characterized the action as a financial necessity for the Companies); *cf. Free Enterprise Fund*, 561 U.S. at 497 (Article II vests all executive power in the President so that he cannot "escape responsibility for his choices by pretending that they are not his own"). As a policy matter, the Administration might not have wanted to adopt the Net Worth Sweep if it could have forced FHFA to use a portion of the Companies' profits to finance housing policy goals not shared by the Republican-controlled House of Representatives—an issue over which the Obama Administration and Mr. DeMarco publicly sparred. *See* Mike Lillis, *Rep. Frank joins calls for top Fannie, Freddie regulator to be replaced*, THE HILL (Mar. 11, 2012), https://goo.gl/kK9YrF. The Court cannot assume that the President would have preferred the Net Worth Sweep to innumerable alternative policies had he been able to influence FHFA by threatening to fire its Director or veto its appropriations.

FHFA has also attempted to distinguish *Free Enterprise Fund* on the ground that the plaintiff in the case was directly regulated by the PCAOB. But Plaintiffs are no less directly regulated by FHFA, which during conservatorship "may, by regulation or order, provide for the exercise of any function by any stockholder . . .

of any regulated entity for which the Agency has been named conservator." 12 U.S.C. § 4617(b)(2)(C); *see also id.* § 4617(b)(2)(A). Indeed, FHFA's previous brief to this Court declared in sweeping terms that "[t]he shareholders' rights are now the FHFA's." FHFA Br. 31 (alteration in original) (quotation marks omitted). The Court need not accept FHFA's unbounded understanding of its authority to act on behalf of shareholders to recognize that this agency directly affects Plaintiffs.[1]

Finally, with respect to redressability, the Court must not lose sight of the fact that Plaintiffs allege *both* past *and* ongoing injuries from FHFA's abuse of its conservatorship authorities. *See* ROA.70 (describing FHFA's continuing "efforts to use its status as the Companies' conservator and regulator to reform the Nation's housing finance system by eliminating Fannie and Freddie"); ROA.75 (statement by FHFA's Director that he does not "lay awake at night worrying about what's fair to

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[1] In *Bhatti v. FHFA*, 332 F. Supp. 3d 1206 (D. Minn. 2018), a district court concluded that shareholders lacked standing to challenge FHFA's structure because Treasury could unilaterally undo the Net Worth Sweep by refusing to accept further dividends from the Companies. But Treasury 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 provide no remedy for the excess dividends Treasury has already collected under the Net Worth Sweep and would not return Plaintiffs to their rightful position in the Companies' capital structure.

the shareholders"). These injuries would be redressed by the injunctive and declaratory relief Plaintiffs seek.

FHFA frames the remedial issues in this case in terms of standing, arguing that Plaintiffs lack standing if they do not receive a remedy vacating the Net Worth Sweep. But these are merits questions. "The Supreme Court has made clear that when considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim." *Cole v. General Motors Corp.*, 484 F.3d 717, 723 (5th Cir. 2007) (quoting *Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007)); *Warth v. Seldin*, 422 U.S. 490, 500 (1975). And the remedy determination is a merits issue.

Regardless, FHFA's remedial arguments fail both because the Net Worth Sweep must be set aside for the reasons explained below, *infra* 17-29, and because Plaintiffs are entitled at the very least to prospective relief, *see Collins*, 896 F.3d at 657-59. Plaintiffs suffer injury every quarter FHFA orders the Companies to pay dividends to Treasury (and not Plaintiffs) under the Net Worth Sweep, and the Court should enjoin those dividend payments so long as FHFA is unconstitutionally structured. FHFA suggested in its en banc petition that the Complaint does not seek prospective relief, but FHFA is wrong. The prayer for relief requests not only vacatur of the Net Worth Sweep but also an injunction against continued implementation of the Net Worth Sweep and a declaratory judgment that FHFA is unconstitutionally

structured. ROA.90. Even if the Court denies all backward-looking relief, it still must put a stop to Plaintiffs' ongoing injuries.

B. FHFA's Structure Is Unconstitutional.

Respecting the merits of Plaintiffs' challenge to FHFA's structure, little can be added to what has already been said by the panel majority, *Collins*, 896 F.3d at 659-75, the *PHH* dissents, *PHH Corp. v. CFPB*, 881 F.3d 75, 164-67 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting); *id.* at 137-39 (Henderson, J., dissenting), and the Department of Justice, *see* Treasury Opp'n to Pet. for Reh'g En Banc at 12-15; ROA.766-768.

No agency has ever been as wholly unaccountable to all three branches of government as FHFA. The Comptroller of the Currency "is removable at will by the President." *PHH*, 881 F.3d at 177 n.4 (Kavanaugh, J., dissenting); *cf. Walpin v. Corporation for Nat'l & Cmty. Servs.*, 630 F.3d 184, 187 (D.C. Cir. 2011). The FTC upheld in *Humphrey's Executor* was a bipartisan multi-member commission subject to the usual appropriations process. *See Collins*, 896 F.3d at 671-72. The Independent Counsel was an inferior officer with "limited jurisdiction" who was required to follow Department of Justice policy. *Morrison v. Olson*, 487 U.S. 654, 691, 691 (1988). The CFPB's regulatory actions may be vetoed by a board of Executive Branch officials and are not immunized from judicial review. *Collins*, 896 F.3d at 669-70. And perhaps most tellingly, as a practical matter the unique

constellation of independence-enhancing features that apply to FHFA go much further than the double for-cause removal provision the Supreme Court struck down in *Free Enterprise Fund*. *PHH*, 881 F.3d at 191 (Kavanaugh, J., dissenting).

FHFA's "concentration of enormous power in a single unaccountable, unchecked Director poses a far greater risk of arbitrary decisionmaking and abuse of power, and a far greater threat to individual liberty, than a multimember independent agency does." *Id.* at 166. This arrangement is unconstitutional.[2]

C. Mr. DeMarco's Status as an Acting Director Does Not Defeat Plaintiffs' Constitutional Claim.

For the reasons explained in Plaintiffs' earlier briefs and adopted by the panel, acting Director DeMarco was removable only for cause. Reply Br. 4-5; *Collins*, 896 F.3d at 656. But even if the en banc Court disagrees, that would not provide a basis for avoiding the merits of the constitutional question this case presents. The Net Worth Sweep has been sustained, implemented, and defended by FHFA under the

[2] FHFA's en banc petition criticized the panel for relying in part on independence-enhancing features of FHFA's structure that were not discussed at length in the parties' briefs. FHFA exaggerates the extent to which the panel's reasoning departed from the legal theory Plaintiffs advanced. *See, e.g.*, Plaintiffs' Opening Br. 19 (discussing FHFA's exemption from the appropriations process). Regardless, "when an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991).

leadership of Director Watt—a Senate-confirmed FHFA Director who indisputably enjoys for-cause removal protection under 12 U.S.C. § 4512.

Moreover, whatever the President's authority to fire Mr. DeMarco, he could have only been replaced by one of Mr. DeMarco's own handpicked deputies—individuals who agreed with Mr. DeMarco and not the President about key housing finance issues. *See* 12 U.S.C. § 4512(c)-(f); *Collins*, 896 F.3d at 667 n.199; Reply Br. 6. In other litigation, FHFA has suggested that the President could replace a removed acting FHFA Director under the Federal Vacancies Reform Act ("FVRA"). The only judicial opinion that has addressed this issue suggests otherwise. *English v. Trump*, 279 F. Supp. 3d 307, 322 (D.D.C. 2018). Regardless, by the time of the Net Worth Sweep, whatever authority the President has under the FVRA had lapsed because more than 210 days had passed since the Senate rejected the President's first nominee to head the agency. *See* 5 U.S.C. § 3346(b)(1). Even under Defendants' interpretation of HERA and the FVRA, in August 2012 there was no way for the President to influence FHFA by firing Mr. DeMarco.

D. FHFA's Decision To Nationalize the Companies Is Attributable to the Government.

In its opposition to en banc rehearing, Treasury argued that the Net Worth Sweep does not offend the separation of powers because FHFA imposed it when acting on behalf of the Companies in a non-governmental capacity. But as the panel explained, given the "prophylactic" nature of the separation of powers, "[w]hether

the FHFA's specific conduct or actions were governmental in nature is not relevant—the structure of the agency is." *Collins*, 896 F.3d at 657; *see Freytag v. Commissioner*, 501 U.S. 868, 882 (1991) (declining to treat special trial judges as inferior officers for purposes of some of their duties but mere employees with respect to others). The separation of powers "rests on an entirely different foundation" from other constitutional provisions that courts have held not to apply to some other actions taken by FHFA as conservator. *Collins*, 896 F.3d at 657.

Moreover, FHFA could not have lawfully agreed to the Net Worth Sweep if it had been acting as a private entity. If the Net Worth Sweep had been agreed to before the Companies went into conservatorship, or by FHFA with no authority beyond its right to "step into the shoes" of the Companies, it would have been a flagrant violation of management's duty of loyalty and numerous other state law principles. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993). There are legal and practical reasons why the Net Worth Sweep is unique in the history of corporate finance. FHFA has conceded that in approving the Net Worth Sweep it "acted pursuant to HERA, rather than merely under powers inherited from the Companies." FHFA Brief at 10, *Bhatti v. FHFA*, No. 17-2185 (D. Minn. Nov. 16, 2017), ECF No. 49 (quotation marks omitted). Where a federal agency exercises authority purportedly derived from a federal statute to expropriate property in furtherance of federal interests, its actions are attributable to the federal government

and must therefore be subject to constitutional limitations. *Slattery v. United States*, 583 F.3d 800, 826-29 (Fed. Cir. 2009); *Preseault v. United States*, 100 F.3d 1525, 1550 (Fed. Cir. 1996); *Hendler v. United States*, 952 F.2d 1364, 1379 (Fed. Cir. 1991).

The Court must not lose sight of the troubling implications of Defendants' more capacious understanding of when FHFA may act free from constitutional constraints. Suppose that FHFA used its conservatorship powers to fire a Fannie executive because of her gender or to direct the Companies not to purchase mortgages issued to racial minorities. Under Defendants' position, the Equal Protection Clause would not apply, and Section 4617(f) would prevent the courts from enjoining FHFA's violation of federal and state antidiscrimination statutes. *See National Tr. for Historic Pres. v. FDIC*, 21 F.3d 469, 472-73 (D.C. Cir. 1994). In *FDIC v. Meyer*, the Solicitor General assured the Supreme Court that the FDIC as receiver is not "immune from applicable constitutional norms." U.S. Br. at 14 n.7, *FDIC v. Meyer*, 1993 WL 638235 (U.S. July 26, 1993). This Court should reject the contrary position urged by the Department of Justice in this case.[3]

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[3] *Meyer* concerned a due process claim against the Federal Savings & Loan Insurance Corporation (FSLIC, predecessor to the FDIC) as receiver. Although the Supreme Court refused to create a cause of action for damages under *Bivens*, it followed the Solicitor General in assuming that federal receivers are subject to constitutional constraints. *Compare FDIC v. Meyer*, 510 U.S. 471, 475-83 (1994) (assuming receiver had sovereign immunity but finding it waived), *with Williamson*

In any event, the Court need not decide precisely when the separation of powers applies to a federal conservator or receiver because the Net Worth Sweep was made possible and has been implemented and sustained by FHFA's exercise of its regulatory powers. The Net Worth Sweep radically transformed the Companies' capital structure and permanently deprived them of their capacity to raise funds by issuing additional stock—steps that the Companies' management could never have taken without the regulator's blessing. *See* 12 U.S.C. §§ 4511(b), 4513(a)(1)(B). And by regulation, every Net Worth Sweep dividend payment the Companies have made to Treasury required the express approval of FHFA as regulator. 12 C.F.R. § 1237.12(a), (b).

Defendants respond that the case caption names FHFA as a defendant "in its capacity as Conservator." But FHFA's Director is also a defendant, and Plaintiffs' constitutional claim against the Director may go forward even if it is dismissed as to FHFA as conservator. *See Ex parte Young*, 209 U.S. 123 (1908); 5 U.S.C. § 702. Plaintiffs have argued throughout this litigation that the Net Worth Sweep involved an exercise of FHFA's regulatory powers and asked the district court for leave to

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v. United States Dep't of Agric., 815 F.2d 368, 373 (5th Cir. 1987) (observing that federal sovereign immunity is grounded "in our constitutional structure"). It also did not disturb the Ninth Circuit's decision that FSLIC and the FSLIC official responsible for administering the receivership *had* violated the plaintiff's due process rights. *See Meyer*, 510 U.S. at 486 n.12; *Meyer v. Fidelity Sav.*, 944 F.2d 562, 572-76 (9th Cir. 1991).

amend the Complaint to the extent that it found a technical defect in how the constitutional claim is pleaded. *See* ROA.531, 729.

Finally, it bears emphasis that unlike the FDIC, FHFA does not exercise its conservatorship powers in a manner that is independent from FHFA as regulator. *See Plaintiffs in All Winstar-Related Cases at Court v. United States*, 44 Fed. Cl. 3, 7 & n.5 (1999). Rather than attempting to silo FHFA's pursuit of its conservatorship and regulatory functions, the same policymakers and lawyers simultaneously represent the agency in both capacities. When FHFA acts as *both* conservator *and* regulator, its actions are attributable to the Government. And the same is true when FHFA acts to pursue governmental objectives, regardless of whether it acts as conservator or regulator or both.

II. The Net Worth Sweep Must be Set Aside Because FHFA Is Unconstitutionally Structured.

Vacatur is the appropriate remedy whenever a litigant with standing challenges the final decision of an official who is unconstitutionally unaccountable to the President. Numerous Supreme Court precedents show that backward-looking relief is *required* in separation of powers cases, just as it is required in other constitutional contexts. FHFA's argument to the contrary conflates whether Plaintiffs are entitled to backward-looking relief and whether the unconstitutional provisions of HERA may be severed from the rest of the statute, but these are distinct issues that the Court must treat separately.

A. Courts Are Required To Set Aside Final Agency Action Taken in Violation of the Separation of Powers.

1. In *Bowsher*, 478 U.S. at 736, the Supreme Court affirmed a lower court judgment that vacated 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 to implement automatically by ordering the sequestration of specified funds in the federal budget. The Comptroller General released his first budget report under this Act on January 21, 1986, and President Reagan issued the mandated sequestration order on February 1, 1986. Ronald Reagan, Order on Emergency Deficit Control Measures for Fiscal Year 1986, https://goo.gl/96DX3T. A union whose retired members stood to lose cost of living adjustments to their pensions sued, arguing that this process was unconstitutional 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 the challenged 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." Order (Feb. 7, 1996) (Exhibit A); *see Synar*, 626 F. Supp. at 1378, 1394-1404. 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 vacatur is the appropriate remedy when a litigant with standing challenges the final decision of an official who is unconstitutionally unaccountable to the President.

In other litigation, FHFA has attempted to distinguish *Bowsher* by observing that it concerned a specific "process" that was unconstitutional, but the same is true of this case. The crux of Plaintiffs' challenge to FHFA's structure is that the process FHFA used to impose and implement the Net Worth Sweep—exercising governmental power without meaningful oversight from the President, Congress, or the judiciary—violated the separation of powers.

Defendants have also argued that *Bowsher* is distinguishable because the statute in that case spoke directly to what should occur if the constitutionally problematic provisions of the Gramm-Rudman-Hollings Act were invalidated. True, the Act included a "fallback" provision that specified alternative procedures to be followed if the Comptroller General's role in the budgeting process was held unconstitutional. *Id*. at 735. But nothing in the statute empowered courts to award relief for *past* presidential sequestration orders that would not have otherwise been

available under background principles of law. *See* Pub. L. No. 99-177 § 274, 99 Stat. 1037 (1985).

2. Further support for the same remedy can be found in the many cases in which courts have vacated past decisions of officials who violated the separation of powers. Vacatur is utterly routine in Appointments Clause cases. *E.g.*, *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018); *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014); *Dresser-Rand Co. v. NLRB*, 576 F. App'x 332, 333 (5th Cir. 2014); *Intercollegiate Broad. Sys., 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). The Supreme Court has also frequently awarded backward-looking relief in other separation of powers cases. *See, e.g.*, *Clinton v. New York*, 524 U.S. 417, 425 & n.9 (1998) (past cancellation of particular funds under Line Item Veto was invalid); *INS v. Chadha*, 462 U.S. 919, 936 (1983) (plaintiff had standing because "[i]f the [legislative] veto provision violates the Constitution, and is severable, the deportation order against Chadha will be cancelled"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952) (President required to return steel mills he had already seized).

In the Appointments Clause context, courts have identified two rationales for vacatur, and both apply with equal force here. First, 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*, 705 F.3d at 493, *aff'd*, 134 S. Ct. 2550 (2014);

see Nguyen v. United States, 539 U.S. 69, 77-78 (2003); *Ringling v. City of Hempstead*, 193 F. 596, 601 (5th Cir. 1911) (if "the only authority claimed" for government action is "an unconstitutional statute," then the entity "had no authority in law to act at all" and its decisions are "void"). 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 minimum degree of oversight by the President. When these procedures are not followed, the official's actions are *ultra vires* and subject to vacatur.

Second, as the Supreme Court reiterated 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; *see also Ryder v. United States*, 515 U.S. 177, 183 (1995) (declining to adopt "rule that would create a disincentive to raise Appointments Clause challenges"). "A key 'constitutional means' vested in the President—perhaps *the* key 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. at 501 (alteration in original) (quoting THE FEDERALIST NO. 51 (James Madison)). The Framers' vision was that the procedures mandated by the Constitution 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.

3. If the Supreme Court's precedents left any doubt about what should happen when an agency violates the separation of powers, it is resolved in this APA case by an unambiguous statutory command. The APA's mandate could not be clearer: "The reviewing court *shall* . . . *hold unlawful and set aside* agency action . . . found to be . . . contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706 (emphasis added). Thus, "[i]n *all* cases agency action *must* be set aside . . . if the action failed to meet . . . constitutional requirements." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 (1971) (emphases added). Whatever the scope of the Court's equitable discretion to fashion an appropriate remedy, it must adopt a remedy that can be fairly said to "set aside" the Net Worth Sweep. *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 934, 1013 (2018) (observing that reviewing courts have an "obligation to 'set aside' unlawful agency action under the APA").

There is no doubt that Plaintiffs are entitled to have the Net Worth Sweep vacated if they prevail on their claims that Defendants violated HERA. The Court must not award a lesser remedy if it is persuaded that FHFA's conduct did not violate

a mere federal statute but the provisions of the Constitution that the Framers considered most important to safeguarding individual liberty.

B. FHFA's Arguments Against Setting Aside the Net Worth Sweep Are Unpersuasive.

1. The cases relied upon by FHFA and cited by the panel do not provide a basis for allowing the Net Worth Sweep to stand. *See Collins*, 896 F.3d at 675. In contrast to *Bowsher*, in which a final action had already occurred by the time the district court entered its judgment, *Free Enterprise Fund* concerned an *ongoing* agency investigation. It is blackletter law that courts will not "set aside" an agency decision until it becomes final. *Bennett v. Spear*, 520 U.S. 154, 174, 177-78 (1997); *see Jobs, Training & Servs., Inc. v. East Texas Council of Gov'ts*, 50 F.3d 1318, 1324 (5th Cir. 1995) ("[A]n agency's initiation of an investigation does not constitute final agency action.").[4]

Moreover, whether the past acts of the PCAOB were subject to vacatur in light of the Supreme Court's holding was never litigated in *Free Enterprise Fund*. The accounting firm plaintiff in that case asked for an injunction against the continued operations of the PCAOB, and its briefs to the Supreme Court did not address whether past PCAOB actions should be vacated if the Court refused to supply the

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[4] The divided panel decision in *John Doe Co. v. CFPB*, 849 F.3d 1129, 1133 (D.C. Cir. 2017), is distinguishable for similar reasons: the plaintiff in that case sought an injunction against an ongoing investigation that to that point required it "to do nothing," *id.* at 1131, not vacatur of a final agency action.

broader remedy it sought. The Supreme Court's opinion said that by the time the case reached the Court the PCAOB's investigation of the firm had concluded and "produced no sanction," thus making vacatur of the decision to start the investigation an empty formalism. 561 U.S. at 490. And on remand from the Supreme Court, the parties settled the case rather than litigating over what should happen to the PCAOB's past actions. A contemporaneous news account indicates that under the terms of the settlement, the PCAOB agreed to "withdraw" one of two non-binding reports in which it had publicly criticized the plaintiff firm and officially terminated the investigation "without any formal findings." Michael Cohn, *Beckstead and Watts Settles Inspection Case with PCAOB*, ACCOUNTING TODAY (Feb. 23, 2011) (Exhibit B). Accordingly, no court was asked to decide what should happen to the PCAOB's past actions if the unconstitutional second layer of for-cause removal protection was severed from the statute and the PCAOB was allowed to continue operating going forward. Notably, in another case about a PCAOB enforcement action that began when the Board was unconstitutionally constituted, the Department of Justice filed a brief acknowledging that a "second proceeding [is] necessary" when an agency official is "unconstitutionally insulated from presidential control at the time of the initial proceeding." Brief of SEC at 37, *Laccetti v. SEC*, 2017 WL 1196137, No. 16-1368 (D.C. Cir. Mar. 31, 2017).

Throughout this litigation, when discussing the remedy in *Free Enterprise Fund*, FHFA has consistently conflated two issues: (1) whether an unconstitutional agency's past actions must be set aside, *see Bowsher*, 478 U.S. at 736; 5 U.S.C. § 706; and (2) whether the courts should sever the Director's for-cause removal protection or otherwise "blue-pencil" HERA to fix FHFA's constitutional problems going forward, *see Free Enterprise Fund*, 561 U.S. at 509. Plaintiffs address the second of those issues below. *See infra* 36-40. But the critical point for present purposes is that *Free Enterprise Fund* has nothing to say about the first. Irrespective of whether the Court severs HERA's unconstitutional provisions, strikes down the statute in its entirety, or adopts an intermediate approach, the Court must set aside 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.

As further support for declining to vacate the Net Worth Sweep, the panel cited *Buckley v. Valeo*, 424 U.S. 1, 142 (1976), and *Citizens for Abatement of Aircraft Noise, Inc. v. Metropolitan Washington Airports Authority*, 917 F.2d 48, 57 (D.C. Cir. 1990). But the courts in those cases granted the plaintiffs all the relief they sought, according *de facto* validity only to past agency actions that the plaintiffs did not challenge. *See Ryder*, 515 U.S. at 184 ("[I]n *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."); *NRA Political Victory Fund*, 6 F.3d at

828 (distinguishing *Buckley* because "the relief sought by the plaintiffs there, declaratory and injunctive remedies, could have purely prospective impact" (citation omitted)); *Citizens for Abatement of Aircraft Noise, Inc. v. Metropolitan Wash. Airports Auth.*, 718 F. Supp. 974, 979 (D.D.C. 1989) (observing that challenged Board of Review had "never exercised its power to plaintiffs' detriment").

Moreover, *Buckley*'s treatment of remedies was limited to its facts in *Ryder*. *See* 515 U.S. at 184. And if *Ryder* left any doubt that *Buckley*'s remedial discussion is no longer good law, it was resolved last term in *Lucia*, 138 S. Ct. at 2055. As in *Buckley*, the Court in *Lucia* found a violation of the Appointments Clause. It vacated the challenged final agency action.

2. The panel's reliance on *Buckley* points to another, more fundamental flaw in its remedial analysis. *Buckley* was decided during an era when the Supreme Court often declined to give retroactive effect to its decisions announcing new rules of constitutional law. The Supreme Court has since repudiated that approach.

The Supreme Court's former practice of denying backward-looking relief in some constitutional cases began in earnest in the criminal context with *Linkletter v. Walker*, 381 U.S. 618 (1965), and was "the product of the Court's disquietude with the impacts of its fast-moving pace of constitutional innovation," *Williams v. United States*, 401 U.S. 667, 676 (1971) (Harlan, J., dissenting). The Supreme Court announced a test for deciding when reliance interests are sufficient to justify limiting

the retroactive effect of constitutional rulings in civil cases in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). In the years that followed, the Court refused to give full retroactive effect to some of its most significant constitutional holdings. *See, e.g.*, *Buckley*, 424 U.S. at 142-43; *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-89 (1982); *Lemon v. Kurtzman*, 411 U.S. 192 (1973).

Several Justices began to criticize existing doctrine—most prominently Justice Scalia, who argued that "prospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be." *American Trucking Ass'ns v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., dissenting). At last, in *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), the Supreme Court overruled *Chevron Oil*. Writing for the Court, Justice Thomas explained that prospective decisionmaking violates "basic norms of constitutional adjudication," *id.* at 97 (quoting *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987)), and that "[n]othing in the Constitution alters the fundamental rule of 'retrospective operation' that has governed 'judicial decisions . . . for near a thousand years,' " *id.* at 94 (brackets omitted) (quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)).

As this Court has observed, *Harper* leaves at most "an indistinct possibility of the application of pure prospectivity in an extremely unusual and unforeseeable case." *Hulin v. Fibreboard Corp.*, 178 F.3d 316, 333 (5th Cir. 1999); *accord*

Landgraf v. USI Film Prods., 511 U.S. 244, 278 n.32 (1994). For decades, the Executive Branch has expressed constitutional concerns about independent agencies structured like FHFA, *see PHH*, 881 F.3d at 174-75 (Kavanaugh, J., dissenting), and Plaintiffs are not asking this Court to overturn any of its precedents that are relevant to the constitutional issue. This is plainly not the "extremely unusual and unforeseeable case" that the *Hulin* Court had in mind.

Of course, the panel did not say that FHFA was operating constitutionally when it adopted the Net Worth Sweep but instead declined to provide any remedy for FHFA's past violations of the separation of powers. But this same analytical approach was considered and rejected in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 753-54 (1995). "If *Harper* has anything more than symbolic significance," the Court asked, what could justify "a virtually identical denial simply because it is characterized as a denial based on 'remedy' rather than 'non-retroactivity'?" *Id.* at 754.

This case does not fit into any of the narrow categories of cases the Supreme Court has recognized in which relief may be denied for past violations of the Constitution. As the *Reynoldsville* Court explained, in some cases there is "an alternative way of curing the constitutional violation." *Id.* at 759; *see, e.g.*, *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 40 (1990) (to remedy violation of dormant commerce clause, state may choose between refunding

taxes of entities that were harmed and imposing back taxes on entities that were not previously taxed). In other cases, there is "a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief." *Reynoldsville*, 514 U.S. at 759; *see, e.g.*, *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 798 (8th Cir. 2013) (litigant who failed to exhaust administrative remedies could not present Recess Appointments Clause challenge to court of appeals). There is also qualified immunity—a "well-established general legal rule" that sometimes trumps new rules of constitutional law because it "reflects *both* reliance interests and other significant policy justifications." *Reynoldsville*, 514 U.S. at 759; *see also id.* at 757-58. And there are doctrines, including res judicata and the statute of limitations, that "limit[ ] the principle of retroactivity itself." *Id.* at 759; *see, e.g.*, *New York Party Shuttle*, 365 NLRB No. 147 (Nov. 16, 2017) (matters finally resolved in litigation were res judicata and would not be reconsidered by NLRB after *Noel Canning*). None of the exceptions to the rule announced in *Harper* applies in this case.

Whether framed in terms of retroactive application of the Court's decision or the appropriate "remedy" for past violations of the separation of powers, denying all backward-looking relief in this case would be fundamentally incompatible with the

judicial function and violate "basic norms of constitutional adjudication." *Harper*, 509 U.S. at 97.[5]

C. The Net Worth Sweep Can Be Set Aside Through Accounting Entries that Would Not Require the Return of Any Money to the Companies.

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 (the amount paid under the Net Worth Sweep less the ten percent annual dividend rate) as having paid down the liquidation preference on Treasury's senior preferred stock. *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). Plaintiffs' proposed remedy would only require accounting entries on the books of Treasury and the Companies; it could be accomplished without any money changing 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.

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[5] To the extent that the Court agrees with Judge Willett's dissent that the Net Worth Sweep must be set aside because it violated HERA, there is no need to decide whether Plaintiffs' constitutional claim provides an independent basis for vacatur. The Court should enter a judgment vacating the Net Worth Sweep if a majority of the judges sitting en banc conclude that to be an appropriate remedy, even if some would grant that remedy based on HERA and others would grant it based on the Constitution.

If FHFA had never imposed the Net Worth Sweep and the Companies simply continued to pay only the 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. As shown in the appendix at the end of this brief, *see* Dividend Calculation Appendix, under this remedy the liquidation preference on both Companies' senior preferred stock would be less than zero, which means that the Companies would not currently owe any quarterly dividends to Treasury. The Court would have discretion either to order that negative amounts of the liquidation preference be used as a credit against any future draws on Treasury's funding commitment, taxes, or dividends declared on stock owned by Treasury or to order that Treasury return to the Companies the residual amount of excess dividends left over after paying the liquidation preference down to zero.

The remedy proposed here is informed by the Government's experience investing in AIG. The Government injected capital into AIG during the 2008 financial crisis and received in return, among other things, both senior preferred and common stock. *See* Press Release, U.S. Dep't of Treasury, Treasury Sells Final Shares of AIG Common Stock, Positive Return on Overall AIG Commitment Reaches $22.7 Billion (Dec. 11, 2012), https://goo.gl/HKrhM7. The Government's

investment diluted but did not wipe out AIG's private shareholders, and the Government ultimately sold its investment in AIG to private investors, a step that allowed the Government to generate a $22.7 billion profit. Likewise, Plaintiffs' proposed remedy would permit Treasury to retain the full $94 billion profit it has reaped from its investment in Fannie and Freddie to date, with the prospect of Treasury making tens or hundreds of billions more by executing its warrants to purchase nearly 80 percent of the Companies' common stock for a nominal price.

Setting aside the Net Worth Sweep in the manner Plaintiffs propose would not only allow Treasury to retain a substantial profit from its investment in the Companies but would also enable FHFA to fulfill its duty as financial regulator. The Net Worth Sweep prevents the Companies from rebuilding capital during profitable quarters, thus putting them in a precarious position that FHFA's Director has described as "especially irresponsible." Melvin L. Watt, Director, FHFA, Statement Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs (May 11, 2017), https://goo.gl/dUC0oj. Under Plaintiffs' suggested remedy, FHFA would be able to require the Companies to maintain capital that they could use to weather any future economic downturn.

Treasury has in the past objected to the remedy just described on the ground that it would allow shareholders to benefit from the original PSPAs even though they were entered into by an unconstitutional FHFA. Whether Plaintiffs benefitted from

the original PSPAs is factually disputed but ultimately irrelevant to whether the Court must comply with the APA's command to "set aside" unlawful agency action. *See* ROA.41-45. Regardless, if the Court deems it more appropriate, Plaintiffs have no objection to vacatur of the PSPAs in their entirety. We doubt that is the remedy Treasury prefers; vacating the PSPAs *in toto* would force Treasury to return its $94 billion profit to the Companies and to forfeit its common stock warrants (this assumes Treasury would be permitted to keep the money it transferred to the Companies and that the Companies later returned in the form of dividend payments). Irrespective of whether the Court adopts Plaintiffs' preferred remedy (thus leaving Treasury's funding commitment under the original agreements in place with the original ten percent return) or vacates the PSPAs in their entirety (thus requiring Treasury to return $94 billion and the common stock warrants to the Companies), Fannie and Freddie would have tens if not hundreds of billions of dollars of financial support with which to operate, and the conservator's mission of restoring the Companies to soundness and solvency would be furthered.

D. Vacating the Net Worth Sweep Would Not Expose Every Other Action FHFA Has Ever Taken to Legal Challenge.

The Court directed the parties to address in their supplemental briefs how setting aside the Net Worth Sweep would affect "other functions of the FHFA." Clerk's Letter (Nov. 15, 2018). If anything, granting Plaintiffs their preferred remedy by declaring that the Companies have paid down the liquidation preference

on Treasury's senior preferred stock would enhance FHFA's ability to perform its regulatory and conservatorship functions. As regulator, FHFA could direct the Companies to begin rebuilding capital so that they could satisfy the capital standards that HERA envisions. *See* 12 U.S.C. § 4611. Permitting the Companies to rebuild capital would likewise enable FHFA achieve its mission as conservator to restore the Companies to soundness and solvency. *Id.* § 4617(b)(2)(D). The Court would not undermine any of FHFA's functions by ending a practice that the agency's Director has called "especially irresponsible."

With respect to actions unrelated to the Net Worth Sweep that FHFA has taken in the past, the implications of a ruling in Plaintiffs' favor might need to be decided in future cases. But there is every reason to expect that setting aside the FHFA actions challenged here would have only very limited practical consequences for other past FHFA actions. As already discussed, a host of legal doctrines limit who can sue an agency for violating the Constitution. Among these doctrines are the statute of limitations and the exhaustion of administrative remedies. Article III's standing requirements would further circumscribe the past FHFA actions subject to challenge; a plaintiff who could not show a redressable injury-in-fact caused by FHFA could not sue the agency for operating unconstitutionally.

It also bears emphasis that 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 other 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* Notice of Ratification, 78 Fed. Reg. 53734-02 (Aug. 30, 2013) (ratifying decisions by CFPB Director whose prior service was unconstitutional under the reasoning of *Noel Canning*). The FEC took the same approach after the D.C. Circuit ruled that the agency was unconstitutionally structured and vacated a final enforcement decision in *NRA Political Victory Fund*, 6 F.3d at 826-27. 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).

FHFA cannot ratify its past decisions until it is restructured to comply with the Constitution, and the Net Worth Sweep must be vacated notwithstanding the possibility that the agency may attempt to ratify past actions that Plaintiffs in this case do not challenge. *See Lucia*, 138 S. Ct. at 2055 & n.6 (vacating final SEC

enforcement decision and ordering reconsideration by different administrative law judge even though SEC had attempted to ratify other decisions); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708 (D.C. Cir. 1996) (even though court had been "obliged . . . to dismiss" earlier case in which defendant argued that FEC's structure violated Appointments Clause, other actions not challenged in original case and taken by unconstitutional FEC could be ratified). The validity of any efforts at ratification would need to be decided in a future case depending on the specific procedures used and facts presented. *See FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994) (ratification requires that principal had authority both at time of act and at time of ratification); *Advanced Disposal Servs. East, Inc. v. NLRB*, 820 F.3d 592, 602 (3d Cir. 2016) (ratification requires "a detached and considered affirmation of the earlier decision"); RESTATEMENT (THIRD) AGENCY § 4.05 (ratification impermissible where a "material change in circumstances . . . would make it inequitable to bind [a] third party").[6] But the experiences of the NLRB, CFPB, and FEC suggest that the broader practical effects of a ruling in Plaintiffs' favor could be limited.

Furthermore, Plaintiffs' challenge to FHFA's structure is based in part on the fact that the agency's head is an officer of the United States who makes important

[6] FHFA might also be able to reissue prior decisions that it could not ratify. *See Noel Canning v. NLRB*, 823 F.3d 76 (D.C. Cir. 2016) (upholding NLRB's decision to reimpose prior sanctions after de novo reconsideration that followed vacatur by Supreme Court).

decisions for the Government and therefore must be accountable to the President. Whether the same challenge could be leveled at the past decisions of FHFA employees is a question the Supreme Court left open in *Free Enterprise Fund* and that this case does not present. *See Free Enterprise Fund*, 561 U.S. at 506 ("We do not decide . . . whether lesser functionaries subordinate to officers of the United States must be subject to the same sort of control as those who exercise significant authority pursuant to the laws." (quotation marks omitted)). It follows that the past decisions of FHFA's employees may not be vulnerable to challenge on separation of powers grounds.

E. The Court Must Set Aside the Net Worth Sweep Without Regard to Whether HERA's Unconstitutional Provisions Are Severable.

For the reasons discussed above, the Court must enter a declaratory judgment that FHFA is unconstitutionally structured and set aside the Net Worth Sweep. That would be enough to resolve this case, and the Court need go no further. The Supreme Court took a similar approach after holding that key provisions of the Bankruptcy Act of 1978 violated Article III, allowing Congress "to determine the proper manner of restructuring the [statute] to conform to the requirements of [Article] III in the way that will best effectuate the legislative purpose." *Northern Pipeline Constr. Co.*, 458 U.S. at 87 n.40. This approach would also account for Justice Thomas's recent observations that application of the modern test for severability is "in tension with traditional limits on judicial authority" and requires inquiry into "hypothetical

intent" that cannot be reconciled with the Supreme Court's statutory interpretation precedents. *Murphy*, 138 S. Ct. at 1485-87 (Thomas, J., concurring). This Court is of course bound by Supreme Court precedent if it undertakes a severability analysis, but no such analysis is necessary for the Court to accord Plaintiffs all the relief they seek in this case (i.e., a declaratory judgment that FHFA is unconstitutionally structured, vacatur of the Net Worth Sweep, and an injunction against continued implementation of the Net Worth Sweep).

However, given the practical implications for FHFA's ability to operate going forward of a ruling that the agency is unconstitutionally structured, the Court could also proceed to decide whether the unconstitutional provisions of HERA are severable. Irrespective of whether the Court reaches the severability question and regardless of how it is resolved, the Court must comply, as previously noted, with the APA's command to "set aside" the final agency action that Plaintiffs challenge because it violated the Constitution. 5 U.S.C. § 706; *accord Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (affirming judgment that *both* severed unconstitutional provision of statute *and* vacated past action taken under severed provision).

If the Court does reach the severability question, it could reasonably follow the panel's approach to this issue and sever only the Director's for-cause removal protection, allowing the rest of the statute to stand. Although *Free Enterprise Fund* provides support for such a ruling, this is a different and more difficult case.

Invalidating one of the two layers of for-cause removal protection in *Free Enterprise Fund* did not fundamentally alter the PCAOB's relationship with the Executive Branch; even after severance, the PCAOB continued to enjoy a significant measure of independence from the President. *See PHH*, 881 F.3d at 191 (Kavanaugh, J., dissenting) (observing that the second layer of for-cause removal protection "did not afford PCAOB members all that much additional insulation from the President"). In contrast, excising the for-cause removal provision in HERA transforms an agency that was designed to be even less responsive to the President than the PCAOB into an agency subject to the President's control.

The Supreme Court's severability precedents instruct courts to ask whether it is "evident that [Congress] would not have enacted those provisions which are within its power, independently of [those] which [are] not." *Murphy v. NCAA*, 138 S. Ct. 1461, 1482 (2018) (alterations in original). After severance, the provisions that remain must "function in a *manner* consistent with the intent of Congress." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987). Under this standard, a decision severing the Director's for-cause removal protection necessarily calls into question the validity of other provisions of HERA that insulate FHFA from congressional oversight.

First, HERA exempts FHFA from the normal appropriations process by providing that the fees FHFA collects from the entities it regulates "shall not be

construed to be Government or public funds or appropriated money." 12 U.S.C. § 4516(f)(2). The manifest purpose of this provision is to prevent both members of Congress and the President from interfering with FHFA's decisionmaking by threatening to restrict its funding. It is unlikely that Congress would have included this provision in HERA if it had known that the agency's Director would not enjoy for-cause removal protection from the President. While exempting an otherwise independent agency from the appropriations process further enhances its independence, *see* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 44-45 (2010), conferring a similar exemption on an executive agency merely increases the President's power at the expense of Congress. Without the Director's for-cause removal protection, FHFA's exemption from congressional oversight through the appropriations process likely would not function "in a manner consistent with the intent of Congress." *Alaska Airlines*, 480 U.S. at 685. Accordingly, a decision invalidating and severing this provision is likely more consistent with congressional intent than striking only the Director's for-cause removal protection. *See Bowsher*, 478 U.S. at 734-36 (courts should be reluctant to sever provisions when doing so would "significantly" change official's position and thereby "alter the balance" between branches "that Congress had in mind"); *see also Alaska Airlines*, 480 U.S. at 685; *PHH*, 881 F.3d at 139

(Henderson, J., dissenting). FHFA's exemption from the appropriations process may not be severable.

Similarly, if the Court agrees with Defendants that 12 U.S.C. § 4617(b)(2)(J) confers on FHFA standardless discretion to do whatever it deems to be in its own "best interests," *see* FHFA Br. 16, 21-22; Treas. Br. 18-19, 24, it should also consider ruling that this provision is invalid and must be severed along with the Director's for-cause removal protection. Whatever discretion Section 4617(b)(2)(J) gives FHFA, Congress intended for it to be exercised by an agency free from "political domination or control" and "separate and apart from any existing department of the government—not subject to the orders of the President." *Humphrey's Executor v. United States*, 295 U.S. 602, 625 (1935). Justice Kavanaugh has recognized the close relationship between agency independence and broad delegations of administrative discretion, observing that if Congress were to repeal the for-cause removal provisions that appear in various statutes it might also enact "more tightly drawn substantive statutes so as to prevent excessive delegations of power to the Executive Branch or perceived concentration of power in the President." *In re Aiken Cty.*, 645 F.3d 428, 447-48 (D.C. Cir. 2011) (Kavanaugh, J., concurring). While Plaintiffs do not believe that Section 4617(b)(2)(J) gives FHFA anything like the unfettered discretion that Defendants claim, in any event it is unlikely that Congress would have given such discretion to an agency subject to control by the President.

III. The Net Worth Sweep Must Be Set Aside Because It Violated HERA.

Whatever interpretive difficulties courts face when determining the scope of an entity's enumerated powers, it is obvious that a wrong turn has been taken when a lengthy and carefully crafted list of powers is read so expansively as to place "essentially *no* limit" on what the entity can do. *Collins*, 896 F.3d at 680 (Willett, J., dissenting). Yet that is the upshot of the interpretation advanced by Defendants and adopted by several of this Court's sister circuits, which reads HERA to authorize FHFA "to do almost anything when it comes to Fannie and Freddie." *Saxton v. FHFA*, 901 F.3d 954, 960 (8th Cir. 2018) (Stras, J., concurring). This Court should refuse to ignore the text of the statute and to go along.

HERA's text spells out FHFA's conservatorship mission: as conservator, FHFA's charge is to do what is "necessary to put the [Companies] in a sound and solvent condition" and "appropriate to carry on the business of the [Companies] and preserve and conserve [their] assets and property." 12 U.S.C. § 4617(b)(2)(D). Courts that have rejected this interpretation have done so primarily on two grounds, both of which were persuasively rebutted in Judge Willett's dissent. First, courts have ruled that use of the word "may" in the provision of HERA that specifies FHFA's conservatorship mission makes pursuit of that mission optional. *See, e.g.*, *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 607 (D.C. Cir. 2017). But "[a]n agency literally has no power to act . . . unless and until Congress confers power upon it."

New York v. FERC, 535 U.S. 1, 18 (2002). When read in context, the word "may" in Section 4617(b)(2)(D) "*enables* the FHFA to act—the FHFA *may* take any action as conservator that is either (1) 'necessary to put the [GSE] in a sound and solvent condition' or (2) 'appropriate to carry on the business of the [GSE] *and* preserve and conserve' GSE assets and property." *Collins*, 896 F.3d at 687 (alterations in original) (Willett, J., dissenting). Defendants attempt to rewrite the statute by effectively reading the words "may or may not" into the text. *See Halverson v. Slater*, 129 F.3d 180, 184-87 (D.C. Cir. 1997) (language that "Secretary may delegate" authority to specific entity prohibits delegation to another entity). But nowhere did Congress give FHFA the power to take actions to put the Companies into an unsound or insolvent position, which is the necessary implication of the Defendants' reading of the statute. Indeed, the text squarely forecloses FHFA's ability to put the Companies into an insolvent position. Insolvent institutions must be placed into receivership. 12 U.S.C. § 4617(a)(4). In directing FHFA to restore the Companies to a "sound" position, Congress plainly intended for the Companies to build capital reserves, *see id.* § 4513(a)(1)(B)(i)—not that FHFA would impose a regime that permanently puts the Companies on the brink of insolvency and that FHFA's Director has described as "especially irresponsible."

Defendants' contrary interpretation makes the statute incoherent, for HERA says that the conservator "may" "take over the assets of and operate" the Companies,

"collect all obligations and money due" to them, and "perform all functions of the [Companies] . . . which are consistent with the appointment as conservator." 12 U.S.C. § 4617(b)(2)(B). These basic functions of conservatorship are plainly mandatory, and the courts that have disagreed have done so only by "myopically focus[ing] on 'may' at the expense of reading HERA as a cohesive, contextual whole." *Collins*, 896 F.3d at 687 (Willett, J., dissenting). Nor does Section 4617(b)(2)(B) give FHFA the unbounded discretion to "operate" the Companies and "transfer" assets that Defendants claim. Embracing Defendants' interpretation of those provisions "render[s] the FHFA's enumeration of specific conservator powers meaningless." *Id.* at 687 (Willett, J., dissenting); *see also* Plaintiffs' Opening Br. 34 n.5.[7]

Outside the context of litigation, FHFA agrees, as the agency repeatedly and consistently has described Section 4617(b)(2)(D) as establishing statutory *mandates*

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[7] In *Roberts v. FHFA*, 889 F.3d 397, 403-04 (7th Cir. 2018), the Seventh Circuit said that treating Section 4617(b)(2)(D) as a mission FHFA is required to pursue during conservatorship would make the parallel provision in Section 4617(b)(2)(B) mandatory and thus imply that receivers are required to "preserve" the Companies' assets rather than liquidating them. But Sections 4617(b)(2)(B) and (b)(2)(D) should both be read as enumerating—and thus limiting—FHFA's powers. The fact that as receiver FHFA has the *additional* power to liquidate the Companies' assets is not inconsistent with this interpretation. Indeed, the receiver must preserve assets to maximize the amount available for liquidation. *See, e.g.*, 12 U.S.C. § 4617(c)(2)(A).

for the agency as conservator. *See* Plaintiffs' Opening Br. 31-32.[8] FHFA's repeated statements show that it understands that Section 4617(b)(2)(D) is mandatory and does not permit FHFA to pursue contrary objectives.

Furthermore, even focusing narrowly on HERA's differing uses of the words "may" and "shall," a separate provision of HERA says that "[i]n exercising any right, power, privilege, or authority as conservator . . . in connection with any sale or disposition of assets of a regulated entity . . . , the agency *shall* conduct its operations in a manner which . . . maximizes the net present value return from the sale or disposition of such assets." 12 U.S.C. § 4617(b)(11)(E) (emphasis added). To the extent that dicta in *Ward v. RTC*, 996 F.2d 99, 102 (5th Cir. 1993), suggests that this provision is also optional, *Ward* is inconsistent with the statute's plain text and should not be followed.

In addition to the word "may" in Section 4617(b)(2)(D), the other statutory hook courts have cited when upholding the Net Worth Sweep is HERA's

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[8] The President's nominee to head FHFA after the end of Director Watt's term also agrees with our interpretation. Michael Krimminger & Mark A. Calabria, *The Conservatorships of Fannie Mae and Freddie Mac: Actions Violate HERA and Established Insolvency Principles* 50 (Cato Institute, Working Paper No. 50, 2015), https://goo.gl/azRQTT ("The conservator's duty is to rehabilitate the Companies to a 'sound and solvent condition' by restoring their compliance with regulatory capital and other prudential requirements since the whole goal is to return the Companies to normal, operating businesses. Contrary to this fundamental requirement for conservators, the effect of the Net Worth Sweep is that the Companies will never be able to build capital, as both Treasury and FHFA have stated publicly.").

"incidental" powers provision, which says that "as conservator" FHFA may "take any action authorized by this section, which [FHFA] determines is in the best interests of the [Companies] or the [FHFA]." 12 U.S.C. § 4617(b)(2)(J); *see Perry Capital*, 864 F.3d at 607-08. This provision does not authorize the Net Worth Sweep for multiple reasons. As an initial matter, Section 4617(b)(2)(J) only permits FHFA to take actions that are otherwise "**authorized by this section**"—meaning that FHFA acts within the scope of its conservatorship powers only when its conduct is *both* authorized elsewhere in Section 4617 *and* determined to be in the "best interests" of the Companies or the agency. Section 4617(b)(2)(J) thus *conditions* FHFA's exercise of authorities granted *elsewhere*; it does not *expand* those authorities. The circuits that have upheld the Net Worth Sweep based on Section 4617(b)(2)(J) have ignored the words "authorized by this section" and read them out of the statute.

This interpretation is reinforced by the fact that Congress described the power conferred by Section 4617(b)(2)(J) as "incidental." " '[I]ncidental' powers must be 'incidental' to *something*," and the rest of Section 4617 does not give FHFA "free-wheeling authority . . . wholly untethered from its specific powers as conservator or receiver." *Collins*, 896 F.3d at 688 (Willett, J., dissenting).

Moreover, FHFA has no authority under Section 4617(b)(2)(J) except when it acts "as conservator"—a term that has a well-established common law meaning,

ratified by decades of practice by the FDIC under a statute materially identical to the one at issue here, that requires the conservator to seek to preserve and conserve assets and restore its ward to soundness and solvency. *Id*. 896 F.3d at 684-86 (Willett, J., dissenting). Where, as with "conservator" in Section 4617, "a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

Under Defendants' contrary interpretation of the general language in Section 4617(b)(2)(J), the specific mission described in Section 4617(b)(2)(D) would be meaningless surplusage and Congress would have handed the agency unbounded power through a provision it labeled as "incidental." The Supreme Court has said that when "the FDIC is acting only as a receiver of a failed institution" "it is not pursuing the interest of the Federal Government as a bank insurer," *Atherton v. FDIC*, 519 U.S. 213, 225 (1997), and this Court should give the same construction to the parallel statutory language that applies to FHFA. Legislative history also supports this interpretation, for when Congress first authorized federal receivers to consider their own "best interests," it anticipated that they would "give due consideration to the interest of all of the claimants upon the assets of the association, including general creditors, uninsured depositors, *and association stockholders*." H.R. Rep. No. 1263, at 10 (1968) (emphasis added).

Furthermore, the Court must not lose sight of the fact that FHFA has never claimed that it imposed the Net Worth Sweep to advance its own "best interests" rather than those of Treasury. Thus, even accepting Defendants' interpretation of Section 4617(b)(2)(J), this provision cannot sustain the Net Worth Sweep. None of the other circuits to consider this question have addressed this dispositive point.

IV. Plaintiffs' Claims Are Not Barred by HERA's Succession Clause.

HERA's Succession Clause applies only to certain *derivative* claims, *First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279, 1283 (Fed. Cir. 1999); *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1024 (9th Cir. 2001), and the panel correctly held that Plaintiffs have a "direct, personal interest in their cause of action—their security interests are subject to the FHFA's continuing jurisdiction, regulation, and control." *Collins*, 896 F.3d at 658 (footnote omitted).

In any event, Defendants' argument that the Succession Clause bars Plaintiffs' constitutional claim fails for multiple additional reasons. As an initial matter, Defendants have never acknowledged what their argument would mean for the Companies' constitutional rights. Defendants' position is that HERA authorizes FHFA to seize the Companies by appointing itself conservator, violate their constitutional rights, and then invoke its power under the Succession Clause to stop them or anyone acting on their behalf from suing to enjoin the violation. If that is what the Succession Clause means, it is unconstitutional. The Due Process Clause

would not permit Congress to pass a law requiring a litigant to accept the decisions of a conflicted class representative, *Richards v. Jefferson Cty.*, 517 U.S. 793, 801 (1996), criminal defense lawyer, *Wood v. Georgia*, 450 U.S. 261, 271-72 (1981), or judge, *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972). Neither may a federal statute require the Companies to accept FHFA as their exclusive representative in a lawsuit alleging that FHFA itself is unconstitutional.

Responding to these points in other litigation, Treasury has said that *someone else* injured by *some other* FHFA action might be able to obtain redress for *their* injuries by offering the same legal theories that Plaintiffs advance here. But that does nothing to lessen the glaring due process problem with leaving it up to FHFA to decide whether the Companies will sue FHFA for violating the Constitution.

Fortunately, the Court need not confront this constitutional issue because all of Plaintiffs' claims are direct. As Treasury has acknowledged, the direct or derivative nature of Plaintiffs' claims is ultimately a question of federal law. *Starr Int'l Co. v. United States*, 856 F.3d 953, 965-66 (Fed. Cir. 2017); Treasury Br. 32. While federal courts often look to state law principles when distinguishing between direct and derivative claims, they will not do so when the application of state law "would be inconsistent with the federal policy underlying the cause of action." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991); *see Guenther v. Griffin Constr. Co.*, 846 F.3d 979, 983 (8th Cir. 2017). The federal policy underlying

Plaintiffs' constitutional claim is clear: "The declared purpose of separating and dividing the powers of government . . . was to 'diffus[e] power the better to secure liberty.' " *Bowsher*, 478 U.S. at 721 (alteration in original) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). To the extent that treating Plaintiffs' claims as derivative would frustrate federal policy by leaving it up to FHFA to decide whether to sue itself, Plaintiffs' claims are direct as a matter of federal law.

This analysis finds support in the Supreme Court's relaxation of prudential third-party standing rules in cases in which there is a "close relationship" between the plaintiff and a third party facing "a 'hindrance' to [his] ability to protect his own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). With FHFA hopelessly conflicted and unable to sue itself, Plaintiffs' status as shareholders gives them a close relationship with the Companies that makes them the appropriate parties to assert the claims at issue here. At least where there is no more directly injured party with the capacity to sue, an individual who has suffered "injury that is concrete, particular, and redressable" "has a *direct* interest in objecting to laws that upset the constitutional balance." *Bond v. United States*, 564 U.S. 211, 222 (2011) (emphasis added).

This Court's decision in *Gregory v. Mitchell*, 634 F.2d 199, 202 (5th Cir. 1981), is not to contrary. That case did not concern separation of powers claims.

Moreover, the due process and equal protection claims at issue in *Gregory* could have been raised by the bank itself as part of a challenge to Alabama regulators' decision to take over the bank. *See* ALA. CODE § 5-8-27 (1980); *Gregory v. Mitchell*, 459 F. Supp. 1162, 1168 (M.D. Ala. 1978) (observing that plaintiffs "were given the opportunity to present their case" in state administrative proceedings). The same is not true here, for Plaintiffs' injuries from the Net Worth Sweep arose years after the Companies were forced into conservatorship.

For these and the other reasons urged in Plaintiffs' prior briefs, HERA's Succession Clause does not bar any of Plaintiffs' claims.

CONCLUSION

The district court's judgment should be reversed.

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Respectfully submitted,

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DIVIDEND CALCULATION APPENDIX

Fannie Mae Senior Preferred Stock Dividends

Quarter	Dividends Actually Paid Under Net Worth Sweep	Cash Dividend Due if Liquidation Preference on Treasury's Senior Preferred Stock Paid Down by Prior Excess Net Worth Sweep Dividends	Remaining Liquidation Preference on Treasury's Senior Preferred Stock if Excess Net Worth Sweep Dividends Used to Reduce Liquidation Preference
2013 Q1	4.2	2.9	115.8
2013 Q2	59.4	2.9	59.3
2013 Q3	10.2	1.5	50.6
2013 Q4	8.6	1.3	43.2
2014 Q1	7.2	1.1	37.1
2014 Q2	5.7	0.9	32.3
2014 Q3	3.7	0.8	29.4
2014 Q4	4.0	0.7	26.2
2015 Q1	1.9	0.7	24.9
2015 Q2	1.8	0.6	23.7
2015 Q3	4.4	0.6	20.0
2015 Q4	2.2	0.5	18.3
2016 Q1	2.9	0.5	15.8
2016 Q2	0.9	0.4	15.3
2016 Q3	2.9	0.4	12.8
2016 Q4	3.0	0.3	10.1
2017 Q1	5.5	0.3	4.9
2017 Q2	2.8	0.1	2.2
2017 Q3	3.1	0.1	-0.8
2017 Q4	0.6	0	-1.5

2018 Q1	0	0	2.2
2018 Q2	0.9	0.06	1.3
2018 Q3	4.5	0.03	-3.1
2018 Q4	4.0	0	-7.1

Notes: All numbers in billions of dollars. Dividends paid under Net Worth Sweep are taken from FHFA, TABLE 2: DIVIDENDS ON ENTERPRISE DRAWS FROM TREASURY, https://goo.gl/QQpFDY. When the Net Worth Sweep went into effect, the liquidation preference on Fannie's senior preferred stock was $117.1 billion. Fannie Mae, Annual Report at 29 (Form 10-K) (2012), https://goo.gl/1bJK1n. Increase in liquidation preference following fourth quarter of 2017 accounts for $3.7 billion draw on Treasury funding commitment and offsetting excess Net Worth Sweep dividend payment of $0.6 billion.

Freddie Mac Senior Preferred Stock Dividends

Quarter	Dividends Actually Paid Under Net Worth Sweep	Cash Dividend Due if Liquidation Preference on Treasury's Senior Preferred Stock Paid Down by Prior Excess Net Worth Sweep Dividends	Remaining Liquidation Preference on Treasury's Senior Preferred Stock if Excess Net Worth Sweep Dividends Used to Reduce Liquidation Preference
2013 Q1	5.8	1.8	68.3
2013 Q2	7.0	1.7	63.0
2013 Q3	4.4	1.6	60.2
2013 Q4	30.4	1.5	31.3
2014 Q1	10.4	0.8	21.7
2014 Q2	4.5	0.5	17.7
2014 Q3	1.9	0.4	16.3
2014 Q4	2.8	0.4	13.9
2015 Q1	0.9	0.3	13.4
2015 Q2	0.7	0.3	13.0
2015 Q3	3.9	0.3	9.4
2015 Q4	0.0	0.2	9.7
2016 Q1	1.7	0.2	8.2
2016 Q2	0.0	0.2	8.4
2016 Q3	0.9	0.2	7.7
2016 Q4	2.3	0.2	5.6
2017 Q1	4.5	0.1	1.2
2017 Q2	2.2	0.02	-1.0

2017 Q3	2.0	0	-3.0
2017 Q4	2.2	0	-5.2
2018 Q1	0	0	-5.2
2018 Q2	0	0	-4.9
2018 Q3	1.6	0	-6.5
2018 Q4	2.6	0	-9.1

Notes: All numbers in billions of dollars. Dividends paid under Net Worth Sweep are taken from FHFA, TABLE 2: DIVIDENDS ON ENTERPRISE DRAWS FROM TREASURY, https://goo.gl/QQpFDY. When the Net Worth Sweep went into effect, the liquidation preference on Freddie's senior preferred stock was $72.3 billion. Freddie Mac, Annual Report at 2 (Form 10-K) (Feb. 28, 2013), https://goo.gl/1Qbmjv. Freddie drew $0.3 billion on Treasury's funding commitment following the fourth quarter of 2017, but no draw would have been necessary had Freddie not paid excess Net Worth Sweep dividend during the same quarter.

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(g), I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief, including the Dividend Calculation Appendix, contains 12,851 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.

Dated: December 12, 2018

s/ Charles J. Cooper
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Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit on December 12, 2018 by using the appellate CM/ECF system. I certify that service will be accomplished on December 12, 2018 by the appellate CM/ECF system on the following:

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