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 THE TREASURY; DEPARTMENT OF THE TREASURY; FEDERAL HOUSING FINANCE AGENCY; JOSEPH M. OTTING,

Defendants-Appellees.

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

SUPPLEMENTAL BRIEF FOR THE TREASURY DEPARTMENT

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CERTIFICATE OF INTERESTED PERSONS

Collins v. Mnuchin, No. 17-20364

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

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INTRODUCTION

Plaintiffs are shareholders in Fannie Mae and Freddie Mac (the enterprises). They challenge the Third Amendment to preferred stock purchase agreements between the Department of the Treasury (Treasury) and the Federal Housing Finance Agency (FHFA), acting as conservator of the enterprises under the Housing and Economic Recovery Act of 2008 (HERA). The initial agreements, entered into when the enterprises were on the brink of insolvency in September 2008, infused the enterprises with a vital capital commitment and entitled Treasury to certain rights in return, including dividend payments. The Third Amendment modified the dividend to vary based on the enterprises' net worth.

Plaintiffs brought suit in October 2016—over four years after the Third Amendment was adopted and over eight years after conservatorship began—challenging the validity of the Third Amendment and FHFA's structure on constitutional and statutory grounds. Plaintiffs seek injunctive and declaratory relief asking this Court to set aside the Third Amendment. Plaintiffs also now request that this Court sever the HERA provision that requires cause for the President to remove FHFA's Director. This Court should deny all such relief, for several reasons.

1. As a threshold matter, plaintiffs' claims are all barred by 12 U.S.C. § 4617(b)(2)(A)(1), known as HERA's "succession provision." FHFA as conservator succeeded to "all rights, titles, powers, and privileges of the [enterprises], and of any stockholder . . . with respect to the regulated entity and the assets of the regulated

entity" *Id.* The succession clause plainly transfers to the FHFA the shareholders' ability to bring derivative suits on behalf of the enterprises, and plaintiffs' claims plainly qualify as such: they assert direct injury to the enterprises, and the relief they seek would flow directly to the enterprises, with plaintiffs benefiting only indirectly and derivatively as shareholders. Although plaintiffs urge that barring this suit would violate the enterprises' due-process rights, they are mistaken. The Constitution does not mandate that plaintiffs be permitted to raise claims belonging to the enterprises—especially since the enterprises themselves had the opportunity under HERA to challenge the constitutionality of FHFA's structure, but chose not to exercise it.

2. Even if plaintiffs' suit were not barred by the succession provision, their claims would provide no basis for setting aside the Third Amendment. A panel of this Court was correct that the FHFA Director's for-cause removal protection unconstitutionally interferes with the President's control of Executive power under Article II. But the panel also correctly held that this constitutional defect does not entitle plaintiffs in the circumstances here to obtain a judicial order invalidating the Third Amendment.

First, FHFA was not exercising Executive power when it entered into the Third Amendment. FHFA acted as a conservator standing in the shoes of the private enterprises, not as their governmental regulator. Accordingly, any inability of the President to control FHFA's decisions concerning the Third Amendment through removal of its Director did not violate Article II and does not render the Third Amendment invalid.

Second, even if adoption of the Third Amendment implicated Executive power, the President had constitutionally adequate control over FHFA at the time of the Third Amendment because there was an *Acting* Director in place, and HERA imposed no restrictions on the President's ability to revoke the Acting Director's designation as such. That is sufficient to refute plaintiffs' constitutional challenge to the Third Amendment based on HERA's infringement of the President's removal authority—and that is so regardless of the extent to which the President's options for designating or appointing a replacement agency head may be limited.

Third, equitable principles do not support invalidation of the Third Amendment. No decision of the Supreme Court or this Court dictates that retrospective remedy in these circumstances. Instead, general remedial principles strongly counsel otherwise, given plaintiffs' lengthy and unwarranted delay in bringing this suit, the extraordinary market disruption that would occur were this complex financial transaction to be unwound, and the implausibility that any impermissible removal restriction actually affected FHFA's agreement with Treasury to adopt the Third Amendment.

Finally, the constitutional defect in HERA's removal restriction does not support any prospective remedy here because plaintiffs have not challenged future action (let alone regulator or conservator action that directly injures them rather than the enterprises). Insofar as the court nevertheless reaches the question of remedy for prospective oversight of the enterprises, the panel was correct that the only provision of HERA that should be severed is the for-cause removal restriction, as plaintiffs all but concede.

3. As the panel correctly concluded, plaintiffs' statutory claim also provides no basis for invalidating the Third Amendment. This claim is barred by HERA's sweeping anti-injunction provision, 12 U.S.C. § 4617(f)—which precludes a court from taking "any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver." The Third Amendment, in which FHFA modified the dividend the enterprises owed Treasury in order to safeguard the capital commitment from Treasury, fits squarely within the broad powers that HERA grants FHFA when acting as conservator and that the anti-injunction provision shields from judicial interference. All five other courts of appeals to address the question have reached the same conclusion.

BACKGROUND

A. Fannie Mae and Freddie Mac

Congress created Fannie Mae and Freddie Mac to, among other things, provide liquidity to the mortgage market by purchasing residential loans from banks and other lenders, thereby providing lenders with capital to make additional loans. *See* 12 U.S.C. § 1716(4). The enterprises finance these purchases by borrowing money in the credit markets and by pooling many of the purchased loans into trusts supporting mortgage-backed securities that they sell to investors. *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 599 (D.C. Cir. 2017). Although the enterprises are private, publicly traded companies, they have long benefited from the perception that the federal government would honor their obligations should they experience financial difficulties. *Jacobs v. FHFA*, 908 F.3d 884, 887 (3d Cir. 2018).

B. The 2008 Housing Crisis and HERA

With the 2008 collapse of the housing market, the enterprises experienced overwhelming losses due to a dramatic increase in default rates on residential mortgages. *Collins v. Mnuchin*, 896 F.3d 640, 646-47 (5th Cir.) (per curiam)*, vacated on reh'g en banc*; *Perry Capital*, 864 F.3d at 599. At the time, the enterprises owned or guaranteed over $5 trillion of residential mortgage assets, representing nearly half of the United States mortgage market. *Collins*, 896 F.3d at 646. Their failure would have had catastrophic effects on the national housing market and economy.

The enterprises lost more in 2008 ($108 billion) than they had earned in the past 37 years combined ($95 billion). *Collins*, 896 F.3d at 647. As a result, the enterprises faced capital shortfalls. *Perry Capital*, 864 F.3d at 599-601; *see also* OIG, FHFA, *White Paper: FHFA–OIG's Current Assessment of FHFA's Conservatorships of Fannie Mae and Freddie Mac* 11 (Mar. 28, 2012) (*OIG Report*).[1] Private investors were unwilling to provide the enterprises with the capital they needed to weather their losses and avoid receivership and liquidation. *Perry Capital*, 864 F.3d at 601.

In July 2008, Congress enacted the Housing and Economic Recovery Act of 2008 (HERA), Pub. L. No. 110-289, 122 Stat. 2654. The legislation created FHFA as an independent agency to regulate the enterprises. 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. *Id.* § 4512(b)(2). If the Director resigns or dies, the President may designate one of three deputy directors to serve as Acting Director until a new Director is confirmed. *Id.* § 4512(f).

HERA also granted FHFA the authority to act as conservator or receiver of the enterprises. 12 U.S.C. §§ 4511, 4617(a). FHFA's authority to appoint itself conservator or receiver is generally discretionary, *id.* § 4617(a)(2), but it must place the enterprises into receivership in some circumstances, *id.* § 4617(a)(4). HERA expressly provides

[1] https://www.fhfaoig.gov/Content/Files/WPR-2012-001.pdf

that the enterprises may bring suit to challenge FHFA's appointment as conservator within thirty days of that appointment. *Id.* § 4617(a)(5).

In authorizing FHFA's appointment as conservator "for the purpose of reorganizing, rehabilitating, or winding up the affairs" of the enterprises, 12 U.S.C. § 4617(a)(2), HERA grants FHFA an array of general powers, including the power to "take over the assets of and operate [the enterprises]" and "conduct all business of the regulated [enterprises]," *id.* § 4617(b)(2)(B), and to "transfer or sell any asset or liability of the [enterprises]," *id.* § 4617(b)(2)(G). FHFA may exercise these general conservator powers "as may be—(i) necessary to put the [enterprises] in a sound and solvent condition; and (ii) appropriate to carry on the business of the [enterprises] and preserve and conserve the assets and property of the [enterprises]." *Id.* § 4617(b)(2)(D). HERA further provides that FHFA as conservator may exercise its statutory powers in a manner "which the Agency determines is in the best interests of the [enterprises] or the Agency." *Id.* § 4617(b)(2)(J)(ii).

Consistent with the sweeping authority granted to FHFA, HERA makes clear that FHFA as conservator "immediately succeed[s] to—(i) all rights, titles, powers, and privileges of the [enterprises] and of any stockholder, officer, or director of such [enterprises]." 12 U.S.C. § 4617(b)(2)(A)(i). HERA also contains an anti-injunction provision, which provides that "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).

Finally, recognizing that an enormous commitment of taxpayer funds could be required, Congress also authorized Treasury (1) to "purchase any obligations and other securities issued by" the enterprises upon "Treasury's specific determination that the terms of the purchase would 'protect the taxpayer,'" *Perry Capital*, 864 F.3d at 600, and (2) to "exercise any rights received in connection with such purchases." 12 U.S.C. §§ 1455(*l*)(1)(A), (2)(A), (D); *id.* § 1719(g)(1)(A), (B).

C. Conservatorship and the Preferred Stock Purchase Agreements

FHFA placed the enterprises in conservatorship on September 6, 2008; one day later, Treasury purchased senior preferred stock in each entity. *Collins*, 896 F.3d at 650. Under these Purchase Agreements, Treasury committed to provide up to $100 billion in taxpayer funds to each enterprise to maintain their solvency by ensuring that their assets were at least equal to their liabilities. *Id.*

The Purchase Agreements entitled Treasury to four principal contractual rights. First, Treasury received preferred stock with a senior liquidation preference of $1 billion for each enterprise plus a dollar-for-dollar increase each time the enterprises drew upon Treasury's funding commitment. *Collins*, 896 F.3d at 650.[2] Second, Treasury was entitled to quarterly dividends equal, on an annual basis, to 10% of Treasury's total liquidation preference. *Id.* Third, Treasury received warrants to

[2] "A liquidation preference is a priority right to receive distributions from the [enterprises'] assets in the event they are dissolved." *Perry Capital, LLC v. Lew*, 70 F. Supp. 3d 208, 216 n.6 (D.D.C. 2014).

acquire up to 79.9% of the enterprises' common stock at a nominal price. *Id.* Fourth, beginning in 2010, Treasury would be entitled to a periodic commitment fee. *Id.*

Treasury's initial funding commitment soon appeared inadequate. In May 2009, FHFA and Treasury amended the Purchase Agreements to double Treasury's funding commitment from $100 billion to $200 billion for each enterprise. *Collins*, 896 F.3d at 651. In December 2009, in the face of ongoing losses, it appeared that even the $200-billion-per-enterprise funding commitment might be insufficient. Treasury and FHFA therefore amended the Purchase Agreements a second time to allow the enterprises to draw unlimited amounts from Treasury to cure net-worth deficits until the end of 2012, at which point Treasury's funding commitment would be fixed. *Collins*, 896 F.3d at 651.

Under the terms of the Purchase Agreements, the enterprises' dividend obligations to Treasury added up to nearly $19 billion per year, and between 2009 and 2011, the enterprises could not pay these substantial dividend obligations out of their earnings. ROA.952. The enterprises thus drew on Treasury's funding commitment to meet those obligations. *Jacobs*, 908 F.3d at 888. Through the first quarter of 2012, Fannie Mae had drawn $19.4 billion and Freddie Mac had drawn $7 billion just to pay the dividends they owed Treasury. *Perry Capital*, 70 F. Supp. 3d at 218. Those draws in turn increased Treasury's liquidation preference, thus further increasing the amount of dividends the enterprises owed. As their SEC filings reflect, the enterprises anticipated that they would not be able to pay their 10% dividends to Treasury without drawing on Treasury's funding commitment in the future. *See* Fannie Mae, 2012 Q2 Quarterly Report (Aug. 8, 2012) at 12;[3] Freddie Mac, 2012 Q2 Quarterly Report (Aug. 7, 2012) at 10.[4] Indeed, as the Fannie Mae 10-Q shows (at 4), the $11.7 billion Fannie Mae owed annually was more than it had made in any year of its existence.

D. The Third Amendment

By June 2012, Treasury had committed $445.5 billion to support the enterprises, and the enterprises had drawn $187.5 billion. As noted, the enterprises had drawn over $26 billion from the commitment simply to pay the dividends owed to Treasury, which in turn increased the amount of dividends the enterprises owed. While this cycle of rising dividend obligations and draws was problematic in its own right, it was particularly troubling in the summer of 2012, given that, under the Second Amendment, the commitment would become fixed at the end of 2012, and any future draws would reduce the size of the remaining commitment. Treasury and FHFA thus needed to end the cycle of the enterprises paying dividends by drawing on Treasury's commitment.

To do so, the parties in August 2012 adopted a "Third Amendment" to the Purchase Agreements, which replaced the previous fixed dividend obligation with a variable dividend equal to the amount, if any, by which the enterprises' net worth for

[3] http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2012/q22012.pdf

[4] http://www.freddiemac.com/investors/financials/sec-filings.html

the quarter exceeds a capital buffer. *Collins*, 896 F.3d at 651. Accordingly, if the enterprises have a negative net worth for a particular quarter, they pay no dividend and thus need not draw upon the commitment to satisfy their dividend obligations. Treasury also agreed to suspend the periodic commitment fee it was owed under the original Purchase Agreements for as long as the variable dividend was in place. *See id.*

By exchanging a fixed dividend for a variable one, Treasury accepted more risk under the Third Amendment. Indeed, Treasury received less in dividends in 2015 ($15.8 billion) and in 2016 ($14.6 billion) than it would have under the original 10% dividend ($18.9 billion). FHFA, *Table 2: Dividends on Enterprise Draws from Treasury*;[5] *see also* ROA.952-53; *Perry Capital*, 864 F.3d at 602. In 2013 and 2014, however, the variable dividend was greater because the enterprises' net worth increased, due partly to a rebound in housing prices and, more importantly, to non-recurring events, including the enterprises' one-time recognition of deferred tax assets. OIG, FHFA, *The Continued Profitability of Fannie Mae and Freddie Mac Is Not Assured* 7-8 (Mar. 18, 2015).[6]

E. Challenges to the Third Amendment

After Treasury and FHFA entered into the Third Amendment, shareholders brought suit challenging the Third Amendment in multiple district courts and the

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[5] https://www.fhfa.gov/DataTools/Downloads/Documents/Market-Data/Table_2.pdf

[6] http://www.fhfaoig.gov/Content/Files/WPR-2015-001.pdf

Court of Federal Claims. The three shareholders here, though, waited four years to file suit in October 2016, only then facially challenging the Third Amendment on both statutory and constitutional grounds.

The district court rejected plaintiffs' statutory and constitutional claims. *See* ROA.946-61. In a splintered opinion for this Court, a panel majority (Stewart, Haynes) affirmed the district court's holding that plaintiffs' statutory claims were barred by HERA's anti-injunction provision, 12 U.S.C. § 4617(f), and that FHFA had not acted *ultra vires* in entering into the Third Amendment. *Collins*, 896 F.3d at 652-53. And although a different panel majority (Haynes, Willett) concluded that separation-of-powers principles required that FHFA's Director be removable at the President's will, that majority further concluded that the appropriate remedy was not to set aside the Third Amendment but rather to sever the provision of HERA making the Director removable only for cause. *Id.* at 653-76.

The en banc Court vacated the panel decision on November 12, 2018, and directed the parties to file supplemental briefs.

ARGUMENT

I. HERA'S SUCCESSION PROVISION BARS PLAINTIFFS' CLAIMS.

A. HERA's succession provision 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 and the assets of the regulated entity." 12 U.S.C. § 4617(b)(2)(A)(i). The provision "plainly transfers [to FHFA the] shareholders' ability to bring derivative suits" on behalf of the enterprises. *Perry Capital, LLC v. Mnuchin*, 864 F.3d 591, 623 (D.C. Cir. 2017); *Roberts v. FHFA*, 889 F.3d 397, 408 (7th Cir. 2018). Because plaintiffs' claims are exclusively derivative, they are barred by HERA's succession provision.

All of plaintiffs' claims belong to the enterprises directly and to the plaintiff-shareholders only derivatively. Whether a suit is direct or derivative "must turn solely 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 (cleaned up); *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004).

Plaintiffs have made clear that the relief they seek will run to the corporations, explaining that the relief requires—in their view—only "accounting entries on the books of Treasury and the Companies," with no money or other relief flowing to them. Supp.Br. 29-32. That acknowledgment is consistent with plaintiffs' recognition throughout the litigation that the harm they allege and the relief they seek runs to the corporation. *See e.g.*, ROA.8 (Compl.) (The Third Amendment "forc[ed] . . . [the] *Companie*s to turn over their entire net worth."); ROA.22 ("[T]he Net Worth Sweep . . . pushes *the Companies* to the edge of insolvency by stripping the capital out of the Companies on a quarterly basis."). Plaintiffs' claims are thus plainly derivative ones. *Roberts*, 889 F.3d at 408; *see also Perry Capital*, 864 F.3d at 625-27.

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 due to the dissipation of the enterprises' assets, does not transform those claims into direct claims. *See, e.g.*, *Gregory v. Mitchell*, 634 F.2d 199, 202 (5th Cir. 1981) (Stockholders cannot "maintain an action to redress an injury to the corporation even though the value of their stock is impaired as a result of the injury."); *Gaff v. FDIC*, 814 F.2d 311, 318 (6th Cir. 1987) ("[Plaintiff] claims that his shares in the failed bank became totally worthless as a result of the defendants' conduct. . . . [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.").

Relying on the panel's statement that they have a "direct, personal interest in their cause of action—their security interests are subject to FHFA's continuing jurisdiction, regulation and control"—plaintiffs contend that their claims must be "direct," and not derivative. Supp.Br. 47 (citing *Collins,* 896 F.3d at 658). But this is simply a reformulation of the proposition that shareholders are not indifferent to the injuries allegedly experienced by the corporation in which they hold equity. FHFA regulates the enterprises and serves as conservator of the enterprises. Any challenge to FHFA's actions as regulator or conservator is thus a claim that plainly belongs to the enterprises directly, and to the shareholders only derivatively.

Recognizing that plaintiffs' claims are derivative and barred by § 4617(b)(2)(A)(i) would not, as plaintiffs assert, "frustrate federal policy by leaving it up to FHFA to decide whether to sue itself." Supp.Br. 49. If Congress had intended to allow shareholders to file derivative actions challenging FHFA's own acts as conservator, it would have included an exception to the succession provision's unqualified transfer to FHFA of the shareholders' right to bring derivative claims on behalf of the enterprises. That Congress did not do so reflects a policy decision to bar such claims. Nor is there anything unfair about preventing shareholders from bringing a derivative suit: "[a] corporation is a legal entity existing separate and distinct from its shareholders, officers, and directors," and plaintiffs benefit from the "general rule" that they "are not liable for the corporation's debts." *FMC Fin. Corp. v. Murphree*, 632 F.2d 413, 421 (5th Cir. 1980); *see Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522 (1947) (In a derivative action, "[t]he cause of action which . . . a plaintiff [stockholder] brings before the court is not his own but the corporation's.").

B. Plaintiffs mistakenly urge that the succession provision is inapplicable to constitutional claims. Supp.Br. 47-50. This Court and others have uniformly rejected the contention that the shareholder-standing doctrine depends on the nature of the claim asserted. *See, e.g.*, *Gregory*, 634 F.2d at 202 (Shareholders do not have standing to pursue constitutional claims on behalf of the corporation in which they own stock.); *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); *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 had failed to allege that they "sustained a particularized, nonderivative injury" separate from any injury to the corporation.). Likewise, under the plain text of HERA's succession provision, whether a claim is a prohibited derivative shareholder suit turns on the nature of the alleged injury and the relief sought, *not* on whether the source of the claimed injury was a statutory violation or a constitutional one. *See* 12 U.S.C. § 4617(b)(2)(A)(i).

Attempting to distinguish this Court's decision in *Gregory*, 634 F.2d at 202, plaintiffs argue that the constitutional claims there "could have been raised by the bank itself as part of a challenge to Alabama regulators' decision to take over the bank." Supp.Br. 49-50. But that is true here too. HERA expressly provides that the enterprises may bring suit to challenge FHFA's appointment as conservator within thirty days of that appointment. 12 U.S.C. § 4617(a)(5). Thus, like the bank in *Gregory*, the enterprises could have raised a constitutional claim against the structure of FHFA—which was, at the time, headed by a Director protected by the removal provision—as part of a suit challenging FHFA's regulatory decision to appoint itself conservator.

The enterprises' ability to challenge the constitutionality of FHFA's appointment as conservator under § 4617(a)(5) forecloses plaintiffs' argument that applying the succession provision here would violate *the enterprises'* due-process rights because it would "require the [enterprises] to accept FHFA as their exclusive representative in a lawsuit alleging that FHFA itself is unconstitutional." Supp.Br. 47-48. Even assuming it would implicate the enterprises' due-process rights to completely preclude them from bringing a constitutional challenge to FHFA's structure, HERA did not do so: it simply required that the enterprises make a prompt challenge under § 4617(a)(5) to FHFA's appointment as conservator. That § 4617(a)(5) required the enterprises to bring such a challenge within thirty days reflects the need to avoid delay in establishing the validity of FHFA's actions as conservator and the significant adverse consequences that flow from a belated challenge to those actions, *see infra* pp. 36-41. Such a scheme satisfies due process. *See, e.g.*, *Yakus v. United States*, 321 U.S. 414, 435 (1944) (concluding that a statutory scheme that channeled all challenges, including constitutional challenges, to wartime price regulations into an administrative process with a sixty-day filing deadline did not violate due process "in view of the urgency and exigencies of wartime price regulation"). Plaintiffs cite no authority for the proposition that the enterprises possess a free-floating due-process right to bring a challenge to FHFA's structure in connection with FHFA's actions as conservator at the time of their choosing.[7]

[7] The enterprises' ability to challenge the constitutionality of FHFA's structure through a timely suit brought pursuant to § 4617(a)(5) also negates the panel majority's conclusion that it had authority to consider plaintiffs' constitutional claim "[d]espite statutory limitations on judicial review." *Collins*, 896 F.3d at 653. Where, as here, "Congress simply channels judicial review of a constitutional claim," and

Moreover, even accepting plaintiffs' theory that *the enterprises* have a due-process right to bring a separation-of-powers challenge to the FHFA's conservator actions beyond the thirty-day time limit for challenging the conservator appointment, that still would not mean that *the shareholders* have a due-process right to bring *derivative suits*. After all, third parties generally cannot bring constitutional claims asserting the rights of others, *see, e.g.*, *Kowalski v. Tesmer*, 543 U.S. 125, 134 (2004); *Danos v. Jones*, 652 F.3d 577, 582-83 (5th Cir. 2011), and application of that principle makes particular sense in the context of third-party shareholders, who generally cannot raise any claims, including constitutional claims, on behalf of their corporations, *see supra* pp. 15-16. Plaintiffs provide no basis in law or logic for why an exception to these principles is appropriate here—particularly given that the enterprises themselves forwent their opportunity to challenge FHFA's appointment as conservator, *see Danos*, 652 F.3d at 582-83 (Plaintiff lacked third-party standing where the directly injured party had the opportunity to vindicate his rights "through [a] mechanism provided by statute," but chose not to.).

II. ON THE MERITS, PLAINTIFFS' SEPARATION-OF-POWERS CHALLENGE DOES NOT STATE A VALID CLAIM FOR RELIEF.

Even apart from the succession provision, plaintiffs' claims fail on the merits. Because plaintiffs' supplemental brief treats their statutory claims as secondary—

Congress's intent to limit judicial review of claims to the specified channel is "fairly discernable," courts lack authority to review claims not brought through that channel. *Elgin v. Dep't of Treasury*, 567 U.S. 1, 9-10 (2012).

presumably reflecting the fact that these claims have been rejected by five other courts of appeals and the panel in this case—this brief will first address plaintiffs' constitutional claim.

The panel correctly held that the FHFA Director's for-cause removal protection unconstitutionally interferes with the President's control of Executive power under Article II. But this constitutional defect does not entitle plaintiffs, in the circumstances here, to obtain a judicial order invalidating the Third Amendment, or even severing the removal restriction.

In considering plaintiffs' constitutional argument, two distinctions are critical. *First*, Article II applies to the exercise of Executive power, not to an exercise of non-governmental power. FHFA adopted the Third Amendment in its capacity as conservator of a private enterprise and thus was not exercising Executive power. Separation-of-powers principles are not implicated by removal restrictions on a conservator. *Second*, a suit seeking to set aside past action is different from a suit seeking to prevent future action by an unconstitutionally structured agency. Plaintiffs are not challenging future regulator or conservator action by FHFA and thus have no basis to seek severance of the for-cause removal provision.[8]

[8] Setting aside the threshold argument that plaintiffs' claims are barred by the succession provision, the government agrees with plaintiffs that they have Article III standing to bring their separation-of-powers claim without having to show that the Third Amendment would not have been executed in the absence of the removal provision. *See* Supp.Br. 2-3. But plaintiffs overlook that the likely harmlessness of any

A. HERA's Removal Provision Infringes on the President's Control of Executive Authority.

The President's Executive power under Article II "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. Public 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 at will principal officers like the FHFA Director. *Id.* at 513-14; *see also id.* at 492-93. As the panel recognized, 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 the panel further recognized, *Collins*, 896 F.3d at 672, the Supreme Court has allowed only one "limited" exception to the President's general authority under Article II to remove principal officers at will, *Free Enterprise*, 561 U.S. at 495, and it does not apply here. In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court upheld a provision establishing that FTC commissioners could be removed

violation is relevant to whether they are entitled to retrospective equitable relief setting aside the Third Amendment. *See infra* pp. 39-40.

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," because they "act[ed] in part quasi-legislatively and in part quasi-judicially." *Id.* at 628, 631-32; *accord Free Enterprise*, 561 U.S. at 493.

As the United States has argued at greater length in its brief in opposition in *State National Bank of Big Spring v. Mnuchin*, No. 18-307 (S. Ct),[9] which addressed the similar question whether for-cause removal protection for the single director of the CFPB violates the separation of powers, the exception recognized in *Humphrey's Executor* and its progeny depends fundamentally on the nature of the FTC as a multi-member body. In contrast, a single-headed agency lacks the critical structural attributes that have been thought to justify "independent" status for multi-member regulatory commissions, for several reasons.

First, Humphrey's Executor viewed the FTC as a "quasi-legislative[]" or "quasi-judicial[]" "body of experts" because it understood the FTC to act 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* 295 U.S. at 624-25, 628. An agency headed by a single officer has none of those attributes, and instead embodies a

[9] https://www.supremecourt.gov/DocketPDF/18/18-307/74714/20181210193658282_18-307%20State%20Natl%20Bank.pdf

quintessentially executive unitary structure that facilitates vigor and dispatch. *See Printz v. United States*, 521 U.S. 898, 922 (1997). Because the *rationale* for the *Humphrey's Executor* exception thus does not apply, even the same level of intrusion into the President's exercise of Executive authority approved in *Humphrey's Executor* cannot be justified when imposed on a single-headed agency like FHFA.

Second, because a single agency head is unchecked by the constraints of group decision-making among members appointed by different Presidents, a single-headed independent agency presents a greater risk than an multi-member independent commission of taking actions or adopting policies inconsistent with the President's Executive policy. *PHH Corp. v. CFPB*, 881 F.3d 75, 188 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting). This risk is exacerbated by regimes such as FHFA's, which permit a single director to serve a term longer than the President's, in contrast to multi-member commissions with staggered boards. *See* 46 U.S.C. § 4512(b)(2). *Third*, unlike multi-member independent commissions, single-headed independent agencies like FHFA are a fairly recent innovation. *PHH Corp.*, 881 F.3d at 173-83. 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 Enterprise*, 561 U.S. at 505.

Finally, there would be no meaningful limiting principle if *Humphrey's Executor* were extended beyond certain multi-member commissions to single-headed agencies like FHFA. The *Humphrey's Executor* characterization of agencies like the FTC as "quasi-legislative" or "quasi-judicial" must be understood to reflect their structure, not just their functions, because, as the Supreme Court has subsequently 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 v. Olson*, 487 U.S. 654, 689 n.28 (1988); *see also Bowsher v. Synar,* 478 U.S. 714, 749 (1986) (Stevens, J., concurring in the 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" based on function, *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 Treasury Secretary.

B. The Constitutional Defect in HERA's Removal Provision Does Not Support Invalidation of the Third Amendment.

The panel was correct not to invalidate the Third Amendment based on the Article II defect in HERA's removal provision. *First*, the Third Amendment was not an exercise of Executive power subject to Article II constraints because it was the act of a conservator, rather than a government regulator. *Second*, even if Article II did apply to the Third Amendment, FHFA was headed by an Acting Director at the time and the President had the power to revoke the acting designation at will. *Third*, and in all events, setting aside the Third Amendment is not an appropriate exercise of this Court's equitable remedial power.

1. FHFA was not exercising Executive power when it entered into the Third Amendment.

a. Courts, including this Court, have long emphasized the important distinction between an agency acting as conservator or receiver 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, this Court 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 necessarily true when it acted as conservator or receiver. *Id.*

The actions FHFA takes as conservator, unlike its regulatory actions, do not require plenary presidential supervision because a conservator does not exercise Executive power. Instead, 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; *see also Herron*, 861 F.3d at 169; *U.S. ex rel. Adams v. Aurora Loan Servs., Inc.*, 813 F.3d 1259, 1261 (9th Cir. 2016); *U.S. ex rel. Petras v. Simparel, Inc.*, 857 F.3d 497, 502-03 (3d Cir. 2017). 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 Jacobs v. FHFA*, 908 F.3d 884, 890 (3d Cir. 2018) ("The Third Amendment is in essence a renegotiation of an existing lending agreement," a "traditional power of corporate officers or directors."). They bear no resemblance to the regulatory activities and enforcement actions that characterize the exercise of Executive power. *See Free Enterprise*, 561 U.S. at 508.

The non-governmental nature of FHFA's actions as conservator accords with 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). State law also generally authorizes the appointment of private entities to serve as receivers for failed banks. *Id.* at 213-15.

Because the actions FHFA takes as conservator are not governmental actions that implicate Executive power, there is no basis to set aside the Third Amendment. Any inability of the President to control FHFA's decisions concerning the Third Amendment through removal of the conservator's top manager did not sufficiently impinge on "the functioning of the Executive Branch," *Morrison*, 487 U.S. at 691, to run afoul of Article II.

b. In response, plaintiffs initially contend (Supp.Br. 13), relying on *Freytag v. Commissioner*, 501 U.S. 868 (1991), that it is immaterial whether FHFA was exercising Executive power when it adopted the Third Amendment because the removal restriction is a structural constitutional violation that taints all of FHFA's actions. But *Freytag* is inapposite. There, the Supreme Court considered whether special trial judges of the Tax Court were inferior officers or mere employees, and it simply rejected the proposition that the special trial judges were "inferior officers for purposes of some of their duties . . . , but mere employees with respect to other responsibilities." *Id.* at 882. In other words, for Appointments Clause purposes, when individuals are exercising governmental authority in *all* their duties, they cannot be officers when performing some governmental functions and mere employees when performing other governmental functions.

Freytag's reasoning has no application here, because FHFA as conservator is exercising no Executive authority. That would be so even if plaintiffs, as in *Freytag,* were raising an Appointments Clause challenge. But it is even more clearly so for the separation-of-powers claim plaintiffs actually raise, which is solely that the Third Amendment must be invalidated because the conservator was not subject to removal at will by the President. In analyzing a challenge to a removal provision, the question is whether the President's control over Executive power under Article II has been unduly infringed. And there can be no infringement of Executive power where only non-governmental action is at issue.

Plaintiffs fare no better in their various contentions that FHFA was in fact exercising Executive power even when acting as conservator. For example, plaintiffs argue that FHFA must have been exercising governmental authority when it entered into the Third Amendment because "FHFA could not have lawfully agreed to the Net Worth Sweep if it had been acting as a private entity." Supp.Br. 13. Plaintiffs base that contention on alleged state-law constraints and FHFA's acknowledgement that the Third Amendment was enacted pursuant to additional powers granted to it under HERA beyond the enterprises' existing powers. But the mere fact that FHFA was acting pursuant to authorities granted to it under federal law does not make its actions governmental, let alone Executive, in nature. *See, e.g.*, *Flagg Bros. v. Brooks*, 436 U.S. 149, 164-66 (1978) (a private actor's actions are not "properly attributable" to the government simply because a statute "has authorized" those actions); *Bass v. Parkwood Hosp.*, 180 F.3d 234, 243 (5th Cir. 1999) (same). And of course, Congress can authorize private parties to take actions that they would otherwise be unable to take under state law, *see, e.g.*, *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380, 385 (5th Cir. 2004) (federal rules preempt state requirements), without transforming those private acts into government acts. Indeed, if HERA had authorized a private person to serve as the enterprises' conservator, adoption of the Third Amendment and any other actions taken by that person as a conservator would plainly not qualify as Executive action subject to Article II.

The Federal Circuit's decision in *Slattery v. United States*, 583 F.3d 800, 826-29 (Fed. Cir. 2009) (cited at Supp.Br. 14), does not counsel a different result. *Slattery* emphasized that the challenged FDIC action—its refusal to turn over the monetary surplus it obtained from a bank liquidation—did not fall within "the standard receivership situation in which the receiver is enforcing the rights or defending claims and paying the bills of the seized bank." *Id.* at 827-28. By contrast, FHFA's negotiation of, and agreement to, the Third Amendment were "quintessential conservatorship tasks." *Perry Capital*, 864 F.3d at 607.

Similarly unavailing is plaintiffs' assertion (Supp.Br. 15) that the Third Amendment was "implemented and sustained by FHFA's exercise of its regulatory powers." The statutory provisions invoked merely authorize FHFA to regulate the enterprises and set forth FHFA's general duties as regulator. *See, e.g.*, 12 U.S.C. § 4511(b)(2) ("The Director shall have general regulatory authority over each regulated entity."); *id.* § 4513(a)(1)(B)(i)-(ii) (FHFA's Director shall "ensure that . . . each regulated entity operates in a safe and sound manner" and that "the operations and activities of each regulated entity foster liquid, efficient, competitive, and resilient national housing finance markets").

The Third Amendment was not an exercise of FHFA's authority as regulator. It was a contractual agreement between FHFA as conservator and Treasury, and regulatory approval was not required. FHFA has suspended the enterprises' regulatory capital requirements during the conservatorship and permitted the enterprises to rely exclusively on Treasury's funding commitment. *See FHFA Announces Suspension of Capital Classifications During Conservatorship* (Oct. 9, 2008), https://go.usa.gov/xETr4. Plaintiffs' argument thus boils down to a contention that the Third Amendment must have been regulatory action because FHFA as regulator failed to prevent it. But plaintiffs have pointed to no authority supporting the counterintuitive notion that they can challenge a private contract that is not itself unconstitutional based on the alleged failure to take discretionary action against the contract by a regulator that is allegedly structured unconstitutionally.[10]

Finally, plaintiffs are also wide of the mark in arguing (Supp.Br. 14) that there would be "troubling implications" in holding that FHFA as conservator does not exercise Executive power because it would mean that "FHFA may act free from constitutional constraints." Private actors are generally not bound by constitutional limitations. *See, e.g.*, *Flagg Bros.*, 436 U.S. at 164-66. Before the conservatorship, for example, the enterprises were not subject to constitutional requirements such as equal-protection principles. *See* Supp.Br. 14. The question whether FHFA as conservator is subject to equal-protection requirements would depend, therefore, on

[10] And plaintiffs likewise err in asserting (Supp.Br. 15) that 12 C.F.R. § 1237.12 provides that the payment of dividends required under the Third Amendment is a regulatory act. Plaintiffs do not dispute that FHFA acts as conservator in declaring quarterly dividends. The cited regulation adds nothing to the analysis, as it is contained in a chapter concerning the operations of FHFA as conservator or receiver of a regulated entity. *See id.* § 1237.1.

whether a plaintiff could demonstrate that FHFA's actions as conservator satisfy the *Flagg Bros.* test for treating private action as under color of law.[11]

Even assuming a plaintiff were able to make the acting-under-color-of-law showing, that would not mean FHFA's actions as conservator constitute exercises of *Executive* power. *See U.S. ex rel. Adams*, 813 F.3d at 1261 ("[J]ust because an entity is considered a federal instrumentality for one purpose does not mean that the same entity is a federal instrumentality for another purpose."). For instance, even if the decision of FHFA (or a private conservator) "to fire a Fannie executive" or "not to purchase mortgages" (Supp.Br. 14) constituted private action under color of law for purposes of certain constitutional provisions, such actions still would not constitute an exercise of Executive power that Article II requires to be performed by an officer removable at the President's will.[12]

2. The Third Amendment was adopted by an Acting Director whose designation was revocable at will by the President.

When FHFA as conservator agreed to the Third Amendment, it was headed by Acting Director DeMarco. The President's ability to revoke at will DeMarco's acting

[11] As plaintiffs acknowledge, both the government and the Supreme Court in *FDIC v. Meyer*, 510 U.S. 471 (1994), merely "*assum[ed]* that federal receivers are subject to constitutional constraints." Supp.Br. 14 n.3 (emphasis added). Indeed, the Supreme Court subsequently made clear in *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994), that, when the FDIC acts as receiver, "[it] is not the United States," but instead steps into the shoes of the failed financial institution.

[12] The same analysis holds for Takings claims, which require governmental action and a taking of property within the meaning of the Fifth Amendment.

designation provides an independent basis to reject plaintiffs' claim that the President lacked sufficient control over FHFA when it agreed with Treasury to adopt the Third Amendment.

DeMarco headed FHFA under 12 U.S.C. § 4512(f), which authorizes the President to designate any of three Deputy Directors "to serve as acting Director" when the Director resigns or dies. The for-cause removal restriction that plaintiffs challenge here, however, 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)(1)-(2). No such for-cause limitation applies to the "Acting Director" under § 4512(f).

Contrary to plaintiffs' assertion (Supp.Br. 11), there is no basis to expand § 4512(b)(2)'s for-cause removal restriction to the President's choice of designee to serve 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). Here, in the *same* statutory section, Congress both established the position of FHFA Director and authorized the President *to choose among three* Deputy Directors to serve as Acting Director. 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 limitation on the President's ability to revoke the acting designation and designate a different official to serve. Moreover, principles of constitutional avoidance counsel against construing statutory removal protections for a permanent agency head to limit the President's authority to revoke the designation of an *acting* agency head. *See Swan v. Clinton*, 100 F.3d 973, 983-88 (D.C. Cir. 1996) (same rationale for not extending removal protections during the term of office to holdover officials remaining after their term has expired).

Given that the President could revoke at will DeMarco's designation as Acting Director, plaintiffs' Article II challenge to the Third Amendment fails. The President had "full control" over DeMarco's adoption of the Third Amendment because he could "hold[] his subordinate[] accountable." *See Free Enterprise*, 561 U.S. at 496. Although plaintiffs further assert (Supp.Br. 12) that the President's options *to replace* DeMarco with a different Acting Director were limited under HERA and the Federal Vacancies Reform Act, that additional assertion is immaterial to their Article II claim that HERA unconstitutionally infringed the President's ability to use the power *to remove* DeMarco as a means of controlling and supervising FHFA's alleged exercise of Executive power. Accordingly, the Article II claim plaintiffs have actually brought fails regardless of the scope of the President's options in choosing a replacement acting Director—which this Court need not address—especially given that the President also had the option of nominating a permanent Director.[13]

3. In all events, invalidating the Third Amendment would be an inappropriate exercise of equitable remedial authority in these circumstances.

Wholly apart from the merits, it would not be proper as a remedial matter to set aside the Third Amendment. Although plaintiffs correctly observe (Supp.Br. 17-20) that setting aside past actions is sometimes an appropriate remedy for a separation-of-powers violation, they erroneously contend that such relief is always required. That relief is neither mandatory nor appropriate here.

a. It is axiomatic that equitable relief "does not follow from success on the merits as a matter of course" but rather is subject to "equitable discretion." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008). Accordingly, courts must consider "the balance of equities" and "the public interest" in assessing the propriety of permanent injunctive relief, *id.*, including whether the relief requested comports with "'what is necessary, what is fair, and what is workable,'" *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) (per curiam), because federal judges are "not mechanically obligated to grant an injunction for every violation of law," *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 313 (1982); *see also eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 394

[13] Although Plaintiffs suggest (Supp.Br. 11-12) that FHFA's eventual permanent Director also took actions concerning the Third Amendment, they fail to identify any specific discretionary act he took that injures them.

(2006) (The traditional principles of equity do not contemplate the "categorical grant of [equitable] relief" upon a finding of liability.).

Contrary to plaintiffs' assertion (Supp.Br. 17), separation-of-power claims are not uniquely exempt from this general equitable rule. *See, e.g.*, *John Doe Co. v. CFPB*, 849 F.3d 1129, 1133 (D.C. Cir. 2017) (recognizing "traditional constraints on separation-of-powers remedies" and noting "vacatur of past actions is not routine"). Plaintiffs invoke (Supp.Br. 17-18) the Supreme Court's decision in *Bowsher*, but neither that case nor any other controlling precedent dictates the invalidation of an agency's past actions whenever the agency was unconstitutionally structured at the time it took those actions. In *Bowsher*, the Court held on the merits that vesting Executive functions in an officer (the Comptroller General) whose removal was subject to congressional control was unconstitutional. 478 U.S. at 726, 732. But, as a remedial matter, the Court held that, rather than converting the Comptroller General into an Executive officer removable at the President's will, the Executive functions (certain reporting and budgetary obligations) should be invalidated, thus triggering a statutory "fallback" provision that provided an alternative budget process if the Executive functions were invalidated. *Id.* at 733-35. In short, *Bowsher* is inapposite because the remedial question resolved by the Court was only whether to sever the removal restriction or the Executive functions, as the statute itself resolved the question whether the past actions should be set aside.

Nor are plaintiffs correct (Supp.Br. 37) that the Administrative Procedure Act (APA) compels courts to abandon established equitable principles. Even assuming that the conservator's actions constituted "agency action" for purposes of the APA, a court "do[es] not lightly assume that Congress has intended to depart from established principles" regarding equitable discretion, *Weinberger*, 456 U.S. at 313, and the APA's general instruction that unlawful agency action "shall" be "set aside" (5 U.S.C. § 706(2)) is insufficient to mandate such a departure.

To the contrary, the APA makes clear that, absent a special review statute, "[t]he form of proceeding for judicial review" is simply the traditional "form[s] of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction," 5 U.S.C. § 703, and that the statutory right of review does not affect "the power or duty of the court to . . . deny relief on any . . . appropriate legal or equitable ground," *id.* § 702(1). Accordingly, the Supreme Court has made clear that, even in an APA case, "equitable defenses may be interposed." *Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967). Indeed, a contemporaneous report on the APA that the Supreme Court has treated as especially persuasive authority (*see Norton v. Southern Utah Wilderness All.*, 542 U.S. 55, 63-64 (2004)) observed that § 706 merely "restates the present law as to the scope of judicial review" of agency action. U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 107-08 (1947). Recognizing this principle, courts finding error under the APA do not uniformly vacate challenged agency action. *See, e.g.*, *Allied-Signal, Inc. v. U.S. Nuclear Regulatory*

Comm'n, 988 F.2d 146, 150-51(D.C. Cir. 1993) (cited in *Basinkeeper v. U.S. Army Corps of Eng'rs*, 715 F. App'x 399, 401 (5th Cir. 2018) (Owen, J., concurring)). And regardless, plaintiffs' proposed remedial scenario for setting aside the Third Amendment (*see* Supp.Br. 29-32) would entail, among other things, that this Court direct Treasury and the enterprises to make accounting entries, which is indisputably injunctive relief and hence subject to equitable principles.

Finally, plaintiffs err in relying (Supp.Br. 25-29) on *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), to argue that retroactive relief is required here. *Harper* and its progeny reject the proposition that a law can have *different substantive meanings* prospectively and retroactively, but they do not foreclose *the denial of retrospective remedies* based on well-established equitable considerations. To the contrary, in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 754-55 (1995), the Supreme Court acknowledged that "the ordinary application of a new rule of law 'backwards[]'" *may* "involve a further matter of remedies" depending upon the "circumstances involved."

b. Traditional equitable principles demonstrate that invalidation of the Third Amendment would be inappropriate here, even assuming the FHFA's unconstitutional structure could somehow be viewed as tainting the Acting Director's decision as conservator to adopt the Third Amendment. Setting aside the Third Amendment is not necessary, fair, or workable, and it would neither serve the public's interest nor properly balance the equities.

To begin, a host of individuals and corporations—including the enterprises, their customers, and their lenders—have conducted their affairs over the past six years in reliance on the Third Amendment, and invalidating the provision would cause a substantial and unwarranted disruption not only in the enterprises' operations, but also in the housing market generally. As explained *supra* pp. 10-11, the Third Amendment ended the draws-to-pay-dividends cycle, thereby curtailing the threat of the enterprises incurring escalating dividend obligations to Treasury and reducing the risk that Treasury's remaining capital commitment (which was and is vital to the enterprises' viability) would be depleted prematurely. The Third Amendment thus reduced the enterprises' fixed financial obligations and reduced their exposure to market downturns and the adverse consequences of failing to earn sufficient income to pay the fixed dividends they owed Treasury under the Purchase Agreements. *See Jacobs*, 908 F.3d at 893-94 (emphasizing that the Third Amendment represented a "risk-averse" measure that assured the enterprises' ongoing operation). In turn, market participants such as lenders, investors, and others relied on the Third Amendment and the safeguards it placed on the enterprises' financial future in structuring their relationships with the enterprises over the past several years. A judicial order setting aside the Third Amendment now would undo those safeguards, undermine all of the transactions that presumed those safeguards' existence, and potentially cast the market into turmoil.

Setting aside the Third Amendment would be particularly anomalous in light of plaintiffs' delay in bringing suit. *See Abbott Labs.*, 387 U.S. at 155 (recognizing that "defense of laches" is available in APA actions); *Nat'l Ass'n of Gov't Emps. v. City Pub. Serv. Bd. of San Antonio,* 40 F.3d 698, 708 (5th Cir. 1994) ("[E]quity aids the vigilant and not those who slumber on their rights."). Plaintiffs waited over four years to complain of what they now decry as egregious conduct—long after several other challenges were filed—and they cannot plausibly claim to have been vigilant in protecting their asserted rights. To the contrary, by waiting four years, plaintiffs were able to see whether the Third Amendment's variable dividend was ultimately a "good deal" for Treasury, and only after it appeared to be did plaintiffs swoop in to claim the deal must be invalidated. Such litigation gamesmanship should be rejected as manifestly unfair, both to Treasury (which bore the risks of the Third Amendment but now would be denied the benefits) and to third parties (who accrued significant reliance interests in the interim).

Applying equitable principles under similar circumstances, this Court held in *Environmental Defense Fund, Inc. v. Alexander*, 614 F.2d 474, 478 (5th Cir. 1980), that the equitable doctrine of laches barred a suit brought to challenge construction of a waterway five years after construction began. The plaintiffs argued that the project was unlawful because it differed from that which Congress had authorized. *Id.* In concluding that the plaintiffs were not entitled to injunctive relief, the Court emphasized that the plaintiffs were well aware of the allegedly unlawful construction many years before they filed suit, *id.* at 479, and that approximately $200 million had already spent on the project at the time of the challenge, *id.* at 480. Because the plaintiffs' delay in filing suit was inexcusable, and because the defendants would be prejudiced if the project was set aside after significant construction had occurred, the Court concluded that equity did not permit it to issue the injunction plaintiffs sought. *Id.* at 480-81. So too here.

Plaintiffs' invocation of the Court's equitable authority is even more extraordinary because their legal theory would render invalid not only the Third Amendment, but all the prior Purchase Agreements and amendments between the conservator and Treasury that rescued the enterprises and that continue to provide them with hundreds of billions of dollars of vital capital. *See Perry Capital*, 864 F.3d at 601 (describing the essential role of the agreements and capital infusion). Yet plaintiffs nevertheless seek to unwind only the agreement they dislike while leaving intact the agreements that have permitted the enterprises to survive. This Court should not countenance such inequitable cherry-picking.

Conversely, on the other side of the equitable balance, plaintiffs would impose all the harm and disruption of invalidating the Third Amendment in order to vindicate a structural principle notwithstanding that the alleged violation was quite likely harmless. Plaintiffs speculate otherwise (Supp.Br. 6-7), but it is highly implausible that HERA's for-cause removal provision had any actual effect on FHFA's decision to enter into the Third Amendment, given that the counter-party was the Treasury

Department, headed by a Secretary who was removable at will by the President. Although plaintiffs are correct (Supp.Br. 4-5) that, upon finding a separation-of-powers violation, courts may vacate *an individual adjudication* without regard to harmless error so that a proper adjudicator can reconsider the case, it would be quite another thing for this Court to unwind a complex commercial contract implicating important third-party reliance interests years after the fact even though the alleged structural violation had no demonstrated effect whatsoever on the contract's enactment.

c. Plaintiffs attempt to minimize the impact of unwinding the Third Amendment by proposing "accounting entries" that would, looking backward to 2012, take any "excess" dividends over the amount due under the Second Amendment and use those to pay down Treasury's liquidation preference. *See* Supp.Br. 29-32. Plaintiffs postulate that by doing so, Treasury would now be fully "repaid" for its investment and not entitled to additional dividends. *See id.* at App. Although any attempt to judicially unwind the Third Amendment would be unjustified and harmful, plaintiffs' proposal fails even on its own untenable terms.

For example, plaintiffs make the unwarranted assumption that, absent the Third Amendment, all excess net worth would have been used to pay down the liquidation preference rather than build up a capital buffer. There is no reason to believe that the enterprises would have proposed this and, moreover, no reason to believe that Treasury would have agreed.[14] And the difference between the two options is significant, because a one-time reduction in the contingent liquidation preference would cause a reduction of Treasury's ongoing and indefinite right to a 10% annual dividend. *See supra* pp. 8-9. Likewise, plaintiffs simply ignore that, absent the Third Amendment, Treasury would be entitled to require payment of a periodic commitment fee. *See id.* In short, whether "money chang[es] hands" or not (Supp.Br. 29), plaintiffs' proposed remedy would improperly deprive Treasury of valuable financial rights.

Even more fundamentally, plaintiffs' model fails to compensate Treasury for the additional risk it took on at the time of the Third Amendment. In hindsight, it is true that the Third Amendment led to greater dividends for Treasury than it would have received under the Second Amendment (at least as of this date). But the Third Amendment carried (and still carries) the risk that Treasury would receive *less or even no dividends*, despite its substantial capital commitment.

For all these reasons, wholly apart from the merits, setting aside the Third Amendment would be an inappropriate exercise of this Court's equitable remedial authority.

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[14] Absent limited circumstances not applicable here, the enterprises are not permitted to pay down the liquidation preference unless they alter the terms of the stock certificates with Treasury's consent. *See* Fannie Mae, 10-K (2017), http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2017/10k_2017.pdf.

C. The Constitutional Defect in HERA's Removal Provision Does Not Support Severance in This Case of Any Provision of HERA, and Certainly Nothing More Than the Removal Provision Itself.

As a threshold matter, although plaintiffs are correct (Supp.Br. 37) that prospective severance of an unconstitutional removal restriction is an appropriate remedy when a party is subject to future regulation by the agency, that is not the situation here. In addition to the fact that, as mere shareholders of the enterprises, plaintiffs are not regulated entities under HERA and their claim is barred by the succession provision, their claim also fails because they do not, in fact, challenge ongoing actions by FHFA as regulator.

If this Court nevertheless were to consider the appropriate remedy for prospective regulatory injuries wholly apart from the Third Amendment, it should simply sever from HERA the Director's for-cause removal restriction. "[W]hen confronting a constitutional flaw in a statute, [courts] try to limit the solution to the problem," jettisoning "problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood of N. New England,* 546 U.S. 320, 328-29 (2006). A court thus "must sustain its remaining provisions unless it is evident that the Legislature would not have enacted those provisions independently of that which is invalid." *Free Enterprise*, 561 U.S. at 509 (cleaned up). Here, as in *Free Enterprise Fund*, nothing in HERA's text or context "makes it 'evident' that Congress . . . would have preferred no [FHFA] at all to [an FHFA] whose [Director is] removable at will." *Id.* Congress created FHFA in the midst of the 2008 financial crisis and did so after finding that "more effective Federal regulation [was] needed to reduce the risk of failure of [the enterprises]," given their importance to "the health of the Nation's economy." 12 U.S.C. § 4501(2). Congress also authorized FHFA to act as the enterprises' conservator in the event the enterprises found themselves in dire financial straits, *id.* § 4617, as they did in 2008. Nothing about HERA demonstrates that Congress would have preferred to leave the enterprises without a dedicated regulator or conservator altogether—the precise problem it sought to address—simply because FHFA's Director cannot have for-cause removal protection.

For their part, plaintiffs concede that this Court "could reasonably follow the panel's approach to this issue and sever only the Director's for-cause removal protection." Supp.Br. 37. Indeed, they do not even argue that HERA in its entirety is non-severable. Instead, plaintiffs spend several pages (*id.* at 38-40) suggesting this Court should additionally excise two other provisions of HERA—one exempting FHFA from the appropriations process, 12 U.S.C. § 4516(f)(2), and one authorizing FHFA to act in its own best interests even when serving as conservator, *id.* § 4617(b)(2)(J). But as much as plaintiffs would like to take a blue pencil to HERA, that approach is not, contrary to their suggestion (Supp.Br. 38), supported by the Supreme Court's recent decision in *Murphy v. NCAA*, 138 S. Ct. 1461 (2018). There, the Court found it evident that Congress would not have enacted the remainder of the legislation at issue because doing so would have "seemed exactly backwards," *see id.* at 1483, imposed "a perverse policy" leading to "a weird result," *see id.* at 1483-84, and presented additional constitutional doubts, *see id.* at 1484. Here, by contrast, even if Congress had known that the FHFA's Director would be removable at the President's will, it would not have been evidently absurd for Congress to have continued to exempt FHFA from the appropriations process and to grant it authority as conservator to act in its own best interests. Plaintiffs' contrary contention reflects nothing more than dubious policy speculation that is inadequate to set aside provisions enacted by Congress.[15]

III. THE PANEL CORRECTLY REJECTED PLAINTIFFS' CLAIM THAT THE THIRD AMENDMENT VIOLATES HERA.

In addition to being barred by HERA's succession provision, plaintiffs' statutory claim that the Third Amendment exceeded FHFA's authority under HERA is independently barred by HERA's anti-injunction provision, 12 U.S.C. § 4617(f). Indeed, plaintiffs all but abandon their statutory claim, relegating it to a six-page section near the end of their brief. They do so for good reason, as all five other courts of appeals to consider such claims have concluded, like the panel here, that they are barred.

[15] In a *Murphy* concurrence expressing "growing discomfort" with severability doctrine, Justice Thomas suggested that courts should go no further than declining to enforce the particular provision at issue in the controversy that is unconstitutional. 138 S. Ct. at 1485-87. Although that approach is, of course, contrary to controlling precedent, its application in this case would lead, at most, to an order that the for-cause removal restriction cannot be enforced.

A. The panel correctly held that plaintiffs' statutory claim is barred by 12 U.S.C. § 4617(f), which provides that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator." This anti-injunction provision "effect[s] a sweeping ouster of courts' power to grant equitable remedies" to parties challenging FHFA's actions as conservator. *Perry Capital*, 864 F.3d at 605.

Under § 4617(f), judicial review of claims seeking to enjoin FHFA's acts as conservator is permissible, if at all, only in the rare case where FHFA "clearly" acts beyond statutory or constitutional bounds. *See Ward v. Resolution Tr. Corp.*, 996 F.2d 99, 102 (5th Cir. 1993) (per curiam); *see also, e.g., Jacobs,* 908 F.3d at 889. If FHFA is even arguably exercising a statutorily authorized power or function and the injunctive relief sought would "restrain or affect" that exercise, § 4617(f) applies and the claim is barred. *See Jacobs*, 908 F.3d at 889; *Saxton v. FHFA*, 901 F.3d 954, 962-63 (8th Cir. 2018) (Stras, J., concurring).

As the courts of appeals have consistently concluded, FHFA acted well within its conservatorship powers under HERA in adopting the Third Amendment. *Collins*, 896 F.3d at 652-53; *Jacobs*, 908 F.3d at 890; *Saxton*, 901 F.3d at 959; *Roberts*, 889 F.3d at 402; *Perry Capital*, 864 F.3d at 614-15; *Robinson v. FHFA*, 876 F.3d 220, 229-32 (6th Cir. 2017). HERA grants FHFA "exceptionally broad operational authority." *Saxton*, 901 F.3d at 960-61 (Stras, J., concurring); *accord, e.g.*, *Perry Capital*, 864 F.3d at 607. In authorizing FHFA's appointment as conservator for the purpose of "reorganizing, rehabilitating, or winding up the affairs" of the enterprises, 12 U.S.C. § 4617(a)(2), HERA grants FHFA an array of general powers, including the power to "take over the assets of and operate [the enterprises]" and "conduct all business of the [enterprises]," *id.* § 4617(b)(2)(B), and to "transfer or sell any asset or liability of the [enterprises]," *id.* § 4617(b)(2)(G). FHFA may exercise these general conservator powers "as may be—(i) necessary to put the [enterprises] in a sound and solvent condition; and (ii) appropriate to carry on the business of the [enterprises] and preserve and conserve the assets and property of the [enterprises]." *Id.* § 4617(b)(2)(D). FHFA is also empowered as conservator to exercise its statutory powers in a manner "which the Agency determines is in the best interests of the [enterprises] or the Agency." *Id.* § 4617(b)(2)(J)(ii).

The Third Amendment "changed the payment schedule and terms" of financial obligations the enterprises owed Treasury, which is the "sort of action [that] is within the heartland of powers vested in the officers or board of directors of any corporation," and thus vested in FHFA as conservator. *See Saxton*, 901 F.3d at 960-61 (Stras, J. concurring). In particular, FHFA renegotiated the dividends the enterprises owed to their critical investor, Treasury, whose remaining commitment of taxpayer funds was (and remains) vital to the enterprises' continued operation. The Third Amendment ended the draws-to-pay-dividends cycle that threatened to burden the enterprises with ever-increasing dividend obligations and to deplete Treasury's funding commitment. "Renegotiating dividend agreements, managing heavy debt and other financial obligations, and ensuring ongoing access to vital yet hard-to-come-by capital are quintessential conservatorship tasks designed to keep the Companies operational." *Robinson*, 876 F.3d at 231 (quoting *Perry Capital*, 864 F.3d at 607).

B. Citing Judge Willett's panel dissent, plaintiffs contend (Supp.Br. 41) that HERA imposes a mandatory and judicially reviewable obligation on FHFA as conservator 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)." That position is flawed in several respects.

First, HERA forecloses plaintiffs' request for this Court to second-guess whether FHFA's act as conservator to adopt the Third Amendment was necessary and appropriate to deal with the enterprises' precarious condition. *See Saxton*, 901 F.3d at 962 (Stras, J., concurring) ("It is clear [under HERA] that the choice among suitable alternatives belongs to FHFA, not to the shareholders and certainly not to the courts."); *accord, e.g.*, *Perry Capital*, 864 F.3d at 607-08. Contrary to plaintiffs' suggestion, HERA's conservatorship provision authorizes FHFA to exercise its general powers as "*may be*" "necessary" and "appropriate" to put the enterprises in a sound and solvent condition and to preserve and conserve their assets. 12 U.S.C. § 4617(b)(2)(D) (emphasis added). Congress thus recognized that the *actual* necessity or appropriateness of a particular action will often be uncertain, and therefore a suit seeking to set aside a conservator act is barred by § 4617(f) unless it falls wholly outside the scope of activities that could possibly preserve and conserve the enterprises' assets. *See Jacobs*, 908 F.3d at 890 ("The Agency 'may' exercise those powers 'as appropriate,' so we ask only whether the Agency picked a suitable action, not the best alternative.") (citing *Saxton*, 901 F.3d at 961-62 (Stras, J., concurring)). In short, "[s]ection 4617(f) prohibits [courts] from wielding [their] equitable relief to second-guess either the dividend-allocating terms that FHFA negotiated on behalf of the Companies, or FHFA's business judgment that the Third Amendment better balances the interests of all parties involved." *Perry Capital*, 864 F.3d at 614-15.

Second, "even assuming that a mandatory [and reviewable] duty to preserve and conserve assets exists, the FHFA's decision to enter the [Third Amendment] did not violate it." *Saxton*, 901 F.3d at 961 (Stras, J., concurring). Simply put, the Third Amendment "falls within the Agency's power to 'preserve and conserve [the enterprises] assets' and to do what is 'necessary to put [them] in a sound and solvent condition.'" *Jacobs*, 908 F.3d at 890.

At the time of the Third Amendment in 2012, the enterprises had drawn $187.5 billion from Treasury's funding commitment. ROA.952. Through the first quarter of 2012, the enterprises drew over $26 billion from the commitment to pay the 10% dividends they owed Treasury. These draws increased Treasury's liquidation preference, which in turn increased the amount of dividends the enterprises owed and the need to further draw upon the commitment, which was capped after 2012. By replacing a fixed dividend obligation with a variable one, the Third Amendment ended this cycle, thereby curtailing the enterprises' burgeoning dividend obligations to

Treasury, reducing the risk that the enterprises would exhaust Treasury's remaining commitment prematurely, ensuring that the enterprises would remain solvent for the foreseeable future, and providing certainty to the financial markets from which the enterprises raise funds. In short, "'[t]he Third Amendment permanently eliminated' [the draws-to-pay-dividends] Catch-22, as well as the associated 'risk that cash dividend payments would consume [the enterprises'] lifeline.'" *Jacobs*, 908 F.3d at 890 (quoting *Roberts*, 889 F.3d at 404-05). Accordingly, FHFA "could reasonably conclude that the Third Amendment would preserve and conserve [the enterprises'] assets in the long run, putting them on a sound and solvent footing." *Id.*[16]

[16] Plaintiffs erroneously contend (Op.Br. 8-9) that, at the time of the Third Amendment in August 2012, FHFA and Treasury anticipated the enterprises would experience a significant increase in their net worth in the next couple years, due largely to a one-time recognition of deferred tax assets in the near future. As SEC documents filed in early 2013 show, even months after the Third Amendment was signed, the enterprises did not anticipate recognizing their deferred tax assets in the near term. *See, e.g.*, Fannie Mae 2012 10-K, at 5 (Apr. 3, 2013) ("[I]n evaluating the recovery of our deferred tax assets, as of December 31, 2012, we again determined that the negative evidence outweighed the positive evidence."), http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2012/10k_2012.pdf; Freddie Mac 2012 10-K at 194 (Feb. 28, 2013) (stating that "as of December 31, 2012," Freddie Mac remained unable "to realize the portion of [its] net deferred tax assets that [was] dependent upon the generation of future taxable income."), http://www.freddiemac.com/investors/financials/sec-filings.html. And even if plaintiffs' contention were true, nothing in HERA prevented FHFA and Treasury from taking a longer-term view of the enterprises' financial condition. As the enterprises' contemporaneous SEC filings indicate, *see supra* p. 10, the enterprises did not expect to earn sufficient income to pay Treasury the 10% fixed dividend out of their earnings over a broader time horizon, an expectation consistent with the enterprises' historical experience.

Finally, FHFA's expansive powers as conservator under HERA go beyond preserving and conserving the enterprises' assets for the benefit of the enterprises (let alone their shareholders). As courts have recognized, "[w]hen the Agency acts as conservator [under HERA], it need not act solely in Fannie's and Freddie's interests, as a traditional conservator would. It may also act to protect its own interests. . . ." *Jacobs*, 908 F.3d at 893; *accord, e.g.*, *Saxton*, 901 F.3d at 958-59. The statute's provisions on "preserv[ing] and conserv[ing] assets" are phrased as permissive "powers" that FHFA "may" wield, *not* mandatory duties that FHFA must satisfy. 12 U.S.C. § 4617(b)(2)(B)(iv), (b)(2)(D). Especially given that the "statute consistently distinguishes between 'shall' and 'may' with the latter term reserved for situations in which one would expect the exercise of discretion," *Roberts*, 889 F.3d at 403, "there is no reason to doubt that the powers-as-conservator provision uses 'may' in its normal, permissive sense, consistent with the rest of the statute," *Saxton*, 901 F.3d at 961 (Stras, J., concurring). And that is especially so because HERA's "incidental powers" provision authorizes FHFA to exercise its powers as conservator as the "'Agency determines is in the best interests of the regulated entity *or the Agency*.'" *Perry Capital*, 864 F.3d at 607 (quoting 12 U.S.C. § 4617(b)(2)(J)) (emphasis added here).

In sum, "the most natural reading of [HERA] is that it permits FHFA, but does not compel it in any judicially enforceable sense, to preserve and conserve [the enterprises'] assets and to return the Companies to private operation." *Saxton*, 901 F.3d at 958 (quoting *Perry Capital*, 864 F.3d at 607). Whether or not the Third

Amendment contravened the enterprises' best interests by preventing them from building up internal capital, "the FHFA certainly considered the agreement to be in its own best interests" by "protecting the entities from future market downturns or full-fledged crises." *Id.* at 961 (Stras, J., concurring); *accord, e.g.*, *Jacobs*, 908 F.3d at 894.

C. Plaintiffs relatedly contend, in a position adopted by Judge Willett in his panel dissent, that the Third Amendment was tantamount to a liquidation of the enterprises, which is a power HERA grants to FHFA only as receiver, not conservator. Supp.Br. 42-43; *see also, e.g.*, *Collins*, 896 F.3d at 681-82 (Willett, J., dissenting). But the conclusion that the Third Amendment amounted to a liquidation ignores the enterprises' ongoing viability, which is in significant part due to the $254 billion capital commitment that Treasury continues to provide to the enterprises to ensure their viability and that the Third Amendment helped to conserve. The enterprises are going concerns with trillions of dollars in assets and continue to play a central role in the housing markets, purchasing and guaranteeing millions of residential mortgages. *See Perry Capital*, 864 F.3d at 602. Indeed, as Judge Willett acknowledged, the enterprises have "returned to profitability," *Collins*, 896 F.3d at 692 (Willett, J., dissenting), which should negate any suggestion that they have been liquidated or are "on the brink of insolvency," Supp.Br. 42. In short, "neither Fannie nor Freddie is in liquidation." *Jacobs*, 908 F.3d at 892.

In agreeing to the Third Amendment, FHFA as conservator prioritized preserving Treasury's massive capital commitment over the build-up of internal capital. "[N]othing in [HERA] mandated that FHFA take steps to return [the enterprises] at the first sign of financial improvement to the old economic model that got them into so much trouble in the first place." *Perry Capital*, 864 F.3d at 613. Because of Treasury's ongoing commitment, the enterprises will continue to serve their critical role in the housing markets for the foreseeable future or until a long-term political solution for the enterprises' operation and structure can be determined. That result is fully consistent with FHFA's role as conservator under the expansive authorities granted it by HERA.

CONCLUSION

The judgment of the district court denying plaintiffs' claims should be affirmed. At most, this Court should sever the FHFA Director's removal protection, and in no circumstance should it invalidate the Third Amendment.

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I also certify that I will file paper copies with the Court, via Federal Express overnight delivery, when the court requests them.

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/s/ Gerard Sinzdak
GERARD SINZDAK

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing brief was prepared using Microsoft Word 2010 and complies with the type and volume limitations set forth in Rule 32 of the Federal Rules of Appellate Procedure. I further certify that the font used is 14 point Garamond, for text and footnotes, and that the computerized word count for the foregoing brief (excluding exempt material) is 12,829 words.

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