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;
JOSEPH M. OTTING, ACTING DIRECTOR OF THE FEDERAL HOUSING FINANCE AGENCY,

Defendants-Appellees

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

EN BANC REPLY 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: January 16, 2019

/s/ Charles J. Cooper
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ARGUMENT

There could be no clearer illustration of the importance of agency accountability to the incumbent President than the brief FHFA filed with the Court earlier this week. It has been the current Administration's litigating position since early 2017 that agencies like FHFA are unconstitutional. Yet for more than *half* of the President's term in office, FHFA relentlessly argued the opposite. FHFA reversed course seven days after Director Watt's term in office expired and the President designated Acting Director Otting to replace him. Mr. Otting's decision not to defend the constitutionality of FHFA's independence at this late date throws into stark relief the consequences of severing the lines of accountability between an administrative agency and the sitting President.

With all parties now in agreement that FHFA's structure violates the separation of powers, Defendants in their en banc briefs take up the task of trying to persuade the Court that it does not matter. Defendants' arguments fail. The Court must not use novel standing arguments, "equitable balancing," or any of the other theories Defendants advance for the first time in their en banc briefs to override the separation of powers and the clear command of the APA. When a federal agency takes a final action that injures someone in violation of the Constitution, the reviewing court "shall . . . set aside" that action. 5 U.S.C. § 706. That unambiguous statutory command requires backward-looking relief in the form of vacatur of the

Net Worth Sweep without regard to severability or how FHFA is to operate going forward.

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

A. FHFA's brief identifies a simple way that the Court can cut through the morass of standing arguments in this case and reach the merits. FHFA acknowledges that "[r]egulated entities may have standing to enforce a general right to be regulated by an agency that conforms to constitutional requirements, even without a particular past agency action for which injury-in-fact, traceability, and redressability can be shown." En Banc Suppl. Br. of Defs.-Appellees FHFA & Joseph M. Otting at 13–14 (Jan. 14, 2019) ("FHFA En Banc Br."). Although FHFA disclaims any authority to regulate the Companies' shareholders, it continues to insist that it is entitled to exercise shareholder rights under HERA's Succession Clause. *See* 12 U.S.C. § 4617(b)(2)(A). Although the parties dispute the precise meaning of the Succession Clause, all agree that it transfers at least *some* shareholder rights to FHFA during conservatorship. As conservator, for example, FHFA indisputably succeeded to Plaintiffs' shareholder voting rights and their right to bring derivative claims when FHFA is not conflicted. That is enough to establish Plaintiffs' standing, and the Court need not wade through the other Article III arguments FHFA presents.

B. FHFA has defended against dozens of shareholder lawsuits challenging the Net Worth Sweep since 2013, but so far as Plaintiffs are aware it was not until this

week that the agency first argued that it is "doubtful" that shareholders suffered an Article III injury-in-fact when they were stripped of their position in the Companies' capital structure and had all of their economic rights transferred to Treasury. FHFA En Banc Br. at 2, 15–16. FHFA's argument is frivolous. To establish injury-in-fact, Plaintiffs' interest in the case "need not measure more than an 'identifiable trifle,' " *Zimmerman v. City of Austin*, 881 F.3d 378, 388 (5th Cir. 2018) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)), and the valuable economic rights Defendants took from Plaintiffs plainly suffice.

FHFA suggests that private shareholders had already been effectively wiped out by the time the Net Worth Sweep was imposed in August 2012, but this argument flatly contradicts the detailed factual allegations in the Complaint, ROA.45-54—allegations that must be taken as true at this stage of the litigation, *see Lujan*, 504 U.S. at 561. Indeed, FHFA's argument flies in the face of not only the Complaint's allegations but incontrovertible facts. In the second quarter of 2013, Fannie paid Treasury nearly $60 billion in dividends thanks to the Net Worth Sweep. Under the prior dividend arrangement, Fannie could have paid at most $2.9 billion in dividends on Treasury's senior preferred stock during that quarter, with any dividends declared and paid in excess of that amount shared among Fannie's junior preferred and common shareholders. Similarly, in the fourth quarter of 2013, Freddie paid Treasury over $30 billion in dividends. Without the Net Worth Sweep, Treasury's

take on its Freddie senior preferred stock during that quarter could not have been more than $1.8 billion. *See generally* FHFA, Table 2: Dividends on Enterprise Draws from Treasury, https://goo.gl/BQcCpN. The notion that, even without the Net Worth Sweep, Plaintiffs would have no hope of ever seeing a return on their investments is risible.

C. With respect to Article III's causation requirement, Plaintiffs' previous en banc brief cited a line of cases in which courts have heard separation of powers challenges from litigants harmed by officials serving in violation of the Constitution despite the fact that those litigants could not show that a constitutionally serving official would have done anything differently. *See* Suppl. En Banc Br. of Pls.-Appellants at 3–6 (Dec. 12, 2018) ("Pls. En Banc Br."). FHFA responds by emphasizing that some (but not all) of these cases involved agency enforcement actions and observes that "Article III does not restrict the opposing party's ability to object to relief being sought at its expense." FHFA En Banc Br. 20–21 (quoting *Bond v. United States*, 564 U.S. 211, 217 (2011)). True enough, Ms. Bond had no need to establish the elements of Article III standing to raise her federalism argument in the district court in which she was prosecuted. But she *was* required to demonstrate standing to *appeal* from the adverse judgment against her, and she could only do so by demonstrating that all three of "Article III's prerequisites [were] met." *Bond*, 564 U.S. at 217; *see Camreta v. Greene*, 563 U.S. 692, 701 (2011). FHFA is

thus wrong when it suggests that the targets of the enforcement actions in cases like *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), had no need to establish traceability under Article III to invoke the federal courts' appellate jurisdiction. FHFA's attempt to distinguish these cases is thus unpersuasive.

FHFA's traceability arguments are flawed not only legally but also factually. In August 2012, the White House was occupied by a Democrat and the House of Representatives majority was Republican. Especially in that political environment, if the President had controlled FHFA he might have preferred to keep money at the Companies that could have been used to fund the Administration's housing policies without the need for appropriations by Congress. Moreover, the Net Worth Sweep was imposed on the eve of a presidential election, and the President might not have been willing to run the political risks inherent in nationalizing Fannie and Freddie without public support from an independent financial regulator. More fundamentally, FHFA never explains why the "counterfactual world" it posits for traceability purposes holds everything but the 2012 Net Worth Sweep constant when President Obama would have been able to install a FHFA Director of his choice in 2009 but for a provision of HERA that all parties now agree is unconstitutional. *See Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 512 n.12 (2010).

D. Plaintiffs' injuries are redressable for the reasons explained in Plaintiffs' previous brief. Pls. En Banc Br. 8–9. FHFA continues to attempt to shoehorn the parties' remedial disputes and virtually every other remaining controverted issue relevant to Plaintiffs' constitutional claim into an argument about Article III standing. FHFA says that whether the Court treats its arguments as going to standing or the merits "makes little practical difference," FHFA En Banc Br. at 39, but this Court should not be so cavalier about the difference between jurisdictional and non-jurisdictional arguments. Indeed, the Supreme Court in recent years has repeatedly emphasized the importance of recognizing "the critical differences between true jurisdictional conditions and nonjurisdictional limitations on causes of action." *Reed Elsevier, Inc. v. Muchnik*, 559 U.S. 154, 161 (2010) (brackets and quotation marks omitted). And "when considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim," *North Cyprus Med. Cent. Operating Co., Ltd. v. Cigna Healthcare*, 781 F.3d 182 (5th Cir. 2015) (brackets omitted), not question it at every turn, as FHFA would have this Court do.

II. Defendants' Remaining Merits Arguments Concerning Plaintiffs' Constitutional Claim Fail.

A. The Court need not decide precisely when a federal conservator's actions are attributable to the Government because adoption and implementation of the Net Worth Sweep required an exercise of FHFA's regulatory authority. FHFA comes

close to conceding the point when it acknowledges that its own regulations require regulatory approval of all dividends paid during conservatorship and admits that it "has not seen it as necessary to engage in a second round of authorization, as regulator, of dividend payments under the Treasury agreements," but instead simultaneously declares dividends as conservator and authorizes them as regulator. FHFA En Banc Br. at 30 n.6; *see* 12 C.F.R. § 1237.12(a), (b); *see also* 12 U.S.C. § 4513(a)(1)(B) (assigning FHFA regulatory duty "to ensure" that the Companies "maintain[ ] adequate capital"). In any event, Defendants cannot distinguish *Slattery v. United States*, 583 F.3d 800, 826–29 (Fed. Cir. 2009). As that case shows, when a federal conservator or receiver acting under a federal statute nationalizes its ward or seizes its assets to benefit the federal government, its actions are attributable to the federal government. Furthermore, Defendants tacitly admit that FHFA was acting as the Government when it imposed the Net Worth Sweep by arguing that this action was authorized by the agency's supposed authority to advance the Government's "best interests" under 12 U.S.C. § 4617(b)(2)(J). Congress cannot frustrate the separation of powers by simply labeling such actions those of a "conservator."[1]

[1] To the extent that Defendants' en banc briefs can be read as calling into question whether the governmental power FHFA exercises is Executive Power, they only imply a different constitutional problem with HERA. The Constitution's Vesting Clauses recognize three types of federal governmental power: Legislative,

B. Defendants' en banc briefs add little new on the issue of whether the President could have influenced FHFA's policy direction in August 2012 by removing Acting Director DeMarco and replacing him with someone whose views were more closely aligned with those of the President. The one new argument on this issue is FHFA's claim that the President can appoint an Acting Director of his choice under the Federal Vacancies Reform Act (FVRA) and thus avoid the requirement that he select one of the outgoing Director's deputies to head the agency temporarily under 12 U.S.C. § 4512(f). To support its position, FHFA cites *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 556 (9th Cir. 2016). But that case concerned the President's concurrent authority to select an Acting General Counsel of the NLRB under the FVRA and another statutory provision that contained nothing equivalent to this language in Section 4512(f): "In the event of the death, resignation, sickness, or absence of the Director, the President *shall designate* [one of FHFA's Deputy Directors] to serve as acting Director *until* the return of the Director, or the appointment of a successor pursuant to subsection (b)." (emphasis added). HERA thus expressly directs the President to choose one of three specified officials to serve as Acting Director, and it does not grant the President any

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Executive, and Judicial. Only the first two of those powers could plausibly provide a basis for the Net Worth Sweep, and the nondelegation doctrine prohibits *any* delegation of Legislative power to an administrative agency. *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 472 (2001).

authority to remove that Acting Director absent cause during the term of his or her service, i.e., until the return or appointment of a permanent Director. In any event, the Court need not resolve this issue, for FHFA does not dispute that any power the President had to replace Mr. DeMarco under the FVRA had expired by the time of the Net Worth Sweep. *See* 5 U.S.C. § 3346(b)(1).

III. The Court Must Set Aside the Net Worth Sweep Because It Was Imposed By An Unconstitutional Agency.

A. FHFA continues to insist that Plaintiffs are entitled to no backward-looking relief for what it now acknowledges is a violation of the President's constitutional removal authority. FHFA persists in conflating the issue of how to remedy *past* violations of the separation of powers with the analytically distinct issue of whether a court should repair an unconstitutional agency's structure going forward through severance. But neither FHFA nor Treasury cites any case, let alone an APA case, in which a court refused to vacate a final agency action that had injured the plaintiff and was taken by an agency operating in violation of the separation of powers.

In an effort to distinguish some of the many cases in which courts have vacated past agency actions on separation of powers grounds, FHFA insists that unlike a violation of the Appointments Clause, violations of the President's removal power "do not implicate the power of the official to act." FHFA En Banc Br. at 35. FHFA cites no authority for this proposition and it is simply wrong; an Officer of the United States *only* has the power to act by following the procedures mandated

by the separation of powers, and that includes acting with a minimum degree of Presidential oversight. While FHFA attempts to limit vacatur as a remedy to "adjudications by officials who lacked jurisdiction to adjudicate" or "boards that did not have the quorum needed to lawfully take action," *id.* (internal alterations and quotation marks omitted), that does not explain the remedy in *Federal Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993). The D.C. Circuit in that case concluded that vacatur was necessary due to the unconstitutional participation of *nonvoting* members of the FEC even though those individuals were "not counted in determining a quorum." *Id.* at 826. Nor does *Free Enterprise Fund* support FHFA's purported distinction between appointments and removal cases for the reasons explained in Plaintiffs' previous briefs. *See* Pls. En Banc Br. 22–24.

FHFA also seeks support for its position by briefly referencing the de facto officer doctrine. FHFA En Banc Br. at 30–31. But that doctrine cannot be used to defeat constitutional claims. Instead, it operates only where a statutory challenge is based on a "merely technical" defect in the incumbent's title to the office. *Nguyen v. United States*, 539 US. 69, 77 (2003). In *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), for example, the Court held that parties could raise Article III challenges to the trial judges who decided their cases. Writing for a plurality, Justice Harlan noted first that the de facto officer doctrine did not apply "when the statute claimed to restrict authority is not merely technical but embodies a strong policy concerning the

proper administration of judicial business," *id.* at 535–36, and held that "[a] fortiori is this so when the challenge is based upon nonfrivolous constitutional grounds," *id.* at 536.

Notably, neither Defendant offers any answer to the point, made by the Supreme Court just last term, that withholding meaningful remedies from separation of powers plaintiffs would eliminate any incentive for litigants to bring suits designed to vindicate the Constitution's structural provisions and thus safeguard everyone's liberty. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 & n.5 (2018).

B. Without endorsing FHFA's sweeping argument that backward-looking relief is never available in cases that concern violations of the President's constitutional removal authority, Treasury argues that the Court should exercise its equitable discretion to deny Plaintiffs all relief in this case. Suppl. Br. for the Treasury Dep't. at 33–36 (Jan. 11, 2019) ("Treas. En Banc Br."). But the APA says that the reviewing court "shall . . . set aside" final agency action taken in violation of the Constitution, 5 U.S.C. § 706, and "[c]ourts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute," *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497–98 (2001). In view of the unambiguous textual command in Section 706, the Court's choice "is not whether enforcement is preferable to no enforcement at all" but instead "simply whether a particular means of enforcing the statute should be chosen over another permissible

means." *Id.* In other words, although the instruction to "set aside" unlawful agency action leaves the Court with a degree of discretion to "tailor its remedy to the occasion," *NAACP v. Secretary of Hous. and Urban Dev.*, 817 F.2d 149, 160 (1st Cir. 1987) (Breyer, J.), the statute's words do not allow the Court to deny backward-looking relief when it finds unlawful agency behavior, *see FCC v. NextWave Pers. Commc'ns, Inc.*, 537 U.S. 293, 300 (2003) (observing that "[i]n all cases agency action must be set aside if the action was . . . not in accordance with law" (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413–414 (1971)).

The other provisions of the APA cited by Treasury do not negate the mandatory duty that Section 706 imposes on a reviewing court to set aside unlawful final agency action. Although Section 703 of the APA says that the "form of proceeding for judicial review" may be an action for a declaratory judgment or an injunction, the APA imposes mandatory constraints on how the reviewing court deploys that "form." Where the statute's terms are satisfied, it "entitle[s]" litigants to judicial review, 5 U.S.C. §§ 702, 703, and then says that the reviewing court "shall"—not "may"—set aside unlawful final agency action, *id.* § 706. Similarly misplaced is Treasury's reliance on Section 702's reference to the reviewing court's authority to deny relief on "equitable ground[s]." *Id.* § 702. That language was enacted in 1976 as part of a broad abrogation of sovereign immunity, and Congress added it to Section 702 "simply to make clear that all other than the law of sovereign

immunity remain unchanged." *Darby v. Cisneros*, 509 U.S. 137, 153 (1993) (brackets and internal quotation marks omitted). The Supreme Court in *Darby* rejected Treasury's argument that this "postenactment legislative history" shines any light on the scope of a reviewing court's equitable discretion under the provisions of the APA that were enacted in 1946 and remain in force. *Id.*

Treasury also errs in seeking support for its position in the D.C. Circuit's controversial practice of sometimes remanding without vacatur in APA cases when an agency's decision is inadequately explained. *Compare Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993), *with Checkosky v. SEC*, 23 F.3d 452, 491 (D.C. Cir. 1994) (Randolph, J., dissenting); *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 758 (D.C. Cir. 2002) (Sentelle, J., dissenting). The crux of the debate over that practice turns on whether an agency's action is per se arbitrary and capricious—and thus must be "set aside"—when the agency fails to provide enough explanation to enable a reviewing court to understand its reasoning. The en banc Court need not take a position on that issue to conclude that, when an agency acts unconstitutionally, the reviewing court is required to give effect to Section 706's command that unlawful final agency actions "shall" be "set

aside."[2] No amount of explanation can cure the fact that FHFA was unconstitutionally structured when it imposed the Net Worth Sweep.

C. Treasury argues for the first time in this case in its supplemental en banc brief that Plaintiffs should be denied all relief based on laches. Treas. En Banc Br. at 38–39. By waiting this long, Treasury has forfeited the argument. In any event, laches would not provide a proper basis for affirming the district court even if the defense had been asserted in a timely manner. "Laches is a gap-filling doctrine, and where there is a statute of limitations, there is no gap to fill." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 961 (2017). Plaintiffs sued within the six-year statute of limitations that applies to APA claims, *see* 28 U.S.C. § 2401(a); *Louisiana State v. United States Army Corps of Eng'rs*, 834 F.3d 574, 580 (5th Cir. 2016), and the Supreme Court has "never applied laches to bar in their entirety claims for discrete wrongs occurring within a federally prescribed

[2] FHFA protests that Plaintiffs did not cite the APA in the constitutional count of the Complaint, FHFA En Banc Br. at 36, but Plaintiffs were not required to do so. *See Johnson v. City of Shelby*, 135 S. Ct. 346, 347 (2014) (per curiam) ("The federal rules effectively abolish the restrictive theory of the pleadings doctrine, making it clear that it is unnecessary to set out a legal theory for the plaintiff's claim for relief."); *Homoki v. Conversion Servs., Inc.*, 717 F.3d 388, 402 (5th Cir. 2013) ("So long as a pleading alleges facts upon which relief can be granted, it states a claim even if it fails to categorize correctly the legal theory giving rise to the claim").

limitations period," *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 680 (2014).

Environmental Defense Fund, Inc. v. Alexander is not to the contrary. 614 F.2d 474, 480 (5th Cir. 1980). The plaintiffs in that case waited *nine years* to challenge the widening of the navigation channel at issue—"a period of time well beyond the six-year statute of limitations provided for bringing civil actions against the United States," *Environmental Defense Fund, Inc. v. Alexander*, 467 F. Supp. 885, 905 (N.D. Miss. 1979).[3] The Court thus had no occasion to decide whether laches may defeat a federal claim filed within a statute of limitations specified by Congress. And although the Supreme Court suggested in dicta in *Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967), that the Government might be able to assert laches as a defense in an APA case, the Court has more recently cautioned that "applying laches within a limitations period specified by Congress would give

[3] The defendants in *Environmental Defense Fund* may have raised laches rather than the statute of limitations as a defense because the plaintiffs sought only equitable relief. *See Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). This Court later clarified that the six-year statute of limitations in 28 U.S.C. § 2401(a) applies to claims for equitable relief under the APA. *See Louisiana State*, 834 F.3d at 580; *see also Spannaus v. United States Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987) (Section 2401(a) generally "applies to all civil actions whether legal, equitable or mixed").

judges a 'legislation-overriding' role that is beyond the Judiciary's power." *SCA Hygiene Prods. Aktiebolag*, 137 S. Ct. at 960 (quotation marks omitted).

In any event, Treasury does not even attempt to demonstrate the type of prejudice that is necessary for a laches defense to succeed: "undue prejudice *to the defendant's ability to present an adequate defense*." *National Ass'n of Gov't Emps. v. City Pub. Serv. Bd.*, 40 F.3d 698, 704 (5th Cir. 1994) (emphasis added). Department of Justice lawyers have expressed constitutional concerns about agencies structured like FHFA since the Carter Administration, Memorandum Opinion for the General Counsel, Civil Service Commission, 2 Op. O.L.C. 120, 120 (1978), and the Net Worth Sweep has been the subject of active litigation since mid-2013, *see Fairholme Funds, Inc. v. FHFA*, No. 13-1053 (D.D.C.) (original complaint filed July 10, 2013). With Treasury fully apprised of both FHFA's constitutional infirmities and shareholders' strenuous objections to the Net Worth Sweep, it can hardly claim to have been taken by surprise when this suit was filed within the statute of limitations or to have been prejudiced in its ability to defend itself. Indeed, given the purely legal nature of the constitutional issues, it is difficult to conceive of a way in which Treasury could be prejudiced in mounting a defense.

Treasury complains that Plaintiffs' remedial proposal "would improperly deprive Treasury of valuable financial rights." Treas. En Banc Br. at 41. But prejudice for laches purposes cannot be established "merely because one loses what

otherwise he would have kept." *In re Bohart*, 743 F.2d 313, 327 (5th Cir. 1984). What is more, under our preferred remedy Treasury would retain the nearly $240 billion in dividends it has been paid under the Net Worth Sweep—an amount much larger than it would have been had Plaintiffs sued immediately—and valuable financial rights including common-stock warrants worth tens if not hundreds of billions more.

Nor can Treasury demonstrate the other essential element of a laches defense—that Plaintiffs unreasonably delayed filing this suit. *See National Ass'n of Gov't Emps.*, 40 F.3d at 704. It was "inherently reasonable" for Plaintiffs to sue within the statute of limitations period that Congress specified, *Grant v. Swarthout*, 862 F.3d 914, 919 (9th Cir. 2017), and that is so "regardless of the remedy sought," *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 798 (4th Cir. 2001). In any event, Plaintiffs did not act unreasonably in awaiting developments in other litigation over the Net Worth Sweep before deciding to go to the expense and trouble of filing their own lawsuit.[4] As Justice Brandeis explained long ago, where a defendant's actions inflict similar injuries on multiple persons, "it is not essential that each such person should intervene in the suit brought in order that he be deemed

[4] The Complaint in this case was filed in October 2016 and contains extensive factual allegations based upon internal FHFA and Treasury documents that the Government produced in litigation over the Net Worth Sweep in the Court of Federal Claims. The Government tenaciously resisted production and public disclosure of these documents, most of which became public in the summer of 2016.

thereafter free from the laches which bars those who sleep on their rights." *Southern Pac. Co. v. Bogert*, 250 U.S. 483, 490 (1919).

D. Treasury's arguments that it would be "unfair" to set aside the Net Worth Sweep likewise fail. Treasury's repeated assertion that it accepted "additional risk" in agreeing to the Net Worth Sweep is false. This revisionist history not only contradicts the allegations in the Complaint but fundamentally mischaracterizes how the Third Amendment changed the structure of Treasury's dividends. There is no scenario—none—where Treasury would make a penny less under the Net Worth Sweep than under the prior version of the PSPAs. Before the Net Worth Sweep, the Companies' net dividend payments to Treasury never exceeded their net worth—to the extent the Companies' net worth fell short of Treasury's 10% dividend, Treasury made up the difference by paying itself additional dividends via circular draws on its funding commitment. So, under the regime in place prior to the Net Worth Sweep, if the Companies' net worth were less than the 10% cash dividend, for example only $2 billion of net worth, then Treasury on a net basis received a dividend of $2 billion. Indeed, it is impossible for the Companies' net dividend payments to Treasury to decline as a result of a change that forces them to hand over their net assets and all future profits in perpetuity, as the Net Worth Sweep does. The "risk" of non-payment of dividends identified by Treasury is inherent in the concept of corporate equity since companies are never "obligated" to pay dividends and are in fact prohibited

from doing so when it would render them insolvent. And, of course, Treasury decided to accept that risk when it structured the original PSPAs as corporate equity investments rather than as debt.

Treasury also protests that if the Net Worth Sweep had not been adopted, it might have insisted on allowing capital to build up in the Companies rather than agreeing to permit the Companies to pay down the liquidation preference on Treasury's senior preferred stock. Treas. En Banc Br. at 40–41. But the Government's policy for every other financial institution it invested in during the financial crisis was to seek repayment. Moreover, Treasury's argument at most suggests that an alternative to Plaintiffs' remedial proposal would be to order Treasury to return the unlawful Net Worth Sweep dividends it has collected since 2013. Treasury nowhere suggests that it would prefer that solution to the far less disruptive method of setting aside the Net Worth Sweep that Plaintiffs advocate.

Treasury also complains that Plaintiffs' proposed remedy fails to account for the periodic commitment fee, but that fee could only have been charged and paid with FHFA's approval—approval that could not have been lawfully given while the agency was unconstitutionally insulated from presidential control. *See* ROA.228.

Treasury also warns that setting aside the Net Worth Sweep would upset the reliance interests of third parties, Treas. En Banc Br. at 37–38, but it never explains how any of the third parties it mentions—"the enterprises, their customers, and their

lenders"—relied on a decision to drain all of the capital out of the Companies to the benefit of no one except the Government. *Id.* at 37. Regardless, the upshot of Plaintiffs' remedial proposal would be to eliminate the dividends owed on Treasury's senior preferred stock going forward (since the liquidation preference would written down entirely), and there is no basis for concluding that any third party would object to a solution that would have the effect of putting the Companies on a path to returning to financial soundness in accordance with the fundamental purpose of conservatorship under HERA.

E. FHFA suggests for the first time that Plaintiffs' constitutional claim might be barred by 12 U.S.C. § 4617(f), FHFA En Banc Br. at 31, but on the very next page it steps back from that argument, acknowledging that the provision does not "by its own force . . . preclude constitutional claims from being litigated," *id.* at 32. That concession plainly is correct, for "if the FHFA were to act beyond statutory *or constitutional* bounds in a manner that adversely impacted the rights of others"—precisely what has happened here—Section 4617(f) "would not bar judicial oversight or review of its actions." *Leon County v. FHFA*, 700 F.3d 1273, 1278 (11th Cir. 2012) (emphasis added). FHFA's suggestion to the contrary reveals much about the extent to which FHFA perceives itself as empowered by Section 4617(f) to operate free from all legal constraints.

F. Plaintiffs previously argued that the acts of an unconstitutionally unaccountable federal agency head are void, and FHFA responds that this argument "necessarily presuppose[s] that the for-cause removal provision in HERA is *non*-severable." FHFA En Banc Br. at 27–28. FHFA's response misses the point of Justice Thomas's concurring opinion in *Murphy*, which is that it is possible for a court to grant relief in a constitutional case (for example, by setting aside the Net Worth Sweep) without proceeding to attempt to fix the statute by opining on what Congress would have done had it anticipated the court's constitutional ruling. *See Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1485–87 (2018) (Thomas, J., concurring). More fundamentally, FHFA continues to improperly conflate the severability and vacatur issues. Severability asks whether and how a court should alter a statute to cure the constitutional violation going forward. It has no bearing on what a court should do about past violations of the separation of powers, which is to vacate the underlying actions. Plaintiffs' insistence that the Net Worth Sweep must be vacated has no bearing on whether the for-cause removal provision is severable moving forward. Put simply, vacatur, which provides backward-looking relief, and severability, which is one form of forward-looking relief, are analytically distinct inquiries.

IV. The Net Worth Sweep Violated HERA.

Treasury says that Plaintiffs "all but abandon[ed]" their statutory claims by discussing this issue for only six pages in their supplemental en banc brief. Treas. En Banc Br. at 44. Not so. Plaintiffs' briefs to the en banc Court focus primarily on the issues that the parties were instructed to address in the Court's letter of November 15, 2018. But Plaintiffs continue to stand behind the statutory arguments made to the panel and fully agree with Judge Willett's dissent. Indeed, if anything the Court should consider deciding Plaintiffs' statutory claims first. It is undisputed that Plaintiffs have standing to assert those claims, and a ruling in Plaintiffs' favor on the statutory claims would clearly require vacatur of the Net Worth Sweep—thus allowing the Court to avoid deciding whether backward-looking relief should ever be granted to someone injured by an agency that operates without the constitutionally required degree of Presidential supervision.

Tellingly, neither Treasury nor FHFA is willing to stand up to the facts alleged in the Complaint. Instead, they devote multiple pages of their en banc briefs to a counternarrative of the events that led to the imposition of the Net Worth Sweep. But the Court should make no mistake: a ruling in Defendants' favor on the statutory claims would be a ruling that Congress authorized a government money grab designed to wipe out the Companies' private shareholders and prevent the

Companies from ever emerging from conservatorship as sound financial institutions as others did following the 2008 financial crisis.

V. HERA's Succession Clause Does Not Defeat Plaintiffs' Claims.

Treasury renews its argument that all of Plaintiffs' claims are derivative and contends that Plaintiffs "have made clear that the relief they seek will run to the corporations" by proposing a method for setting aside the Net Worth Sweep that could be given effect by accounting entries on the books of Treasury and the Companies. Treas. En Banc Br. at 13. This is wrong. Plaintiffs' proposal for setting aside the Net Worth Sweep would restore private shareholders to the Companies' capital structure. Where, as here, a plaintiff seeks injunctive relief rather than damages, the only way to determine to whom the relief flows is to consider whose injury it remedies. Accordingly, "courts have been more prepared to permit the plaintiff to characterize the action as direct when the plaintiff is seeking only injunctive or prospective relief." *Grimes v. Donald*, 673 A.2d 1207, 1213 (Del. 1996), *overruled on other grounds*, *Brehm v. Eisner*, 746 A.2d 244, 253 (Del. 2000). For example, *Gatz v. Ponsoldt* held that a shareholder's claim was direct where the plaintiff asked the court to unwind a transaction entered into by the corporation to the advantage of certain shareholders at the expense of others. 2004 WL 3029868, at *7–*8 (Del. Ch. Nov. 5, 2004) (unpublished). Plaintiffs seek similar relief. However the requested relief would affect the Companies, Plaintiffs would benefit

in a way that is unique and independent from the Companies, since the relief would restore the balance of value between Treasury's holdings and the other outstanding classes of stock.

Finally, in arguing that its interpretation of the Succession Clause does not violate due process, Treasury emphasizes the availability of judicial review to challenge the appointment of FHFA as conservator under 12 U.S.C. § 4617(a)(5). But neither Plaintiffs nor the Companies could have invoked that provision, which permitted judicial review during a 30-day window in 2008, to challenge an unconstitutional action FHFA took in 2012. That distinguishes this case from *Yakus v. United States*, 321 U.S. 414, 435 (1944)—a decision that "was motivated by the exigencies of wartime" and "turned on the fact that adequate judicial review of the validity of the regulation was available in another forum," *United States v. Mendoza-Lopez*, 481 U.S. 828, 838 n.15 (1987).

CONCLUSION

The district court's judgment should be reversed.

Date: January 16, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

This brief contains 5,946 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: January 16, 2019

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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 January 16, 2019 by using the appellate CM/ECF system. I certify that service will be accomplished on January 16, 2019 by the appellate CM/ECF system on the following:

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