UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

WAZEE STREET OPPORTUNITIES FUND IV, LP, *et al.*, Plaintiffs, v. THE FEDERAL HOUSING FINANCE AGENCY, *et al.*, Defendants.	Case No. 2:18-cv-03478-NIQA

FHFA DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND REPLY MEMORANDUM IN SUPPORT OF DISMISSAL

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INTRODUCTION

Plaintiffs' memorandum fails to overcome the fundamental jurisdictional defects with their claims, let alone justify the final judgment on the merits and extraordinary relief Plaintiffs seek. Plaintiffs treat the critical threshold issue of Article III standing as an afterthought, relegating it to cursory treatment at the end of their brief. Plaintiffs make no effort to deal with the well-reasoned opinion of another court dismissing all of the same claims raised here. *See Bhatti v. FHFA*, 332 F. Supp. 3d 1206 (D. Minn. 2018), *appeal docketed*, No. 18-2506 (8th Cir.). Nor do they confront the major obstacles that the Third Circuit's recent decision in *Jacobs v. FHFA*, 908 F.3d 884 (2018), places in their path.

Under prior leadership, FHFA argued in its motion to dismiss that Plaintiffs' Count I failed not only due to lack of standing, but also on the merits because FHFA's leadership structure, consisting of a single director removable only for cause, was constitutional. Since January 7, 2019, FHFA has been led by a new Acting Director, who has reconsidered the issues presented in this case. For the reasons discussed herein, it remains FHFA's position that Plaintiffs lack standing and it is unnecessary for this Court to reach the constitutionality of the for-cause removal provision in order to resolve this case and dismiss Plaintiffs' claims. To the extent the Court concludes it is necessary to reach the merits of the for-cause removal provision, FHFA will no longer defend the constitutionality of that provision. FHFA withdraws the arguments set forth in Section II.B of the Memorandum of Law in Support of FHFA Defendants' Motion to Dismiss (ECF 16), and agrees with the analysis in Section II.B of the Memorandum in Support of Motion to Dismiss by the U.S. Department of the Treasury (ECF 15-1) that the provision infringes on the President's control of executive authority.

Nevertheless, for the reasons explained elsewhere in FHFA's motion to dismiss, Treasury's motion to dismiss, and this memorandum, HERA's for-cause removal provision has nothing to do with the issues about which Plaintiffs complain, and provides no basis for awarding any relief to Plaintiffs on Count I or any other count. Therefore, the Court should grant FHFA's motion to dismiss and deny Plaintiffs' motion for summary judgment.[1]

ARGUMENT

I. PLAINTIFFS LACK STANDING TO CHALLENGE THE CONSTITUTIONALITY OF HERA'S FOR-CAUSE REMOVAL PROVISION.

As established in FHFA's motion to dismiss, Plaintiffs must demonstrate Article III standing for their constitutional claims. (ECF 16 at 8-9) ("FHFA Mem.").[2] That requirement is even more acute now that Plaintiffs are no longer merely resisting dismissal on the pleadings, but moving for entry of summary judgment, including far-reaching relief, in their favor. Injury-in-fact, traceability, and redressability "are not mere pleading requirements, but rather an indispensable part of the plaintiff's case" that "must be supported in the same way as any other

[1] With their memorandum of law, Plaintiffs filed a separate free-standing Statement of Material Facts in Support of Plaintiffs' Motion for Summary Judgment. (ECF 18-1). The Federal Rules of Civil Procedure and Local Rules of this Court do not call for such a statement or for a response by the party opposing summary judgment. Plaintiffs' statement, moreover, generally consists of legal conclusions or quotations from statutes or documents that speak for themselves, or assertions that are not material to the constitutional claims in this case. Should the Court find that a paragraph-by-paragraph response from the FHFA Defendants would nevertheless be helpful in adjudicating the issues presented, FHFA Defendants request leave to file such a response within seven days of an order granting such leave.

[2] "FHFA Mem." as used herein refers to the Memorandum of Law in Support of FHFA Defendants' Motion to Dismiss (ECF 16). "Pls.' Mem." refers to the Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendants' Motions to Dismiss (ECF 18). "Treasury Mem." refers to the Memorandum in Support of Motion to Dismiss by the U.S. Department of the Treasury (ECF 15-1).

matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). At summary judgment in particular, a plaintiff "can no longer rest on . . . mere allegations" to carry its burden to establish standing and jurisdiction. *Id.*

FHFA's opening memorandum demonstrated that, even at the pleading stage, Plaintiffs could not meet the traceability and redressability requirements for their removal-restriction claims. FHFA Mem. at 9-15. Plaintiffs treat those threshold issues as an afterthought, giving them only passing mention toward the end of their brief. Pls.' Mem. at 27-31. "Without jurisdiction," however, "the court cannot proceed at all in any cause," and "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Plaintiffs' cursory treatment of standing fails to establish traceability and redressability. And even if Plaintiffs had Article III standing, the unavailability of vacatur of the Third Amendment as relief for their removal-restriction claim would still preclude the judgment they seek.

A. Plaintiffs Do Not Have Article III Standing Because Traceability Is Lacking.

1. Article III's traceability requirement obligates Plaintiffs to establish a "causal connection between [their] injury" and the alleged constitutional violation. *N.J. Physicians, Inc. v. President of U.S.*, 653 F.3d 234, 238 (3d Cir. 2011). The problem for Plaintiffs here is that the notion that the Third Amendment had a "causal connection" with FHFA's *independence* from the Executive Branch contradicts the whole premise of their case: that FHFA entered into a transaction *with* the Executive Branch on terms that unduly *favored* the Executive Branch. FHFA Mem. at 9-11; *see Bhatti*, 332 F. Supp. 3d at 1213-14.

Plaintiffs try to shore up traceability by speculating that the Administration was only "willing to take the political risks" associated with the Third Amendment because FHFA was independent. Pls.' Mem. at 27. But the summary-judgment record is devoid of anything suggesting anyone perceived the Third Amendment as posing "political risks." The Complaint pleads the opposite: that the Administration publicly endorsed the Third Amendment, announcing on the day of adoption that "'every dollar of earnings that Fannie Mae and Freddie Mac generate will be used to benefit taxpayers'" and that it fulfills a "'commitment made in the Administration's 2011 White Paper.'" Compl. ¶ 41 (quoting Treasury press release). The Court should reject Plaintiffs' inverted logic, in which *greater* Administration control translates into a *lesser* likelihood that the Administration pursues its agenda. Plaintiffs also speculate that if the Obama Administration had greater control over FHFA, FHFA might hypothetically have implemented an Administration proposal "to reduce the principal on certain mortgages." Pls.' Mem. at 27. But Plaintiffs do not explain how reducing mortgage principal, which would have exacerbated the Enterprises' losses and made securing Treasury's backstop even more critical, would somehow have "obviated" the Third Amendment. *Id.*

Plaintiffs alternatively argue they do not need to "prove what the agency action would have been had it not been unconstitutionally structured." Pls.' Mem. at 27. That misses the point. The problem is not merely a lack of "precise proof." *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 512 n.12 (2010). It is that Plaintiffs' allegations are fundamentally at cross-purposes with any notion that "their injury—a Third Amendment that (in plaintiffs' view) is too favorable to the Executive Branch" is causally connected with a "lack of Executive Branch influence over FHFA." *Bhatti*, 332 F. Supp. 3d at 1213. The constitutional problem, according to Plaintiffs, is "the lack of any power by the President to overrule, directly or indirectly, a

decision by FHFA." Pls.' Mem. at 2. But the President had complete power to *directly overrule* the sole decision relevant here, by simply ordering Treasury not to enter into the transaction.

Plaintiffs' Complaint itself made clear that their theory is that the Third Amendment "was not really an 'agreement' between two different entities negotiating at arm's length, but was instead a unilateral action by two governmental entities acting in concert." Compl. ¶ 36. Their summary judgment memorandum goes even further, doubling down on the narrative that the Administration and Treasury Department were behind the Third Amendment. Plaintiffs insist that Treasury was a "*central actor* in the harm cause[d] to Plaintiff" and "*drove* the Third Amendment which wiped out Plaintiffs' shareholder rights and interest." Pls.' Mem. at 38 (emphasis added). According to Plaintiffs, "Treasury was involved in (if not the ultimate determiner of) the decision to place the companies into receivership." *Id.* In Plaintiffs' telling, it was Treasury that "imposed the Third Amendment on the Companies and took Plaintiff shareholders' rights and interests. . . . If not the tip of the spear, Treasury was certainly the shaft." *Id.* at 38-39. Plaintiffs cannot reconcile these allegations with the necessary predicate for traceability and standing: that FHFA's *independence* (the alleged constitutional violation) from Treasury made the Third Amendment (the alleged injury) *more* likely to happen.

The cases upon which Plaintiffs rely do not support their attempt to dispense with traceability. Plaintiffs rely on the principle that "[p]arty litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency *designated to adjudicate their rights*" without a need "to show . . . less favorable treatment than . . . if the agency were lawfully constituted." Pls.' Mem. at 28 (quoting vacated panel opinion in *Collins v. Mnuchin*, 896 F.3d 640, 654 (5th Cir. 2018)) (emphasis added here), *reh'g en banc pending*, 908 F.3d 151 (5th Cir. 2018); *see Buckley v. Valeo*, 424 U.S. 1,

117 (1976). But Plaintiffs do not and cannot assert that FHFA is "designated to adjudicate their rights." In non-adjudicatory settings, like the one here, it is axiomatic that standing requires a plaintiff challenging agency action to offer a plausible and coherent theory of how the alleged constitutional violation made the plaintiff worse off. *See*, *e.g.*, *Bond v. United States*, 564 U.S. 211, 225 (2011); *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 264 (1991); *Comm. for Monetary Reform v. Bd. of Governors of Fed. Res. Sys.*, 766 F.2d 538, 542-43 (D.C. Cir. 1985).

2. Plaintiffs' alleged injury lacks a causal connection to the for-cause removal provision because that provision did not apply to Acting Director DeMarco, who was responsible for the Conservator's entry into the Third Amendment. The provision governing removal of a *permanent Senate-confirmed Director*, 12 U.S.C. § 4512(b)(2), purports to confer for-cause protection; the neighboring provision concerning *acting directors*, § 4512(f), does not. FHFA Mem. at 11-12.[3]

Plaintiffs respond that Acting Director DeMarco nevertheless enjoyed for-cause removal protection because of a general pronouncement at the outset of the statute that FHFA is an "independent agency." 12 U.S.C. § 4511(a); *see* Pls.' Mem. at 16. But an agency can be considered "independent" in a wide variety of ways, of which for-cause removal protection is only one. *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 772 (2013) (identifying a "broad set of indicia of

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[3] As noted above, FHFA is not defending on the merits the constitutionality of the for-cause removal provision for permanent Senate-confirmed Directors in § 4512(b)(2). However, that makes no difference to the outcome of this case. Because the for-cause provision did not apply to the FHFA official who took the challenged action, that provision is irrelevant and this is not an appropriate case to test its constitutionality.

independence," and observing that "agenc[ies] commonly thought of as independent" do not share any particular "single feature—not even a for-cause removal provision"). Plaintiffs' request that the Court *infer* removal protection for FHFA acting directors from the general adjective "independent" flouts at least three canons of statutory construction: (1) that "specific language controls over general language," *West v. Keve*, 721 F.2d 91, 96 (3d Cir. 1983); (2) that inclusion of language in one subsection coupled with omission from a parallel subsection is presumed to be deliberate and to have significance, *Vorchheimer v. Philadelphian Owners Ass'n*, 903 F.3d 100, 107 (3d Cir. 2018); and (3) that statutes should be construed to avoid or minimize constitutional problems, *Brown v. City of Pittsburgh*, 586 F.3d 263, 274 (3d Cir. 2009); Datla & Revesz, 98 Cornell L. Rev. at 775 ("Article II of the Constitution assigns the executive power to the President, so a clear statement is generally required when Congress chooses to limit this power.").

Plaintiffs also emphasize that a Senate-confirmed FHFA Director covered by the then-in-effect for-cause standard later "defended" the Third Amendment in this and other litigation. Pls.' Mem. at 16. Far from establishing traceability, that point underscores the irrelevance of the for-cause removal provision to the matters of which Plaintiffs complain. The Third Amendment has been defended with equal vigor by two FHFA Acting Directors without for-cause removal protection, by a Senate-confirmed FHFA Director with removal protection, and by multiple Secretaries of the Treasury who all served at the pleasure of the President. Plaintiffs cannot draw any plausible link between their alleged injury and the for-cause removal provision, and they consequently lack standing to challenge the constitutionality of that provision.

3. Two of the three Plaintiffs, Brown and Wazee, lack standing for the additional reason that they acquired their stock in 2014 and 2016-17 respectively—well after the 2012 action that

by their account had already "expropriated . . . all the economic rights" associated with the stock and rendered it worthless (Pls.' Mem. at 8). Under bedrock standing principles, a party cannot voluntarily subject itself to an alleged violation and then invoke the power of the federal courts to adjudicate that issue. FHFA Mem. at 12.

Plaintiffs counter that under Delaware court decisions "shareholder rights run with the stock." Pls.' Mem. at 30. But state corporate law is irrelevant to the federal jurisdictional and separation-of-powers principles that underlie Article III, which do not apply in state court. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989). Plaintiffs Wazee and Brown lack standing because (a) the Third Amendment's impact, if any, on their stock prices was already absorbed before they purchased (negating injury-in-fact), and (b) Plaintiffs voluntarily purchased their shares with full awareness of the Third Amendment and the structural constitutional issues they allege (negating traceability). FHFA Mem. at 12. The Delaware-law principle that certain rights run with the stock does not bear on either of those shortcomings.

Even if Delaware law were relevant, rather than helping Plaintiffs on this point, it would simply confirm that their claims cannot proceed. "[L]ongstanding Delaware public policy" disfavors "the 'evil' of purchasing stock in order 'to attack a transaction which occurred prior to the purchase of the stock.'" *Omnicare, Inc. v. NCS Healthcare, Inc.*, 809 A.2d 1163, 1169 (Del. Ch. 2002) (quoting *Rosenthal v. Burry Biscuit Corp.*, 60 A.2d 106, 111 (Del. Ch. 1948)). Whether Plaintiffs' self-inflicted grievance is evaluated under the rubric of federal standing or under Delaware public policy, the result is the same: Plaintiffs Wazee and Brown have no basis for pursuing their claims for alleged injury that they voluntarily brought on themselves.[4]

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[4] Plaintiffs Wazee and Brown also state in passing that they have standing irrespective of the Third Amendment because they are "subject to the regulatory authority and rulings" of FHFA.

Footnote continued on next page

B. Vacatur of the Third Amendment Is Not an Available Form of Relief.

In addition to the lack of traceability, the remedy for the relevant constitutional defect—limitation of the President's removal power—does not include invalidation of FHFA actions like the Third Amendment. No court, including the Fifth Circuit panel decision in *Collins* upon which Plaintiffs rely extensively, has invalidated or enjoined past agency action on the ground that the official who took it could be removed by the President only for cause. That defeats redressability, a separate prerequisite for Article III standing, but even if it did not, it would still mean Plaintiffs simply cannot obtain the relief they hope to achieve through this case.

1. The Presence of an Unconstitutional Removal Restriction Does Not Invalidate an Agency's Past Actions.

a. Defendants' motion explained how the Supreme Court's most recent removal-restriction decision undermines Plaintiffs' request for invalidation. FHFA Mem. at 12-13; *Free Enterprise Fund*, 561 U.S. at 508-09. In *Free Enterprise Fund*, an accounting firm injured by PCAOB actions, including excessive auditing standards and a burdensome investigation, sought an order "nullifying and voiding" the "prior adverse action[s]" on the ground that restrictions on the President's ability to remove PCAOB members were unconstitutional. Compl. ¶¶ 69-80, p. 23, *Free Enterprise Fund v. PCAOB*, No. 1:06-cv-217-JR (D.D.C.), 2006 WL 316852. Although the Supreme Court held the removal restrictions unconstitutional, it specifically denied that relief, rejecting the premise that "the Board's 'freedom from Presidential oversight and control'

Footnote continued from previous page
Pls.' Mem. at 31. They do not identify the "rulings" they anticipate, and hedge funds and individuals who simply buy stock in the Enterprises are not regulated by FHFA. *See infra* at 17-18. In any event, the fact remains that they purchased their stock knowing full well the constitutional issues for which they now ask the Court to award extraordinary relief. The voluntary nature of that transaction breaks the link of causation no matter how they may conceptualize the injury that allegedly gives them standing.

rendered it 'and all power and authority by it' in violation of the Constitution." *Free Enterprise Fund*, 561 U.S. at 508 (citing complaint). The "existence of the Board [did] not violate the separation of powers"; rather, the problem was limited to the offending removal restriction, and the solution was simply to declare that provision invalid. *Id.* at 508-09.

Plaintiffs barely touch on *Free Enterprise Fund*. Plaintiffs note that the Court's analysis included "whether the Court should sever the unconstitutional [removal-restriction] provision." Pls.' Mem. at 18. But Plaintiffs are wrong in perceiving severability as irrelevant to the issue here. If a removal restriction is severable, that means other parts of the statute and the agency's underlying existence and activities are not compromised, hence the relief awarded is limited to a declaration of the invalidity of the removal restriction. *Free Enterprise Fund*, 561 U.S. at 508-09, 513. Plaintiffs do not attempt to rebut the presumption of severability and do not suggest HERA's for-cause language is somehow *non*-severable. That concession is fatal to Plaintiffs' position that vacatur of past FHFA actions is an available remedy for the severable removal restriction in this case.[5]

b. Even if vacatur of past agency action could in theory be a remedy for an unconstitutional removal restriction in certain cases, there are additional reasons why it does not

[5] Plaintiffs cannot fairly argue in reply that HERA's for-cause removal provision is non-severable because that would deprive FHFA Defendants of an opportunity to respond. *See*, *e.g.*, *Wilson v. Colvin*, 218 F. Supp. 3d 439, 452 (E.D. Pa. 2016) (holding that arguments "raised for the first time in Plaintiff's reply brief" are "waived"). Regardless, any such argument would be without merit. Like the statute in *Free Enterprise Fund*, HERA "remains fully operative as a law with [the] tenure restriction[] excised." 561 U.S. at 509 (internal quotation marks omitted). HERA's remaining provisions are "not incapable of functioning independently, and nothing in the statute's text or historical context" suggests Congress "would have preferred no [FHFA] at all" to an FHFA whose Director is "removable at will." *Id.* It does not matter that HERA lacks an express severability clause; neither did the statute in *Free Enterprise Fund*, and "the absence of a severability clause" does not "raise a presumption against severability." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987).

apply in *this case*. Since the goal of presidential removal power is simply to enable control of "the executive Power" that is the focus of Article II, to the extent vacatur is ever appropriate, it would be limited to actions that exercise that "executive Power" free of presidential supervision—not to conservator financial transactions like the Third Amendment. FHFA Mem. at 13-14; *see* U.S. Const. art. II, § 1. Contrary to Plaintiffs' contention that the Third Circuit's recent decision in *Jacobs* "undermine[s]" this argument (Pls.' Mem. at 14), that decision recognizes the Third Amendment's essential character as "an exercise of the Agency's power to take over Fannie and Freddie's assets and operate their businesses," including to "secure ongoing access to capital, manage debt loads, control cash flow, and decide whether and how to pay dividends." 908 F.3d at 890; *accord Saxton v. FHFA*, 901 F.3d 954, 960 (8th Cir. 2018) (Stras, J., concurring) (Third Amendment consisted of "renegotiat[ing] an existing lending agreement. . . . Fannie and Freddie owed money; the Net Worth Sweep changed the payment schedule and terms"). While *Jacobs* did not involve constitutional claims, that recognition contradicts the notion that the Third Amendment involved the type of sovereign executive activity, such as law enforcement, that the President must ultimately control.

To be sure, *Jacobs* noted that HERA also gave the Conservator "other powers" beyond those "inherited from [the Enterprises]." *Id.* at 894. But "it does not follow that [the Conservator's] actions are therefore governmental," let alone executive in nature. *Bhatti*, 332 F. Supp. 3d at 1226. "Legislatures can expand conservatorship and similar powers without transforming conservators into agents of government." *Id.* The issue is not whether the Enterprises could have entered into the Third Amendment on their own outside of conservatorship, but whether the character of the activity is such that the President must retain

plenary control over it. *Jacobs*' description of the nature of the Third Amendment correctly reflects that it was not of that character.

Plaintiffs' contention that the Third Amendment "was made possible and has been implemented by FHFA's exercise of its regulatory powers" is also wrong. Pls.' Mem. at 15. FHFA entered into the Third Amendment in its capacity as Conservator. *See* (ECF 16-1 (FHFA MTD Ex. A) at PDF pages 32, 39) (agreements are between Treasury and each Enterprise "acting through the Federal Housing Finance Agency . . . as its duly appointed conservator"); *id.* at 38, 46 (FHFA signature is as "its Conservator"). The general provisions Plaintiffs rely upon do not support their thesis that the Third Amendment was a regulatory action. *See* 12 U.S.C. § 4511(b) (providing simply that Director has "general regulatory authority over each regulated entity"); *id.* § 4513(a)(1)(B) (enumerating general duties of Director). Plaintiffs likewise err in assuming FHFA makes discrete approvals of contractually-required dividend payments to Treasury in FHFA's distinctive capacity as regulator.[6]

Regardless, for reasons already discussed and that Plaintiffs have not overcome, vacatur of past actions is not a proper remedy for an unconstitutional removal restriction no matter what

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[6] Because the considerations relevant to whether to approve a dividend under the regulation referenced by Plaintiffs are the same considerations that guide the Conservator in the performance of its duties in the first place, and because the Treasury agreements are recognized as an integral and foundational part of the conservatorships, FHFA has not seen it as necessary to engage in a second round of authorization, as regulator, of dividend payments under the Treasury agreements. In any event, non-approval under the regulation would simply result in Treasury's liquidation preference being increased by the same amount. Under the certificates of designation for the senior preferred stock owned by Treasury, "[t]o the extent not paid [timely in cash], dividends on the Senior Preferred Stock shall accrue and shall be added to the Liquidation Preference." (ECF 18-5, Pls.' Mem. Ex. C, at PDF page 33 of 66). Plaintiffs do not claim that they, as shareholders subordinate to Treasury's liquidation preference, would be any better off through accretion of the dividend to that liquidation preference compared to present payment to Treasury in cash.

may be the nature of that action. *See supra* at 9-10; FHFA Mem. at 12-13. That the challenged action here was by a Conservator—not even executive or regulatory in nature—simply reinforces that Plaintiffs' desired outcome of nullifying that action is a non-starter.

2. Plaintiffs' Authorities Are Inapposite.

The cases cited by Plaintiffs do not support invalidation of the Third Amendment. Plaintiffs rely principally on *Bowsher v. Synar*, 478 U.S. 714 (1986). But *Bowsher* was not a case about "the President's power to remove officers" as Plaintiffs claim. Pls.' Mem. at 17. The constitutional violation in *Bowsher* consisted of a novel automatic deficit-reduction process in which "an officer controlled by Congress . . . execut[ed] the laws," creating what amounted to a "congressional veto." 478 U.S. at 726. Thus, upon finding that "the automatic deficit reduction process" requiring the President to defer to the Comptroller General was "unconstitutional," the court naturally held that orders issued "pursuant to the unconstitutional automatic deficit reduction process" were "without legal force and effect." *Synar v. United States*, 626 F. Supp. 1374, 1404 (D.D.C. 1986), *aff'd*, 478 U.S. 714.

That is far different from this case. Plaintiffs' theory here is not that a specific unconstitutional process caused the Third Amendment, but rather that *any* action FHFA takes while the removal restriction is in effect itself becomes a constitutional violation, notwithstanding the lack of any connection between the agency's independence and the action. *Bowsher* offers no support for that sweeping proposition. On the contrary, the lower court observed that the Comptroller General had long performed a vast array of functions "as a legislative aid, in the performance of which he cannot in any proper sense be characterized as an arm or an eye of the executive." *Synar*, 626 F. Supp. at 1399 & n.29 (internal quotation marks omitted). There was no suggestion those actions were rendered invalid, but only the specific

functions assigned to him by the deficit-reduction statute—and as to those, only after searching analysis established their "executive nature." *Bowsher*, 478 U.S. at 733. That distinction underscores the irrelevance of Plaintiffs' theory to the Conservator's entry into the Third Amendment, which, like those other Comptroller General functions, was *not* of an executive nature. *See supra* at 10-13; FHFA Mem. at 13-14.

Moreover, unlike *Free Enterprise Fund* and this case, in *Bowsher* the statute expressly mandated that if any aspect of the scheme was found unconstitutional, the whole process would be null and the budget would have to be redone. *Synar*, 626 F. Supp. at 1381. Thus, the statute directly answered the severability and redressability questions, making it unnecessary to consider what type of remedy might have been available absent Congress's specification.

Plaintiffs' description of the remedy in *Bowsher* as "backward-looking" is also misleading. Pls.' Mem. at 18. That suit was brought in December 1985 "[w]ithin hours" of the statute's enactment; plaintiffs sought to enjoin a budget process that had not yet begun, and the litigation and budget process proceeded simultaneously. *Bowsher*, 478 U.S. at 719; *Synar*, 626 F. Supp. at 1377-78. The court order in *Bowsher* upon which Plaintiffs rely was issued on February 7, 1986, and it vacated a challenged sequestration order dated just six days earlier (February 1, 1986) that would not take effect for another month. 626 F. Supp. at 1377, 1404. That timeline bears no resemblance to this case filed six years after the challenged transaction.

Aside from *Bowsher*, Plaintiffs rely on cases vacating the outcomes of adjudications because the adjudicators were invalidly appointed. Pls.' Mem. at 17. "The appropriate remedy for an *adjudication* tainted with an *appointments violation* is a new hearing before a properly appointed official." *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) (internal quotation marks omitted; emphasis added). Plaintiffs' removal-restriction claim, however, involves neither an

appointments violation nor an adjudication. An invalid appointment means the judge lacks jurisdiction, which is universally acknowledged as a basis for reversal. In contrast, the existence of an (unenforceable) statute that purports to limit the President's ability to remove an official does not detract from that official's power to act.

The various other authorities Plaintiffs cite are equally wide of the mark. The Supreme Court vacated exercises of the legislative veto and line-item veto because, like the congressional veto in *Bowsher*, the very source of the exercised power was facially unconstitutional, and the plaintiffs challenged that exercise immediately (within days or weeks). *Clinton v. City of N.Y.*, 524 U.S. 417, 425 & n.9 (1998); *INS v. Chadha*, 462 U.S. 919, 936 (1983). *Slattery v. United States*, 583 F.3d 800 (Fed. Cir. 2009), and the other cases cited on page 15 of Plaintiffs' brief are takings cases that have no bearing on the separation-of-powers remedy issues presented here. The Federal Circuit's holding that the FDIC as receiver in that case constituted the United States for takings purposes has nothing to do with whether the Third Amendment was an exercise of the type of the sovereign executive authority that Article II reserves for presidential control.[7] *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995), used the term "prophylactic device" not in reference to remedies in removal-restriction cases, but to explain why final judgments of Article III courts must be protected from congressional interference on a "categorical" basis rather than subject to case-by-case balancing. *Id.*

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[7] Notably, Plaintiffs have filed a parallel action challenging the Third Amendment as an unconstitutional "taking" and on related grounds in the U.S. Court of Federal Claims, which action is currently pending. *Wazee Street Opportunities Fund IV LP et al. v. United States*, Case No. 18-1124 C (U.S. Ct. of Fed. Cl.). Plaintiffs are free to present their arguments under *Slattery* and other takings cases in that forum.

Lastly, Plaintiffs' reliance on language in the Administrative Procedure Act is misplaced. Plaintiffs have not brought any APA claim here. Even if they had, the general APA provision providing for setting aside "agency action . . . found to be . . . contrary to constitutional right, power, privilege, or immunity" would be inapplicable. 5 U.S.C. § 706. HERA's for-cause removal provision—the only thing alleged here to be contrary to any constitutional rights, powers, or privileges—is an act *of Congress*, not an "agency action." *See* 5 U.S.C. § 551(1)(A) ("'agency' . . . does not include . . . the Congress"). Nor was the Conservator's entry into the Third Amendment on behalf of the Enterprises "agency action"; the Conservator was not functioning as the Government with regard to that action. *Compare*, *e.g.*, *U.S. ex rel. Petras v. Simparel*, 857 F.3d 497, 502-04 (3d Cir. 2017) (holding that Small Business Administration, "when acting as a receiver" of a private firm, was "not acting as the Government," and relying largely on case law involving FHFA as Conservator of the Enterprises), *with* 5 U.S.C. § 551(1) ("'agency' means each authority of the Government of the United States"); *see also* FHFA Mem. at 14; supra at 10-13. And even if the Conservator's entry into the Third Amendment were deemed to constitute "agency action," *Free Enterprise Fund* makes clear that the separate and unrelated existence of the for-cause removal provision in the statute would not cause such action itself to be "contrary to constitutional right." *See Free Enterprise Fund*, 561 U.S. at 508-09; *supra* at 9-10.

C. The Unavailability of Vacatur Defeats Redressability.

The unavailability of vacatur of the Third Amendment as a remedy here means that Plaintiffs' alleged injury is not redressable via their claim, and they lack Article III standing. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court." *Steel Co.*, 523 U.S. at 107; *see also Warth v. Seldin*, 422 U.S. 490, 508 (1975) (redressability

hinges on whether plaintiff "*personally* would benefit *in a tangible way* from the court's intervention") (emphasis added). Plaintiffs' Complaint and summary judgment memorandum leave no doubt as to the source of their alleged injury: the Third Amendment, or as they sometimes call it, the "Net Worth Sweep." *See*, *e.g.*, Compl. ¶¶ 37 ("[T]he Third Amendment expropriated for the Government all of the economic rights held by the private shareholders of Fannie and Freddie."), 53 ("This action challenges the Third Amendment . . . ."); Pls.' Mem. at 2 ("The Net Worth Sweep thus effectively nationalized the Companies . . . ."). But the relief that would issue as a result of finding the for-cause removal provision unconstitutional—a declaratory judgment striking the for-cause language in the statute—would leave both the Third Amendment and that purported injury in place.

Plaintiffs remark in passing that "relief other than voiding the Third Amendment . . . would redress some of Plaintiffs' injury." Pls.' Mem. at 31. But they do not explain (a) what non-Third-Amendment-related injury they have suffered, (b) what other relief they seek, or (c) what portion of their unspecified injury would be redressed by that unspecified relief. While Plaintiffs rely on the Fifth Circuit panel's observation in *Collins* that "being subjected to enforcement or regulation by an unconstitutionally constituted body" may qualify as a separate "ongoing injury," 896 F.3d at 657-58, Plaintiffs do not and could not plausibly allege that they are subject to ongoing or future enforcement or regulation by FHFA. FHFA regulates the Enterprises, not remote shareholders of the Enterprises in Plaintiffs' position. To the extent Plaintiffs rely on FHFA's regulation of *the Enterprises* to support standing, that would simply reinforce that their claims are derivative and barred by HERA's transfer-of-shareholder-rights provision. Treasury Mem. at 8-13. As for Plaintiffs' *own* interests as shareholders, they identify

no injury flowing from anything other than the Third Amendment, the six-year-old action they claim totally "expropriated" their rights. Compl. ¶ 37.[8]

D. Even If Plaintiffs Had Standing, the Judgment They Seek Would Be Precluded By Law.

For the reasons discussed, Plaintiffs lack Article III standing. But whether or not the Court views the remedial considerations discussed above as having implications for Article III jurisdiction, in all events they plainly foreclose the ultimate relief Plaintiffs seek, *i.e.*, invalidation of the Third Amendment. With Plaintiffs having moved for judgment, this case is no longer at the threshold stage, and the parties agree the only thing left to do is to enter judgment for one side or the other. And regardless of standing, the judgment Plaintiffs seek is one that applicable substantive law precludes.

Whether as a matter of jurisdiction or of prudential restraint, the Court should not reach the merits of a constitutional question in a case where the answer has no impact on any concrete personal interest of the Plaintiffs. Even when standing is not in question, courts do not "reach out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 184 (1999). In no event should the Court grant any relief on Count I beyond a declaration that HERA's for-cause limitation on the President's ability to remove an

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[8] FHFA sought rehearing *en banc* of the Fifth Circuit panel's decision in *Collins* that the plaintiff shareholders there possessed standing based on ongoing regulation. The full Fifth Circuit granted both sides' petitions and heard argument on January 23, 2019, and its decision is pending. Regardless, under the *Collins* panel's rationale for standing, the sole relief would be a declaratory judgment that the for-cause removal provision in HERA is unconstitutional, and not the judgment Plaintiffs seek vacating the Third Amendment. *Collins*, 896 F.3d at 675-76.

FHFA Director is invalid and unenforceable, *i.e.*, the relief granted by the Fifth Circuit panel in *Collins*.

II. THE COURT SHOULD DISMISS PLAINTIFFS' APPOINTMENTS CLAUSE COUNT.

Plaintiffs' Count III, which asserts that Acting Director DeMarco's service violated the Appointments Clause of the Constitution, is barred by both lack of Article III standing and the *de facto* officer doctrine. It alternatively fails to state a claim on the merits. In their summary judgment brief, Plaintiffs abandon some of the appointment-related claims embedded in Count III, while attempting to add a new argument they did not plead. Rather than rehabilitating their case, however, that new argument introduces new and intractable justiciability problems. All of Plaintiffs' arguments fail as a matter of law. The Court should dismiss Count III, as the court did in *Bhatti* when confronted with precisely the same claims and arguments. *See Bhatti*, 332 F. Supp. 3d at 1217-25.

A. Plaintiffs Lack Standing.

Plaintiffs do not specifically address FHFA's standing arguments with respect to Count III, nor do they dispute that their standing depends on the premise that the Third Amendment was the type of activity in which only "Principal Officers" under the Constitution may engage. FHFA Mem. at 24-26; *see Buckley*, 424 U.S. at 139 (emphasizing that there is no constitutional problem with non-"Officers" performing functions "removed from the administration and enforcement of the public law"). Just as the Third Circuit's characterization of the business function of the Third Amendment in *Jacobs* confirms it was not the type of executive law-enforcement function that Article II reserves for presidential supervision, it likewise was not so central to administration and enforcement of the public law that it could only be handled by a "Principal Officer" confirmed by the Senate. *See Jacobs*, 908 F.3d at 890; *supra* at 10-12.

For this reason, a holding that Mr. DeMarco could not constitutionally exercise powers reserved for Senate-confirmed "Principal Officers" would have no relevance to the Third Amendment—which was not an exercise of such a power anyway—and would not be a basis for vacating it. Count III thus amounts to a request for an impermissible advisory opinion on a historical legal issue with no current significance to Plaintiffs. Article III of the Constitution does not countenance such a use of judicial resources.

B. The *De Facto* Officer Doctrine Applies.

As established in FHFA's motion to dismiss, Count III also is barred by the *de facto* officer doctrine. Plaintiffs' lengthy delay in bringing the claim fails the requirement that challenges to a federal officer's appointment or tenure be brought "at or around the time that the challenged government action is taken." *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 81-82 (D.C. Cir. 2015) (internal quotation marks omitted), *aff'd on other grounds*, 137 S. Ct. 929 (2017). Plaintiffs are seeking to unwind a transaction taken the better part of a decade ago, on account of an alleged defect in the tenure of an official gone from the agency for over five years, while in the meantime billions of dollars have been paid and the U.S. secondary mortgage market has functioned in reliance on Treasury's continuing quarter-trillion dollar commitment to keep the Enterprises afloat and operational.

The *de facto* officer doctrine is not limited to "merely technical" defects as Plaintiffs assert. Pls.' Mem. at 24. As the court observed in *Bhatti*, courts "employ the *de facto* officer doctrine to avoid invalidating the actions of officials, even when the officials' authority is challenged on constitutional grounds." 332 F. Supp. 3d at 1224. For example, the Supreme Court "accorded de facto validity" to the "past acts" of the Federal Election Commission in a constitutional challenge to that agency under the Appointments Clause. *Buckley*, 424 U.S. at

142; *see also FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708 (D.C. Cir. 1996) (observing that "[i]n *Buckley*, the Supreme Court accorded *de facto* validity to all FEC proceedings and allowed the FEC to continue to function" despite "severe" constitutional violation); *Citizens for the Abatement of Aircraft Noise, Inc. v. Metro. Wash. Airports Auth.*, 917 F.2d 48, 57 (D.C. Cir. 1990), *aff'd*, 501 U.S. 252 (1991). And just recently, the First Circuit held that the *de facto* officer doctrine insulated prior actions of the Financial Oversight and Management Board of Puerto Rico from attack, despite finding that members of that board were not appointed consistently with the Constitution. *Aurelius Inv., LLC v. Commonwealth of P.R.*, No. 18-1671, 2019 WL 642328, at **15-17 (1st Cir. Feb. 15, 2019). The court decisively rejected the plaintiffs' request for invalidation, observing that the board members "were acting with the color of authority" and significant disruption would ensue from "eliminat[ing] otherwise valid actions of the board." *Id.* at 52-53.

As the court in *Bhatti* also explained, the possible "limits on the *de facto* officer doctrine" suggested in the cases relied upon by Plaintiffs "only apply in challenges to judicial appointments." *Bhatti*, 332 F. Supp. 3d at 1224. Those cases exclusively "involved challenges by litigants to the power of the judicial officers who were presiding over their cases," *id.*, and any limiting language in them is expressly confined to the judicial context.[9] That distinction is

[9] *See Nguyen v. United States*, 539 U.S. 69, 77 (2003) ("Whatever the force of the *de facto* officer doctrine in other circumstances, an examination of our precedents concerning *alleged irregularities in the assignment of judges* does not compel us to apply it in these cases."); *Ryder v. United States*, 515 U.S. 177, 182-83 (1995) ("one who makes a timely challenge to the constitutional validity of the appointment of an officer *who adjudicates his case* is entitled to a decision on the merits"); *Glidden Co. v. Zdanok*, 370 U.S. 530, 535-36 (1962) (plurality opinion) (holding that appellate challenge to trial judge's authority on the grounds that implicate "policy concerning the *proper administration of judicial business*" is considered "jurisdictional") (all emphases added).

critical because "the disruption caused by invalidating a judgment on the basis of the invalidity of the judicial officer's appointment is no different from the disruption caused by overturning a judgment for any other reason. . . . [I]t is generally not a big deal." *Bhatti*, 332 F. Supp. 3d at 1224. Here, in contrast, Plaintiffs "are attempting to unwind the actions of an executive agency going back more than five years—actions of national (indeed, international) significance that have been the basis of trillions of dollars' worth of economic activity." *Id.* at 1225.

Moreover, the litigants in Plaintiffs' cases "raised their challenges . . . during the course of litigation." *Id.* at 1224. Indeed, such a challenge, which takes the form of an appeal or certiorari petition, typically must be brought within 14, 60, or 90 days of the adverse judgment under the relevant rules. Fed. R. App. P. 4 (14-day deadline for criminal notice of appeal, 60 days for civil appeal against the government); Sup. Ct. R. 13 (90-day deadline for certiorari petition). Those short windows are fully consistent with the *de facto* officer doctrine, which allows challenges "at or around the time that the challenged government action is taken." *SW Gen.*, 796 F.3d at 81-82. Here, the protracted period during which Plaintiffs sat on their hands and held back their Appointments Claim from prior Third Amendment suits exceeded that benchmark by a multiple of at least 24 and potentially as high as 156.

Plaintiffs cannot take refuge in their having filed on the last day of a general six-year statute of limitations. As the *Bhatti* court explained, and Plaintiffs once again ignore, "[t]he private interests served by statutes of limitation cannot be compared to the need for a stable, functioning government." *Bhatti*, 332 F. Supp. 3d at 1225. The overarching statute of limitations covering all "civil action[s] commenced against the United States," 28 U.S.C. § 2401, does not take account of the unique policy considerations that undergird the *de facto* officer doctrine, and does not obviate application of that doctrine.

In short, this is the very type of case that illustrates why the *de facto* officer doctrine exists. The Court should dismiss Count III without need for further analysis.

C. Any Suggestions that Mr. DeMarco's Designation Was Void *Ab Initio* Are Either Abandoned or Directly Foreclosed By Precedent.

One paragraph within Count III asserts that, aside from the duration of Mr. DeMarco's service as Acting Director, he was never properly designated as Acting Director in the first place because "President Obama chose Mr. DeMarco from among three possible candidates to serve as FHFA's acting director, all of whom were inferior FHFA officers selected by the outgoing Director." Compl. ¶ 97. FHFA's motion to dismiss explained why that theory is untenable. FHFA Mem. at 28-29. Plaintiffs' opposition brief is silent on these points. Any such claims are therefore waived. *See*, *e.g.*, *Lada v. Delaware Cnty. Cmty. Coll.*, 2009 WL 3217183, at *10 (E.D. Pa. Sept. 30, 2009).

Plaintiffs' brief includes a conclusory statement that Mr. DeMarco's designation violated the Constitution because "there are only two mechanisms in the Constitution for appointing principal officers: the Appointments Clause and the Recess Appointments Clause." Pls.' Mem. at 24. But that argument disregards what Plaintiffs acknowledge elsewhere in their brief: that "the Supreme Court allows inferior officers to assume the duties, responsibilities, and powers of principal officers" on a temporary acting basis without being "'thereby transformed into the superior and permanent official.'" Pls.' Mem. at 3 (quoting *United States v. Eaton*, 169 U.S. 331, 343 (1898)); *see also id.* at 20 (agreeing that acting officials are constitutional insofar as they may serve "for a limited time"). Plaintiffs' suggestion that lack of Senate confirmation or a

recess appointment made it impossible for Mr. DeMarco ever to serve as Acting Director, even on the date of his designation, is simply incompatible with *Eaton*.[10]

D. Plaintiffs' Recess Appointment Analogy And Proposed Implicit Two-Year Limit On Acting Officials Are Unsupported.

Plaintiffs' primary attack on Mr. DeMarco is not that he could never serve as Acting Director at all, but that he served as Acting Director too long. Plaintiffs' Complaint pleaded that Mr. DeMarco's service was too long based on a single rationale: "[t]he Recess Appointments Clause, which provides for the temporary filling of certain offices, limits the duration of those [appointments] to the end of the Senate's [next] session," *i.e.*, "at most, two years." Compl. ¶¶ 95, 96. However, as established in FHFA's motion to dismiss, and held by the Court in *Bhatti*, the Recess Appointments Clause is inapplicable to Mr. DeMarco because he served as an Acting Director, not as a recess appointee. FHFA Mem. 29-32; *Bhatti*, 332 F. Supp. 3d at 1221.

Plaintiffs respond that recess appointments and acting designations "both are ways a person may serve as a principal officer of the United States without Senate confirmation for a 'limited time' or 'temporary' time" and consequently are "analogous." Pls.' Mem. at 21. That is

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[10] The only authority Plaintiffs cite for this suggestion is a concurring opinion by Justice Thomas in *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 945-49 (2017). However, that opinion was not joined by any other Justice and therefore does not constitute a holding of the Supreme Court. Moreover, Justice Thomas's view that Senate confirmation was necessary for an acting general counsel of the NLRB appears to have been driven by the *duration* of that acting general counsel's service. *See id.* at 946 n.1. To that extent, the argument is without merit for the reasons discussed in FHFA's opening memorandum and below. To the extent Justice Thomas's reasoning was intended to suggest the acting general counsel's service violated the Appointments Clause *from the outset*, it is inconsistent with *Eaton*. In all events, the challenge in *SW General* would have been precluded by the *de facto* officer doctrine anyway if there had been as long a delay bringing it there as in this case. *See SW Gen.*, 796 F.3d at 82 (holding that *de facto* officer doctrine did not apply only because appointments challenge was raised contemporaneously as defense in NLRB administrative proceeding), *aff'd*, 137 S. Ct. 929.

wrong. Acting officials do *not* serve as principal officers. *See Designation of Acting Solicitor of Labor*, 26 Op. O.L.C. 211, 214-15 (2002) ("An acting official does not hold the office, but only performs the functions and duties of the office. He is not appointed to the office, but only directed or authorized to discharge its functions and duties, and he receives the pay of his permanent position, not of the office in which he acts."). Moreover, the very specific condition necessary for a recess appointment—a bona fide "Recess of the Senate"—is distinct from the range of circumstances that can prompt a need to designate an acting official. *See SW General*, 137 S. Ct. at 935 ("The President may not promptly settle on a nominee to fill an office; the Senate may be unable, or unwilling, to speedily confirm the nominee once submitted.").

Most importantly, the two situations are also not comparable because "expirat[ion] at the End of [the Senate's] next session" is the *only* durational limit on a recess appointment, and Congress lacks any power to vary it. U.S. Const. art. II, § 2, cl. 3. In contrast, Congress has total control over how long acting officials can serve. *See SW General*, 137 S. Ct. at 935 (detailing history of legislated time limits); 5 U.S.C. § 3346. As the court in *Bhatti* reasoned, "[t]he unlimited constitutional power to make recess appointments is therefore unlike the limited statutory power to designate acting officials." *Bhatti*, 332 F. Supp. 3d at 1221. Plaintiffs offer no response. Nor do Plaintiffs make any effort to rebut FHFA's arguments (FHFA Mem. at 31-32) that their theory, if accepted, would necessarily imply the invalidity of a host of other statutes and acting officials reaching far beyond this situation, which underscores its lack of plausibility. The Recess Appointments Clause analogy fails.

E. Plaintiffs' New Unpled Reasonableness Claim Fails.

Implicitly recognizing that their Recess Appointments Clause analogy is unsound, Plaintiffs' opposition brief argues that Mr. DeMarco's service was unconstitutional on an

alternative basis absent from their complaint: not because it surpassed an arbitrary two-year marker, but because it was longer than "reasonable under the circumstances" based on factors such as "the President's ability to devote attention" to the nomination of a permanent Director and his "desire to appraise the work of an Acting Director." Pls.' Mem. at 22-23; *see* FHFA Mem. at 32 n.5. As Plaintiffs may not amend their complaint through arguments in briefs, the Court should disregard the new claim on this basis alone. *Pa. ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 181 (3d Cir. 1988); *Collins v. Kimberly-Clark Pa., LLC*, 247 F. Supp. 3d 571, 596 n.19 (E.D. Pa. 2017).

To the extent the Court might decide to entertain the new claim, it should be dismissed, as in *Bhatti*, on the ground that it presents a "non-justiciable political question." *Bhatti*, 332 F. Supp. 3d at 1218. While the Department of Justice's Office of Legal Counsel has advised in published opinion letters to the Executive Branch that the President should make nominations within a "reasonable" time, no court has ever found this to be an actionable standard in litigation. As the court explained in *Bhatti*, "a dispute will be found non-justiciable" where there is "'a lack of judicially discoverable and manageable standards for resolving it'" or "where it is not possible to resolve the dispute 'without an initial policy determination of a kind clearly for nonjudicial discretion." 332 F. Supp. 3d at 1218 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). "Both of these concerns are implicated here." *Id.* In particular:

> The OLC opinions on which plaintiffs rely illustrate why the "reasonable under the circumstances" test is not a judicially discoverable or manageable standard. Applying that standard would require a judge to assess the functioning of the entire Executive Branch and the changing state of the nation (actually, the world) throughout the length of the acting officer's tenure to determine at what point, if ever, the length of the officer's service became unreasonable. These assessments are far outside the competency of the judiciary and would require delving into areas–such as "the President's ability to devote attention to the matter" and his "desire to appraise the work of an Acting Director"–that are not normally the

> subject of judicial inquiry. Moreover, these assessments would involve "initial policy determination[s] of a kind clearly for nonjudicial discretion."

Id. at 1218-19.

Indeed, foremost among the factors bearing on reasonableness would be the "difficulty of finding suitable candidates" for the permanent nomination. *Dep't of Energy—Appointment of Interim Officers—Dep't of Energy Org. Act*, 2 Op. O.L.C. 405, 410 (1978). Delving into such matters would require the Court to evaluate some of the most delicate and privileged matters in the Executive Branch: a President's efforts and processes for considering and selecting high-level appointees. Such judicial exploration would raise profound separation-of-powers concerns of its own. *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 381 (2004). As the *Bhatti* court remarked, "it is difficult to imagine what such litigation would look like or how the normal tools of discovery would operate. ('Mr. President, I see that you spent two hours meeting with the ambassador from Aruba on March 23. Wasn't it more important for you to devote attention to the affairs of the FHFA?')." 332 F. Supp. 3d at 1219-20.

Plaintiffs acknowledge they "are unaware" of the "particular reason" the President did not make a nomination other than the one that failed. Pls.' Mem. at 23. And that is precisely the problem: the parties and Court are all unaware of salient facts, and there is no judicially manageable way of gaining that awareness and enabling the reasonableness of the President's nomination efforts to be tested in a courtroom.

Plaintiffs insist that the question of "how long is too long" presented by their claim is "essentially the same type of question the Court resolved with respect to how long an intra-session recess must be to allow the President to make recess appointments" in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). Pls.' Mem. at 23-24 n.9. But that analogy is refuted by *Bhatti*, which Plaintiffs again ignore. "Unlike the reasonableness of DeMarco's tenure, . . . the meaning

of 'recess' is a static question of law that is capable of prospective determination." *Bhatti*, 332 F. Supp. 3d at 1220. The justiciability problem here does not stem from the temporal nature of the issue, but from the unsuitability for judicial evaluation of the President's and Senate's nomination and confirmation efforts in a particular situation.

Plaintiffs' "reasonable under the circumstances" claim is also unsound because it "would throw the functioning of the government into intolerable uncertainty." *Bhatti*, 332 F. Supp. 3d at 1219. Plaintiffs' admission that the standard would be "malleable" (Pls.' Mem. at 23) hints at the morass that would ensue. As the *Bhatti* court explained,

> Because the conditions under which an acting officer serves are continually changing, it would be impossible to know, in advance, how long those conditions would justify an acting officer's continued service. Nor would it even be possible–as conditions fluctuate from day to day, week to week, month to month–to contemporaneously identify the moment at which the acting officer's tenure became too long. The passage of yet more time would be necessary to put those changes in perspective.
>
> As a result, none of those who had business before or were being affected by the agency–not private individuals, not businesses, not other governmental agencies, not members of Congress, not even the President himself–would have any way of knowing whether the acting officer who was heading the agency had lost his or her authority to act on the agency's behalf. Instead, they would have to order their affairs with the knowledge that, at some point years later, a judge acting with the benefit of hindsight might pronounce the length of the tenure unreasonable and pick an essentially arbitrary point beyond which the officer's actions will be deemed invalid.

Bhatti, 332 F. Supp. 3d at 1219. In short, that would be "no way to run a government." *Id.*

If the Court nevertheless finds the "reasonable under the circumstances" claim justiciable, it should still dismiss the claim on the merits. Plaintiffs have moved for summary judgment and disclaim any need for discovery before resolution of the claim. The pleaded and judicially noticeable facts easily establish the reasonableness of the President's nomination efforts, and *a fortiori* Mr. DeMarco's service as Acting Director in August 2012, under the OLC factors.

When the vacancy arose in 2009, with the country still reeling from recession, the Enterprises' future (and thus FHFA's future role as their Conservator and regulator) was uncertain. Despite the self-evident problems such uncertainties would create in finding qualified nominees willing to serve, President Obama nominated an FHFA Director in the year after the vacancy arose, only to see that nomination rejected by the Senate in a highly polarized political environment. Compl. ¶ 65; FHFA Mem. at 4. The next time the President submitted a nomination, for a sitting Member of Congress, it took seven months and the historic abolition of the filibuster for that nomination to be approved by the narrowest of party-line margins. Compl. ¶ 65; FHFA Mem. at 6. Given this fractious climate, and Plaintiffs' own allegations that the President sparred with Mr. DeMarco over policy issues unrelated to the Third Amendment, giving the President ample incentive to replace him, *see* Compl. ¶¶ 67-69, there is no basis to suspect the amount of time it took to fill the office was attributable to anything other than factors outside the President's control.

Moreover, the three years Mr. DeMarco had served as Acting Director as of August 2012 are not outside the range of times for which other subordinate officials have acted in senior posts, going back many decades and presidential administrations. *See* FHFA Mem. at 32. Contrary to Plaintiffs' rhetoric, these examples are offered not in an attempt to "overturn" Supreme Court precedent (Pls.' Mem. at 23), but to illustrate that Plaintiffs' novel interpretation of that precedent is out of sync with both reality and the longstanding consensus among the political branches. Even if these illustrative instances may not be "old enough or frequent enough" to satisfy Plaintiffs (*id.*), they plainly show Mr. DeMarco's tenure was not remotely the aberration Plaintiffs portray.

The Court should accordingly dismiss Plaintiffs' Appointments Clause claim for any or all of the reasons discussed above.

III. THE COURT SHOULD DISMISS PLAINTIFFS' NONDELEGATION CLAIMS.

Plaintiffs' nondelegation claims fail because FHFA as Conservator did not exercise legislative powers—or any other form of sovereign, governmental power—when it entered into the Third Amendment. FHFA Mem. at 32-35. In response, Plaintiffs once again rely heavily on language in the Third Circuit's *Jacobs* decision noting that HERA conferred powers on the Conservator beyond those inherited from the Enterprises themselves, and authorized the Conservator to act in the "public interest." Pls.' Mem. at 25-26.

As already discussed in the context of Plaintiffs' other claims, Plaintiffs have *Jacobs*'s significance backward. The Third Circuit held that the Third Amendment was an exercise of Conservator's power "to take over Fannie and Freddie's assets and operate their businesses," including to "secure ongoing access to capital, manage debt loads, control cash flow, and decide whether and how to pay dividends. . . . in essence a renegotiation of an existing lending agreement (albeit with equity rather than debt)." *Jacobs*, 908 F.3d at 890. That is fatal to Plaintiffs' nondelegation claims because "these are the types of activities that any conservator would typically undertake, not exercises of governmental power." *Bhatti*, 332 F. Supp. 3d at 1226.

Moreover, Plaintiffs fail to explain why the fact that powers are conferred by a statute and are exercised in accordance with the public interest renders those functions so distinctively *governmental* that it becomes a constitutional violation for anyone other than the Government to engage in them. "Legislatures can expand conservatorship and similar powers without transforming conservators into agents of government." *Bhatti*, 332 F. Supp. 3d at 1226. And

nothing forbids non-sovereign entities from acting with the public interest in mind: "Fannie and Freddie themselves were created to accomplish a number of governmental objectives for the national housing market, and yet no one disputes that they are private entities." *Id.*[11]

HERA also abounds with the sort of "intelligible principles" that courts have long held sufficient to avoid any nondelegation concerns. FHFA Mem. at 35-36; *Bhatti*, 332 F. Supp. 3d at 1227-28. Plaintiffs' only response is that many relevant HERA provisions give FHFA "permissive, discretionary authority." Pls.' Mem. at 26 (quoting *Perry Capital*, 864 F.3d 591, 607 (D.C. Cir. 2017)). That overlooks Congress's clear direction in HERA that "[t]he need for preferences or priorities" favoring the Government, among other factors, "shall" be taken into account in connection with infusion of taxpayer funds. 12 U.S.C. §§ 1455(*l*), 1719(g).

In any event, Plaintiffs cite no authority excluding statutory provisions that "state what FHFA 'may' do or 'may' consider" (Pls.' Mem. at 26) from serving as intelligible principles. The U.S. Code is replete with provisions authorizing, but not requiring, agencies to take certain actions or to consider certain factors. The very case upon which Plaintiffs rely emphasizes that "Congress is *not* confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers." *Mistretta v. United States*, 488 U.S. 361, 379 (1989) (quoting *Yakus v. United States*, 321 U.S. 414, 425-26 (1944)) (emphasis added here); *see Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001) (the Supreme Court has "never demanded . . . that statutes provide a 'determinate criterion'"—a statement of "how much is too

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[11] Plaintiffs do not suggest—because they cannot—that the Third Amendment is remotely similar to the tiny handful of instances where courts have found impermissible private delegations. *See Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (statute empowering private company to impose regulations with force of law binding on its competitors).

much"). Courts routinely reject nondelegation challenges to statutory grants framed in permissive and mandatory language alike.[12]

IV. PLAINTIFFS HAVE ABANDONED COUNT II.

Plaintiffs' Complaint included a Count II alleging that FHFA's structure is unconstitutional because "Congress likely has no ability to direct or supervise the agency" due to FHFA's funding through assessments on the regulated entities, and because HERA contains certain limitations on judicial review. Compl. ¶¶ 89, 90. FHFA's motion to dismiss established that FHFA's funding mechanism and HERA's limitations on judicial review do not pose any constitutional problems. FHFA Mem. § I.C. While FHFA no longer defends the constitutionality of the for-cause removal provision on the merits, FHFA maintains its position that these other aspects of its structure are not problematic. Plaintiffs' memorandum did not attempt to support the claim that FHFA is unconstitutional due to insulation from congressional oversight or judicial review. Therefore, the Court should treat Count II as abandoned, regardless of whether Plaintiffs ever had standing to bring it in the first place. *See*, *e.g.*, *Lada*, 2009 WL 3217183, at *10 ("To put it simply: plaintiffs who fail to brief their opposition to portions of motions to dismiss do so at the risk of having those parts of the motions to dismiss granted as uncontested.").

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[12] *See*, *e.g.*, *Yakus*, 321 U.S. at 420 (rejecting nondelegation challenge to statute authorizing President to set prices that "*in his judgment* will be generally fair and equitable and will effectuate the purposes of this Act"); *United States v. Amirnazmi*, 645 F.3d 564, 577 (3d Cir. 2011) (rejecting nondelegation challenge to statute providing that "the President *may*, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—investigate, regulate, or prohibit" a range of activities in case of national emergency); *Defs. of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 127 (D.D.C. 2007) (upholding statute authorizing agency to grant waivers of laws as "*he determines* necessary to ensure expeditious construction'' of barriers on Mexico border) (internal quotation marks omitted) (all emphases added).

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

FHFA adopts and incorporates by reference the arguments set forth in Section I of Treasury's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Treasury's Motion to Dismiss (ECF 29) that Plaintiffs' claims are derivative in character and barred by HERA's transfer-of-shareholder-rights provision.

CONCLUSION

The Court should grant the FHFA Defendants' motion to dismiss, deny Plaintiffs' motion for summary judgment, and enter judgment for Defendants.

Dated: February 15, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2019, I filed and served via the Court's ECF system a true and correct copy of the foregoing documents.

/s/ Leslie M. Greenspan
Leslie M. Greenspan