No.

In the Supreme Court of the United States

STEVEN T. MNUCHIN, SECRETARY OF THE TREASURY, ET AL., PETITIONERS

v.

PATRICK J. COLLINS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

During the national housing crisis of 2008, the Federal Housing Finance Agency (FHFA) exercised its authority under a federal statute to appoint itself as conservator of Fannie Mae and Freddie Mac. FHFA, as conservator, negotiated agreements with the Department of the Treasury under which Treasury committed to investing billions of dollars in the enterprises in return for compensation consisting, in part, of fixed dividends. In 2012, after numerous quarters in which the enterprises' dividend obligations exceeded their total earnings—forcing the enterprises to draw more money from Treasury just to pay the dividends—FHFA and Treasury negotiated the Third Amendment to their agreements. The Third Amendment replaced the fixed dividend with a variable quarterly dividend equal to the enterprises' net worth minus a specified capital reserve. The questions presented are:

1. Whether the statute's anti-injunction clause, which precludes courts from taking any action that would "restrain or affect the exercise of powers or functions of the Agency as a conservator," 12 U.S.C. 4617(f), precludes a federal court from setting aside the Third Amendment.

2. Whether the statute's succession clause—under which FHFA, as conservator, inherits the shareholders' rights to bring derivative actions on behalf of the enterprises—precludes the shareholders from challenging the Third Amendment.

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellees below) are the Department of the Treasury; the Federal Housing Finance Agency; Steven T. Mnuchin, in his official capacity as Secretary of the Treasury; and Mark A. Calabria, in his official capacity as Director of the Federal Housing Finance Agency.*

Respondents (plaintiffs-appellants below) are Patrick J. Collins, Marcus J. Liotta, and William M. Hitchcock.

RELATED PROCEEDINGS

United States District Court (S.D. Tex.):

Collins v. *Mnuchin*, 16-cv-3113 (May 22, 2017)

United States Court of Appeals (5th Cir.):

Collins v. *Mnuchin*, 17-20364 (Sept. 6, 2019)

Supreme Court of the United States:

Collins v. *Mnuchin*, 19-422 (Sept. 25, 2019)

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* Former Secretary of the Treasury Jacob L. Lew was a defendant in the district court. Secretary Steven T. Mnuchin replaced him in the district court. Former Director of the Federal Housing Finance Agency Melvin L. Watt was a defendant in the district court and an appellee in the court of appeals. Former Acting Director Joseph M. Otting and, later, Director Mark A. Calabria replaced him in the court of appeals.

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The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-147a) is reported at 938 F.3d 553. The opinion of the court of appeals panel (App., *infra*, 150a-253a) is reported at 896 F.3d 640. The memorandum and order of the district court (App., *infra*, 254a-267a) are reported at 254 F. Supp. 3d 841.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 4617(f) of Title 12 of the United States Code states:

> Except as provided in this section or at the request of the Director, no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver.

Section 4617(b)(2)(A) of Title 12 of the United States Code states:

> The Agency shall, as conservator or receiver, and by operation of law, immediately succeed to—(i) all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity; and (ii) title to the books, records, and assets of any other legal custodian of such regulated entity.

STATEMENT

A. Factual Background

1. Congress created the Federal National Mortgage Association (Fannie Mae or Fannie) in 1938 and the Federal Home Loan Mortgage Corporation (Freddie Mac or Freddie) in 1970. See App., *infra*, 6a. Those enterprises operate in the secondary mortgage market primarily by buying home loans from private lenders, pooling some of those loans into mortgage-backed securities, guaranteeing timely payment on those securities, and selling those securities to private investors. See *ibid*. By buying loans from lenders, the enterprises provide funds to those lenders that the lenders can then use to make additional loans. And by bundling loans into securities backed by the enterprises' credit guarantees,

the enterprises attract investors who might not otherwise have invested in mortgages, thereby expanding the pool of funds available for housing loans. The enterprises are publicly traded companies with private shareholders, but they operate under congressional charters and have long benefited from the perception that the federal government would intervene to support their obligations if they were to experience financial difficulties. See *Jacobs* v. *Federal Hous. Fin. Agency*, 908 F.3d 884, 887 (3d Cir. 2018).

In 2008, Fannie and Freddie suffered overwhelming losses because of a marked decline in home prices and a sharp increase in defaults on home loans. *Perry Capital LLC* v. *Mnuchin*, 864 F.3d 591, 599 (D.C. Cir. 2017), cert. denied, 138 S. Ct. 978 (2018). The enterprises lost more in 2008 ($108 billion) than they had earned in the previous 37 years combined ($95 billion). App., *infra*, 6a-7a. The enterprises needed to raise more capital in order to stay in business—but private investors were unwilling to provide that capital. *Perry Capital*, 864 F.3d at 601. At the time, the enterprises' mortgage portfolios were worth approximately $5 trillion, or nearly half the national mortgage market. App., *infra*, 6a. The enterprises' failure would have had catastrophic effects for the national housing market and the economy.

2. In July 2008, Congress enacted the Housing and Economic Recovery Act of 2008 (Recovery Act or Act), Pub. L. No. 110-289, 122 Stat. 2654. Through the Act, Congress created the Federal Housing Finance Agency (FHFA or Agency) to regulate Fannie and Freddie. 12 U.S.C. 4511. FHFA is headed by a single Director, appointed by the President with the advice and consent

of the Senate. 12 U.S.C. 4512(a) and (b)(1). The Director serves a five-year term, but the President may remove him sooner for cause. 12 U.S.C. 4512(b)(2).

The Recovery Act provides that FHFA may, "at the discretion of the Director," appoint itself as "conservator or receiver" for Fannie and Freddie "for the purpose of reorganizing, rehabilitating, or winding up the affairs" of those enterprises. 12 U.S.C. 4617(a)(2). By appointing itself as conservator, FHFA obtains broad powers over the enterprises. 12 U.S.C. 4617(b). For example, it "immediately succeed[s] to * * * all rights, titles, powers, and privileges of the [enterprises] and of any stockholder, officer, or director of such [enterprises] with respect to the [enterprises] and the[ir] assets." 12 U.S.C. 4617(b)(2)(A). It may "take over the assets of and operate the [enterprises]," "conduct all business of the [enterprises]," and "transfer or sell any asset or liability of the [enterprises]." 12 U.S.C. 4617(b)(2)(B)(i) and (G). The Act further provides that the "Agency may, as conservator, take such action as may be—(i) necessary to put the [enterprises] in a sound and solvent condition; and (ii) appropriate to carry on the business of the [enterprises] and preserve and conserve the assets and property of the [enterprises]." 12 U.S.C. 4617(b)(2)(D). FHFA may act "in the best interests of the [enterprises] or the Agency." 12 U.S.C. 4617(b)(2)(J)(ii).

The Recovery Act separately grants the Department of the Treasury "temporary" authority to "purchase any obligations and other securities issued by" Fannie and Freddie—though only on terms that "protect the taxpayer" and "provide stability to the financial markets" —as well as the authority to "exercise any rights received in connection with such purchases." 12 U.S.C.

1455(*l*)(1)(A), (2)(A), (D), and 1719(g)(1)(A)-(B) (capitalization and emphasis omitted). That authorization "made it possible for Treasury to buy large amounts of Fannie and Freddie stock, and thereby infuse them with massive amounts of capital to ensure their continued liquidity and stability." *Perry Capital*, 864 F.3d at 600.

Finally, the Recovery Act limits judicial review of FHFA's exercise of its powers. It provides that the enterprises may sue to challenge FHFA's initial decision to appoint itself as conservator or receiver (if they do so within 30 days of the appointment), and that a court may order FHFA to "remove itself as conservator or receiver." 12 U.S.C. 4617(a)(5)(A). The Act further provides that, "[e]xcept as otherwise provided in [Section 4617] or at the request of the Director, no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver." 12 U.S.C. 4617(f).

3. On September 6, 2008, FHFA appointed itself as conservator of both Fannie and Freddie. App., *infra*, 162a. One day later, FHFA, in its capacity as conservator of the enterprises, entered into agreements with Treasury under which Treasury committed to buy up to $100 billion in stock in each enterprise. *Ibid.* In return for its commitment, Treasury received various forms of compensation—including priority over other stockholders in getting its investment back if the enterprises were later liquidated, periodic fees, and dividends at a fixed rate. *Ibid.* Critically, the size of the dividends each enterprise owed was tied to the amount of money Treasury had invested in the enterprise; it did not vary with the enterprise's profits. *Ibid.*

Treasury's initial commitment to provide up to $100 billion to each enterprise soon proved to be inadequate.

In May 2009, FHFA and Treasury amended the purchase agreements to increase Treasury's investment commitment to $200 billion for each enterprise. App., *infra*, 163a. Then, in December 2009, FHFA and Treasury amended the agreements again to make the investment commitment unlimited through the end of 2012, at which point the size of the commitment would become fixed. *Ibid.*

Between 2009 and 2011, the dividends that the enterprises owed to Treasury repeatedly exceeded their quarterly earnings by billions of dollars. Resp. C.A. ROA 952-953. The enterprises therefore had to draw more money from Treasury just to pay Treasury's dividends. *Jacobs*, 908 F.3d at 888. Under the dividend formula established by the agreements with Treasury, however, drawing more money from Treasury meant increasing the size of future dividends. *Ibid.* That vicious cycle—drawing money to pay dividends, in turn enlarging the dividends—was particularly troubling because the size of Treasury's commitment was scheduled to become fixed, and therefore finite, at the end of 2012. By early 2012, the dividends that the enterprises owed Treasury had reached nearly $19 billion a year, exceeding their projected income and threatening their solvency. Resp. C.A. ROA 952-953.

Accordingly, in August 2012, Treasury and FHFA amended the purchase agreements a third time. The Third Amendment replaced the previous fixed dividend (tied to the size of Treasury's investment) with a variable dividend (tied to the enterprises' net worth). App., *infra*, 14a. Under the new formula, Treasury's dividend each quarter would equal the amount, if any, by which the enterprises' net worth exceeded a specified capital reserve. *Ibid.* "In simple terms, the Third Amendment requires Fannie and Freddie to pay quarterly to Treasury a dividend equal to their net worth—however much or little that might be. Through that new dividend formula, Fannie and Freddie would never again incur more debt just to make their quarterly dividend payments, thereby precluding any dividend-driven downward debt spiral. But neither would Fannie or Freddie be able to accrue capital [above the reserve allowed by the agreement] in good quarters." *Perry Capital*, 864 F.3d at 602. In the Third Amendment, Treasury also agreed to suspend the periodic fees that it was owed under the original agreements. See *Roberts* v. *Federal Hous. Fin. Agency*, 889 F.3d 397, 404-405 (7th Cir. 2018).

B. Proceedings Below

1. In October 2016, over four years after Treasury and FHFA agreed to the Third Amendment, three shareholders (respondents here) challenged the Amendment in federal district court. The shareholders raised three statutory claims challenging the Third Amendment: that FHFA had exceeded its authority under 12 U.S.C. 4617(f) as conservator, that Treasury had exceeded its authority under 12 U.S.C. 1455(*l*) to buy securities, and that Treasury had acted arbitrarily and capriciously in violation of the Administrative Procedure Act (APA), 5 U.S.C. 702. The shareholders also claimed that FHFA's structure—a single head removable only for cause—violates the Constitution.

2. The district court dismissed the statutory claims, granted the government's motion for summary judgment on the constitutional claim, and denied the shareholders' cross-motion for summary judgment on the constitutional claim. See App., *infra*, 254a-267a. The court first held that the Recovery Act's anti-injunction clause barred the statutory claims, reasoning that the

"adoption of the Third Amendment falls within FHFA's statutory conservatorship powers." *Id.* at 262a (citation omitted). The court also rejected the shareholders' constitutional claims, reasoning that "a 'for cause' removal provision" complies with the Constitution even where the provision protects "a single director" rather than "a multimember board." *Id.* at 267a.

3. A fractured panel of the court of appeals affirmed in part and reversed in part. App., *infra*, 150a-253a. In a per curiam opinion, the court first affirmed the district court's dismissal of the shareholders' statutory claims. *Id.* at 167a. The court explained that "the D.C., Sixth, and Seventh Circuits ha[d] all rejected" statutory challenges to the Third Amendment, and it adopted "the same well-reasoned basis common to those courts' opinions." *Ibid.* Turning to the constitutional claim, the court concluded that the Recovery Act violated the Constitution by making FHFA's single Director removable only for cause, but that the proper remedy for that violation was to declare unconstitutional the statutory provision addressing removal, not to invalidate the Third Amendment. *Id.* at 167a-216a.

Judge Haynes joined the panel's opinion in full. App., *infra*, 150a n.1. Chief Judge Stewart joined the panel's statutory holding, but dissented from its constitutional holding. *Id.* at 217a-221a. Judge Willett joined the panel's constitutional holding, but dissented from its statutory holding. *Id.* at 222a-253a.

4. The court of appeals, rehearing the case en banc, affirmed in part and reversed in part. App., *infra*, 1a-147a. A majority of the en banc court reversed the dismissal of the statutory claim against FHFA, while affirming the dismissal of the statutory claims against Treasury. *Id.* at 18a-51a. A different majority held that

FHFA's structure violated the Constitution. *Id.* at 52a-64a, 65a n.1. A third majority held that the appropriate remedy for the constitutional violation was to declare unconstitutional the removal provision, not to invalidate the Third Amendment. *Id.* at 65a-72a.

a. The court of appeals addressed the shareholders' statutory claims by a vote of 9-7, in an opinion by Judge Willett. App., *infra*, 18a-51a. The court reversed the dismissal of the shareholders' statutory claim against FHFA, remanding the case so that the district court could determine "if fact issues require trial or if summary judgment should be granted." *Id.* at 51a. At the same time, the court of appeals affirmed the district court's dismissal of the shareholders' statutory claims against Treasury. *Id.* at 32a-33a.

The court of appeals first rejected the government's contention that the Recovery Act's anti-injunction clause—which forbids a court from taking "any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or receiver," 12 U.S.C. 4617(f)—forecloses the shareholders' statutory claims. See App., *infra*, 18a-25a. The court asserted that the clause "distinguishes improperly exercising a power (not restrainable) from exercising one that was never authorized (restrainable)." *Id.* at 19a. The court concluded that "whether the anti-injunction provision bars relief * * * depends entirely on whether the [Third Amendment] exceeded FHFA's statutory conservatorship powers." *Id.* at 25a.

Turning to that question, the court of appeals held that the shareholders "stated a plausible claim that the Third Amendment exceeded statutory authority." App., *infra*, 46a. The court reasoned that FHFA, as conservator, had the authority to preserve and conserve the enterprises' assets, but that only a receiver, not a conservator, had the authority to "liquidate" those assets. *Id.* at 37a; see *id.* at 33a-45a. Relying on the shareholders' allegations, the court concluded that, in adopting the Third Amendment, FHFA improperly "abandoned rehabilitation in favor of 'winding down'" the enterprises. *Id.* at 46a-47a. The court emphasized that the Third Amendment grants Treasury "a right to the [enterprises'] net worth in perpetuity" and that the shareholders' complaint included allegations suggesting (in the court's view) that FHFA designed the Third Amendment with the intent "to deprive Fannie and Freddie of all their capital." *Id.* at 47a, 50a (brackets and citation omitted). The court acknowledged that its decision "conflicts with at least some other circuits." *Id.* at 50a-51a.

The court of appeals also rejected the government's alternative argument that the shareholders' statutory claims were independently foreclosed by the Recovery Act's succession clause—under which FHFA, as conservator, "immediately succeed[s] to * * * all rights * * * of any stockholder * * * with respect to the [enterprises] and assets of the [enterprises]," 12 U.S.C. 4617(b)(2)(A). See App., *infra*, 25a-32a. The court acknowledged that the succession clause prohibits shareholders from bringing derivative claims on behalf of the enterprises while the enterprises remain in conservatorship. *Id.* at 26a. The court concluded, however, that the succession clause did not preclude the shareholders from bringing direct claims against FHFA, and that the shareholders' challenge to the Third Amendment was a direct claim, not a derivative one. *Id.* at 27a-32a. The court emphasized that FHFA's acts had allegedly injured the shareholders as "residual claimants of [the enterprises'] value" and that the shareholders had brought their claims under the APA. App., *infra*, at 29a.

Finally, the court of appeals affirmed the district court's dismissal of the shareholders' claims that the Third Amendment exceeded Treasury's authority and was otherwise arbitrary and capricious. App., *infra*, 32a-33a. The court concluded that the shareholders were outside the zone of interests protected by the statutory provisions they invoked, and that their claims under those provisions were accordingly barred. *Ibid.*

Judge Haynes, writing for seven judges, dissented from the court of appeals' reversal of the dismissal of the statutory claim against FHFA. App., *infra*, 108a-113a. The dissenters agreed with the "five other circuits" that have rejected statutory challenges to the Third Amendment. *Id.* at 108a. Given the Recovery Act's "extensive" grant of authority, the dissenters concluded that FHFA "acted within its statutory powers when it adopted" the Third Amendment. *Ibid.*

b. In an opinion by Judge Willett, writing for the same nine judges who reversed the dismissal of the statutory claim against FHFA, the court of appeals held that the shareholders were entitled to summary judgment on their claim that the structure of FHFA violated the Constitution. App., *infra*, 52a-64a. The court first concluded that the shareholders had standing to challenge the structure of FHFA, reasoning that the shareholders had suffered an injury in fact ("pumping large profits to Treasury instead of restoring the [enterprises'] capital structure") that was "traceable to the removal protection" and that was redressable by "vacatur" of the Third Amendment. *Id.* at 53a-54a. The court also concluded that the succession clause did not bar the constitutional challenge, reasoning that the clause did not speak with the clarity needed to foreclose judicial review of a constitutional claim. *Id.* at 55a-56a. Turning to the merits, the court held that the Act's "for-cause removal protection infringes Article II" because it "limits the President's removal power." *Id.* at 56a. The court acknowledged that this Court had upheld a for-cause removal provision in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), but reasoned that the "exception" to the removal power recognized in that case "applie[s] only to multi-member bodies of experts," not to FHFA's single Director. App., *infra*, 56a.

Judges Southwick, Haynes, and Graves concurred in that judgment. App., *infra*, at 65a n.1. In a joint opinion concurring in part and dissenting in part, Judges Oldham and Ho explained that the constitutional holding accorded with the original meaning of the Constitution and with this Court's precedents. *Id.* at 76a-101a. Judge Higginson, writing for four judges, dissented from the constitutional holding on the merits. *Id.* at 114a-127a. Judge Costa, writing for two judges, dissented from the constitutional holding on the additional ground that the shareholders lacked standing to challenge the constitutionality of FHFA's structure. *Id.* at 128a-139a.

c. In an opinion by Judge Haynes and by a vote of 9-7, a different majority of the court of appeals held that the appropriate remedy for the constitutional violation was to sever and declare unconstitutional the provision governing the removal of FHFA's Director, not to invalidate the Third Amendment. App., *infra*, 65a-72a. The court emphasized that "the President had adequate oversight" of the adoption of the Amendment: The Secretary of the Treasury "was subject to at will removal by the President," meaning that the President "had plenary authority to stop the adoption of the [Third Amendment]" if he wanted to do so. *Id.* at 69a. The court concluded: "This is thus a unique situation where we need not speculate about whether appropriate presidential oversight would have stopped the [Third Amendment]. We know that the President, acting through the Secretary of the Treasury, could have stopped it but did not." *Id.* at 69a-70a.

The court of appeals also observed that, although the shareholders sought invalidation of the Third Amendment, they did not seek invalidation of any other parts of the agreements. App., *infra*, at 67a. That, the court continued, was "because the rest of the deal [wa]s a pretty good one for them: who would not want a virtually unlimited line of credit from Treasury?" *Ibid.* The court concluded that the shareholders were not entitled to "pick and choose among remedies based on their preferences," unwinding the parts of the agreements that they dislike but not the parts that they prefer. *Ibid.*

Judge Willett, writing for seven judges, dissented from that remedial holding. App., *infra*, at 140a-147a. In their joint opinion concurring in part and dissenting in part, Judges Oldham and Ho asserted that the court of appeals' remedial holding violated the Constitution. *Id.* at 101a-107a.

5. On September 25, 2019, the shareholders filed a petition for a writ of certiorari seeking review of the court of appeals' constitutional and remedial holdings. See *Collins* v. *Mnuchin* (No. 19-422). The government plans to file a brief in opposition to that petition.

REASONS FOR GRANTING THE PETITION

This case is one of several challenges to FHFA's decision, as conservator of Fannie Mae and Freddie Mac, to renegotiate the enterprises' financial obligations to Treasury, a critical investor whose commitment of hundreds of billions of dollars of taxpayer funds is responsible for the enterprises' continued operation. The court of appeals' resolution of that challenge is wrong, creates conflicts with the decisions of several other courts of appeals, and has significant practical importance.

To start, the court of appeals erred in reversing the dismissal of the shareholders' challenge to the Third Amendment. The Recovery Act's anti-injunction clause prohibits courts from taking any action that would "restrain or affect the exercise of powers or functions of the Agency as a conservator." 12 U.S.C. 4617(f). That clause forecloses this statutory challenge to the Third Amendment, because the renegotiation of the enterprises' financial obligation to Treasury, the enterprises' most important investor, falls within the core of FHFA's powers and functions as conservator. The Recovery Act's succession clause separately prohibits shareholders from pursuing derivative actions on behalf of the enterprises during the conservatorship. See 12 U.S.C. 4617(b)(2)(A)(i). This lawsuit qualifies as a derivative action, because the alleged harm in this case is a harm to each corporation rather than to individual shareholders and because any relief would flow to the corporations rather than to individual shareholders.

The court of appeals' statutory ruling also creates two separate circuit conflicts. The court's interpretation of the anti-injunction clause creates a conflict with the decisions of the five other courts of appeals to address the issue; all of those courts have held that the clause bars statutory challenges to the Third Amendment. And its interpretation of the succession clause creates a conflict with the decisions of the two other courts of appeals to address the issue.

Finally, the court of appeals' decision is of immense practical importance. The decision below raises the possibility that the Third Amendment will be set aside, with significant financial implications for the federal government, the enterprises, and market participants. In addition, legal uncertainty resulting from the decision may frustrate the federal government's proposed and ongoing efforts to reform the housing finance system and to end the ongoing conservatorships of the enterprises. The government therefore respectfully requests that the Court grant this petition for a writ of certiorari and resolve this case this Term.

A. The Court Of Appeals Erred In Holding That The Anti-Injunction And Succession Clauses Allow The Shareholders To Maintain Their Claim Against FHFA

1. As every court of appeals to consider the issue apart from the court below has held, the Recovery Act's anti-injunction clause forecloses a statutory challenge to the Third Amendment. See *Jacobs* v. *Federal Hous. Fin. Agency*, 908 F.3d 884, 889-896 (3d Cir. 2018); *Robinson* v. *Federal Hous. Fin. Agency*, 876 F.3d 220, 227-235 (6th Cir. 2017); *Roberts* v. *Federal Hous. Fin. Agency*, 889 F.3d 397, 402-406 (7th Cir. 2018); *Saxton* v. *Federal Hous. Fin. Agency*, 901 F.3d 954, 957-959 (8th Cir. 2018); *Perry Capital LLC* v. *Mnuchin*, 864 F.3d 591, 604-614 (D.C. Cir. 2017), cert. denied, 138 S. Ct. 978 (2018).

a. The anti-injunction clause provides: "Except as provided in [Section 4617] or at the request of the Director, no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver." 12 U.S.C. 4617(f). Like similarly worded provisions in other statutes, that clause permits judicial review, if at all, only where FHFA "engage[s] in an activity" that is "outside its statutory powers" as conservator or receiver. *Ward* v. *Resolution Trust Corp.*, 996 F.2d 99, 103 (5th Cir. 1993); see *Perry Capital*, 864 F.3d at 605-606; *Gross* v. *Bell Savings Bank PA SA*, 974 F.2d 403, 407 (3d Cir. 1992). Where FHFA is "engaging in a kind of activity in which it is expressly authorized by statute to engage," a court may not review its decision, even if a challenger alleges that the Agency is "improperly or even unlawfully exercising [that] function or power." *Ward*, 996 F.2d at 103. Put simply, "as long as [FHFA] is 'exercising judgment under one of its enumerated powers,' * * * the courts may not enjoin the activities of [FHFA] merely because someone alleges that it is not 'running the troubled institution's affairs in a legal manner.'" *Ibid.* (quoting *Gross*, 974 F.2d at 408) (brackets omitted).

The Recovery Act authorizes FHFA, as conservator, to use a broad range of means to preserve the enterprises' assets and promote the enterprises' solvency. For example, FHFA inherits "all rights, titles, powers, and privileges" previously vested in the enterprises and their directors, officers, and shareholders. 12 U.S.C. 4617(b)(2)(A)(i). FHFA may "take over the assets" of the enterprise, "operate" the enterprise, "conduct all business" of the enterprise, "perform all functions of the [enterprise] in the name of the [enterprise] which are consistent with the appointment as conservator," and "preserve and conserve the assets and property" of the enterprise. 12 U.S.C. 4617(b)(2)(B). In addition, FHFA may "take such action as may be—(i) necessary to put the [enterprise] in a sound and solvent condition;

and (ii) appropriate to carry on the business of the [enterprise] and preserve and conserve the assets and property of the [enterprise]." 12 U.S.C. 4617(b)(2)(D).

The Third Amendment falls well within the range of activities authorized by the Recovery Act. "Before the Third Amendment, * * * Fannie and Freddie sometimes had to draw funds from the Treasury just to pay the Treasury's dividend. That dug Fannie and Freddie deeper and deeper into the hole, increasing their future dividend obligations while also reducing their available funds." *Jacobs*, 908 F.3d at 890 (citation omitted). In the Third Amendment, FHFA renegotiated the enterprises' financial obligations to Treasury, putting an end to that vicious cycle, ensuring that the enterprises would not owe $19 billion in annual dividends regardless of their ability to pay, and preserving the finite funding commitment available to the enterprises. "Renegotiating dividend agreements, managing heavy debt and other financial obligations, and ensuring ongoing access to vital yet hard-to-come-by capital are quintessential conservatorship tasks designed to keep the Companies operational." *Perry Capital*, 864 F.3d at 607; see *Jacobs*, 908 F.3d at 890; *Saxton*, 901 F.3d at 960-961 (Stras, J., concurring).

b. The court of appeals' contrary reasoning is flawed. The court did not deny that, as a general matter, the Recovery Act authorizes FHFA to renegotiate the enterprises' financial obligations in order to secure ongoing access to Treasury's extraordinary commitment of capital. The court instead concluded, in light of the shareholders' allegations, that the particular terms to which FHFA agreed in the Third Amendment violated the law. Under the anti-injunction clause, however, the court had no power to make that determination. The clause forbids courts from reviewing whether FHFA is "improperly or even unlawfully exercising a function or power" granted by the statute; as long as FHFA is "'exercising judgment under one of its enumerated powers,'" a court may not review whether FHFA used that power in "'a legal manner.'" *Ward*, 996 F.2d at 103 (brackets and citation omitted). Here, the clause prohibits the courts from "second-guess[ing] either the dividend-allocating terms that FHFA negotiated on behalf of the [enterprises], or FHFA's business judgment that the Third Amendment better balances the interests of all parties involved." *Perry Capital*, 864 F.3d at 614-615. The court of appeals' contrary theory—under which the applicability of the anti-injunction clause "depends entirely" on the merits of the statutory challenge to the action, App., *infra*, 25a—drains the anti-injunction clause of virtually all independent effect. But "[i]t cannot be presumed that any clause * * * is intended to be without effect." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

In any event, the court of appeals' statutory objections to the Third Amendment fail on their own terms. First, the court asserted that the Third Amendment was tantamount to a liquidation of the enterprises, a function that FHFA could perform only as receiver, not as conservator. App., *infra*, 46a-48a. That is incorrect. Seven years after the adoption of the Third Amendment, the enterprises remain going concerns with trillions of dollars in assets. See *Perry Capital*, 864 F.3d at 602. There is no way to reconcile that simple reality with the suggestion that the enterprises have now been liquidated. Put simply, "neither Fannie nor Freddie is in liquidation." *Jacobs*, 908 F.3d at 892.

Second, the court of appeals asserted that, because the Third Amendment grants Treasury "a right to the [enterprises'] net worth in perpetuity," it violates FHFA's duty as conservator to put the enterprises in a "'sound and solvent condition'" and "'preserve and conserve' [the enterprises'] assets." App., *infra*, 47a (quoting 12 U.S.C. 4617(b)(2)(D)). But the relevant statutory provision states only that "[t]he Agency *may*, as conservator, take such action as *may be*" necessary to promote solvency and appropriate to conserve assets. 12 U.S.C. 4617(b)(2)(D) (emphasis added). Congress used the word "may" because it will often be uncertain whether a particular business decision will in fact prove necessary to promote the enterprises' solvency or appropriate to preserve and conserve their assets. "The Agency 'may' exercise [its] powers 'as appropriate,' so [a court should] ask only whether the Agency picked a suitable action, not the best alternative." *Jacobs*, 908 F.3d at 890 (citation omitted).

FHFA's action here satisfies that test. Before the adoption of the Third Amendment, the enterprises were trapped in a vicious cycle under which they had to draw more money from Treasury just to pay Treasury's dividends, in turn increasing the size of those dividends. See p. 6, *supra*. The Third Amendment helped preserve and conserve the enterprises' assets by ending that cycle, by curtailing the enterprises' rising dividend obligations, by suspending the periodic fees owed to Treasury, and by reducing the likelihood that the enterprises would prematurely exhaust Treasury's remaining commitment. The Third Amendment also shifted significant risk from the enterprises to Treasury; if the enterprises lost money in a given quarter, Treasury would receive no dividend under the new formula, forgoing the billions of dollars that it would have received under the old formula. Accordingly, "even assuming that a mandatory [and judicially reviewable] duty to preserve and conserve assets exists, the FHFA's decision to enter the [Third Amendment] did not violate it." *Saxton*, 901 F.3d at 961 (Stras, J., concurring).

Third, the court of appeals asserted that the Third Amendment was "inconsistent with conservatorship's common-law meaning" and contradicted the principles of "traditional conservatorship." App., *infra*, 48a-49a. That emphasis on traditional conservatorship was misplaced. A "traditional conservator" must "act solely in [the ward's] interests." *Jacobs*, 908 F.3d at 893. FHFA, by contrast, may consider the public's interest. After all, Congress created the enterprises to serve the public interest, see 12 U.S.C. 1716; it allowed Treasury to invest taxpayer funds in the enterprises to serve the public interest, see 12 U.S.C. 1455(*l*)(1)(B); and it expressly authorized FHFA to consider interests beyond those of the enterprises when acting as conservator, see 12 U.S.C. 4617(b)(2)(J)(ii). FHFA struck a permissible balance among the relevant interests when it renegotiated the enterprises' financial obligations and ensured that they retained "ongoing access to vital yet hard-to-come-by capital." *Perry Capital*, 864 F.3d at 607.

2. As two other courts of appeals have held, the Recovery Act's succession clause independently precludes shareholders from challenging FHFA's adoption of the Third Amendment. See *Perry Capital*, 864 F.3d at 623-628; *Roberts*, 889 F.3d at 408-410.

a. The succession clause provides that FHFA "shall, as conservator or receiver, and by operation of law, immediately succeed to * * * all rights, titles, powers, and privileges of the [enterprise], and of any stockholder, officer, or director of such [enterprise] with respect to the [enterprise] and the assets of the [enterprise]." 12 U.S.C. 4617(b)(2)(A)(i). One of the traditional rights of a shareholder is the right, in some circumstances, to bring a "derivative action"—a mechanism "by which a single stockholder may sue in the corporation's right" where the corporation's officers have refused to "pursue a remedy." *Koster* v. *(American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522 (1947). At a minimum, the succession clause transfers the right to bring derivative lawsuits on behalf of each enterprise from the shareholder to FHFA as conservator—as the court below acknowledged, and as other courts of appeals have held. See App., *infra*, 26a; *Perry Capital*, 864 F.3d at 623; *Roberts*, 889 F.3d at 408.

This challenge to the Third Amendment is a derivative action. A lawsuit constitutes a derivative action if (1) the corporation, rather than the suing shareholder, suffered the alleged harm and (2) recovery would flow to the corporation, rather than to individual shareholders. *Roberts*, 889 F.3d at 409 (citing *Tooley* v. *Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004)). This lawsuit rests on an allegation that the Third Amendment has harmed the corporations: The shareholders assert that the Third Amendment "forc[ed] * * * [the] *Companies* to turn over their entire net worth" to Treasury and that it "pushes *the Companies* to the edge of insolvency by stripping the capital out of the Companies on a quarterly basis." C.A. ROA 8, 22 (emphasis altered). The relief that the shareholders seek would also flow solely to each corporation: Any relief invalidating the corporations' dividend payments to Treasury might put more money in *the corporations'* bank accounts, but would not directly affect *the shareholders'* bank accounts. See Resp. C.A. Supp. Br. 29-32. In short, the cause of action that each of these shareholders asserts "is not his own but the corporation's." *Koster*, 330 U.S. at 522. The lawsuit thus qualifies as a derivative action.

b. The court of appeals' contrary reasoning lacks merit. The court reasoned that the shareholders, as "residual claimants of [the] firm's value," suffered an "injury" because of the conservator's purported failure to conserve the enterprises' assets. App., *infra*, 29a. That line of reasoning proves too much, and, if taken to its logical conclusion, would obliterate the distinction between direct and derivative actions. *Every* wrong to a corporation could be said to injure a shareholder by reducing the corporate value to which the shareholder has a residual claim. If that were enough to make a claim direct rather than derivative, no action would ever qualify as derivative. That is why courts have consistently recognized that a lawsuit does not cease to be derivative simply because the injury to the corporation causes "a diminution in the value of stock." *Gaff* v. *FDIC*, 814 F.2d 311, 318 (6th Cir. 1987).

The court of appeals also reasoned that the shareholders' claim constituted a direct action because the shareholders had brought it under the APA. See App., *infra*, 27a-28a. But even assuming that the APA applies to the actions of an agency as a conservator standing in the shoes of a private company, the shareholders' reliance on the APA does not overcome the succession clause. The direct or derivative character of a lawsuit depends on who suffered the alleged harm and who benefits from the recovery—not on the statute under which the lawsuit is brought. See p. 21, *supra*. The shareholders assert that FHFA has violated the APA, but that violation is alleged to have harmed the corporation, and any remedy for that violation would flow to the corporation. The shareholders' claim is therefore derivative. And the APA does not displace the statutory rule preventing shareholders from bringing such derivative claims; to the contrary, the APA expressly provides that "[n]othing [t]herein * * * affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground," 5 U.S.C. 702.

B. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals

1. The court of appeals' interpretation of the Recovery Act's anti-injunction clause conflicts with the decisions of five other courts of appeals. As noted, shareholders have challenged the Third Amendment in the Third, Sixth, Seventh, Eighth, and D.C. Circuits on statutory grounds identical to those asserted in this case, and all of those courts have held—contrary to the decision below—that the anti-injunction clause bars such challenges. See *Jacobs*, 908 F.3d at 890 (3d Cir.); *Robinson*, 876 F.3d at 229-232 (6th Cir.); *Roberts*, 889 F.3d at 402 (7th Cir.); *Saxton*, 901 F.3d at 959 (8th Cir.); *Perry Capital*, 864 F.3d at 614-615 (D.C. Cir.).

The court of appeals recognized that "[its] decision conflicts with [the decisions of] at least some other circuits"—specifically, with at least the Seventh Circuit's decision in *Roberts* and the Eighth Circuit's decision in *Saxton*. App., *infra*, 50a-51a. The court asserted, however, that "the facts at this stage are distinguishable from those in [the other] sister-circuit decisions," because the shareholders in this case included allegations that FHFA "designed the Third [Amendment] to prevent Fannie and Freddie from recapitalizing." *Id.* at 49a. That assertion is unpersuasive. First, the allegations about FHFA's motive cannot distinguish the decisions of the other courts, because (as the other courts have recognized) the Recovery Act makes FHFA's motive legally immaterial. There is "nothing * * * in the Recovery Act that hinges FHFA's exercise of its conservatorship discretion on particular motivations." *Perry Capital*, 864 F.3d at 612; see *Robinson*, 876 F.3d at 229 n.7. Second, even on the court of appeals' own terms, its decision conflicts with at least the decisions of the Seventh and Eighth Circuits. App., *infra*, 50a-51a. Given the importance of the question presented, that alone justifies this Court's review.

2. The court of appeals' interpretation of the succession clause also conflicts with the decisions of other courts of appeals. Most directly, the decision below conflicts with the Seventh Circuit's decision in *Roberts*. In that case, the Seventh Circuit held that the succession clause precluded shareholders from bringing derivative actions, and that a statutory challenge to the Third Amendment (materially identical to the statutory challenge in this case) constituted a derivative action. See *Roberts*, 889 F.3d at 408-410.

The decision below also conflicts with the D.C. Circuit's decision in *Perry Capital*. In that case, the D.C. Circuit held that the succession clause precluded shareholders from bringing derivative actions, and that a shareholder's challenge to the Third Amendment constituted a derivative action. See *Perry Capital*, 864 F.3d at 623-628. To be sure, the D.C. Circuit reached that conclusion in the course of addressing a claim that FHFA had violated its fiduciary duties, rather than (as in this case) a claim that it had exceeded its statutory powers. *Ibid.* But nothing in the court's reasoning—which focused on "(1) who suffered the alleged harm and (2) who would receive the benefit of the recovery"—turned on that distinction. *Id.* at 626 (brackets, citation, and internal quotation marks omitted).

C. The Practical Effects Of The Decision Below Warrant Immediate Review

1. The serious practical effects of the decision below warrant not only granting this petition for a writ of certiorari, but also reviewing the case this Term. To start, the Third Amendment was a major alteration to a set of financial agreements involving hundreds of billions of taxpayer dollars. Treasury's stock in the enterprises carries a combined liquidation preference of more than $200 billion, and its remaining funding commitment to the enterprises stands at more than $250 billion. Any judicial remedy that might invalidate or modify the Third Amendment would carry significant financial implications for the federal government, the enterprises, and participants in the national housing finance market. In addition, the government, the enterprises, and other market participants have conducted their affairs for the past seven years in reliance on the Third Amendment. Any judicial remedy that might invalidate or modify the Amendment could cause substantial disruption by frustrating those reliance interests.

The decision below also casts a cloud of uncertainty over key aspects of ongoing efforts aimed at comprehensive reform of the national housing finance market. In September 2019, Treasury issued a plan for reforming the housing finance system, ending the conservatorships, and recapitalizing the enterprises. See U.S.

Dep't of the Treasury, *Housing Reform Plan* (Sept. 2019).[*] That plan recommends ending the conservatorships when the enterprises satisfy certain conditions, including having "retained or raised sufficient capital and other loss absorbing capacity to operate in a safe and sound manner." *Id.* at 26. Recapitalizing the enterprises would require determining how much capital the enterprises must raise or retain, valuing Treasury's existing stock in the enterprises, and determining appropriate compensation for Treasury's remaining funding commitment. *Id.* at 27-28. Prolonged uncertainty concerning the validity of the Third Amendment and the capital structure of the enterprises could hinder the pursuit of the reforms outlined in Treasury's plan.

2. The government acknowledges that this case comes to this Court in an interlocutory posture. The court of appeals reversed a district court judgment granting the government's motion to dismiss and remanded the case for further proceedings. App., *infra*, 51a. But that interlocutory posture should not deter this Court from granting review. The Court has often granted petitions for writs of certiorari from interlocutory rulings creating circuit conflicts on important questions of federal law. See, *e.g.*, *Cochise Consultancy, Inc.* v. *United States*, 139 S. Ct. 1507 (2019) (No. 18-315). That course is particularly appropriate here. The anti-injunction clause is designed to enable FHFA to address "exigent financial circumstances" without "litigative interference," *Perry Capital*, 864 F.3d at 605-606, but that protection would largely be nullified if

[*] https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf

FHFA were required to wait until the end of proceedings on remand before raising the issue in this Court. In addition, allowing the decision below to stand would result in prolonged uncertainty about the lawfulness of the Third Amendment. As explained above, that uncertainty is itself harmful—to the enterprises, to third parties who have relied on the Third Amendment, and to the national housing market.

3. The shareholders' pending petition for a writ of certiorari, which seeks review of the court of appeals' constitutional and remedial holdings, also should not delay this Court's review. As the government plans to explain in its brief in opposition, the Court should deny the shareholders' petition. The shareholders prevailed below on the constitutional question on which they seek review, and, in any event, the Court has already granted review on essentially the same constitutional question in *Seila Law* v. *CFPB* (No. 19-7) (Oct. 18, 2019). And there is no circuit conflict on the remedial question that the shareholders lost below. But regardless of whether the Court grants, holds, or denies the shareholders' petition, the statutory issues presented in this petition warrant immediate review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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* The Solicitor General is recused in this case.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-20364

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; MARK A. CALABRIA, DIRECTOR OF THE FEDERAL HOUSING FINANCE AGENCY, DEFENDANTS-APPELLEES

[Filed: Sept. 6, 2019]

Appeal from the United States District Court
for the Southern District of Texas

Before: STEWART, Chief Judge, JONES, SMITH, DENNIS, OWEN, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, COSTA, WILLETT, HO, DUNCAN, ENGELHARDT, and OLDHAM, Circuit Judges.

DON R. WILLETT, Circuit Judge, joined by JONES, SMITH, OWEN, ELROD, HO, DUNCAN, ENGELHARDT, and OLDHAM, Circuit Judges:

The bicentennial of the United States Constitution in 1987 celebrated our Founding generation's ingenious system of separated powers: legislative, executive, and judicial. The Constitution inaugurated a revolutionary design. Madisonian architecture infused with

Newtonian genius—three separate branches locked in synchronous orbit by competing interests. "Ambition . . . made to counteract ambition," explained Madison, making clear that this law of constitutional motion, using friction to combat faction, was a feature, not a bug.[1] Our Constitution's most essential attribute, the separation of powers, *presumes* conflict, which, counterintuitively, produces equilibrium as the branches behave not as willing partners but as wary rivals. And our Constitution's paramount aim, preserving individual liberty, presumes that branches will behave neither centripetally (seizing other branches' powers) nor centrifugally (ceding their own), but jealously (defending their assigned powers against encroachment). No mere tinkerers, the Framers upended things. Three rival branches deriving power from three unrivaled words—"We the People"—inscribed on the parchment in supersize script. In an era of kings and sultans, nothing was more audacious than the Preamble's first three words, a script-flipping declaration that ultimate sovereignty resides not in the government but in the governed.

The Constitution's 200th birthday coincided with a centennial, the 100th birthday of the federal administrative state.[2] Congress's passage in 1887 of the Interstate

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[1] THE FEDERALIST NO. 51, at 349 (James Madison) (J. Cooke ed., 1961); *see also Mistretta v. United States*, 488 U.S. 361, 380 (1989) ("This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.").

[2] An Act to Regulate Commerce (Interstate Commerce Act), ch. 104, 24 Stat. 379 (1887). While many scholars peg the birth of the federal administrative state to the Interstate Commerce Commis-

Commerce Act, making railroads the first industry subject to federal regulation, and the Act's creation of the nation's first federal regulatory body, the Interstate Commerce Commission, profoundly altered the Framers' tripartite structure. The ICC was an amalgam of all three powers, blending functions of all three branches. The administrative state has sprouted since then. But this iron truth endures: Even the most well-intentioned bureaucrats, no less than presidents, legislators, and judges, are bound by constitutional principles. An agency is restrained by the four corners of its enabling statute and "literally has no power to act . . . unless and until Congress confers power upon it."[3] And Congress, when creating agencies, is itself constrained—at all times—by the separation of powers.

* * *

The plaintiffs (the Shareholders) own shares in Fannie Mae and Freddie Mac. In 2008 Fannie and Freddie's new regulator, the Federal Housing Finance Agency, placed them in conservatorship. FHFA secured financing from the Treasury to keep Fannie and Freddie afloat. That relationship continued, and in 2012 FHFA and Treasury adopted a Third Amendment to their financing agreements. Under the Third Amendment, Fannie and Freddie give Treasury nearly all their net worth each quarter as a dividend.

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sion, others point to other enactments, like the Pendleton Civil Service Reform Act of 1883, which created the United States Civil Service Commission, or the Steamboat Act of 1852, which created the Steamboat Inspection Service.

[3] *New York v. FERC*, 535 U.S. 1, 18 (2002) (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).

The Shareholders have two principal objections to this arrangement:

First, the Third Amendment exceeded FHFA's statutory powers. FHFA's enabling statute gives it general powers to use as either conservator or receiver. The statute grants other, more directed powers to FHFA as conservator or receiver respectively. As conservator, the agency may take actions "(i) necessary to put the regulated entity in a sound and solvent condition; and (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity."[4] These enumerated conservator powers don't vanish in the glare of the more general ones. Congress created FHFA amid a dire financial calamity, but expedience does not license omnipotence. The Shareholders plausibly allege that the Third Amendment exceeded FHFA's conservator powers by transferring Fannie and Freddie's future value to a single shareholder, Treasury. In Parts I-VI of this opinion, a majority of the en banc court holds that this claim survives dismissal under Federal Rule of Civil Procedure 12(b)(6).

Second, the Shareholders argue that FHFA lacked authority to adopt the Third Amendment because its Director was not removable by the President. We adhere to the panel's reasoning and conclusion that FHFA's design, an independent agency with a single Director removable only "for cause," violates the separation of powers.[5] In Parts VII-VIII of this opinion, a majority of

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[4] 12 U.S.C. § 4617(b)(2)(D).

[5] *Id.* § 4512(b)(2).

the en banc court holds that the Director's "for cause" removal protection is unconstitutional.

The remaining question is what remedy the Shareholders are entitled to. A different majority of the en banc court holds that prospective relief is the proper remedy. In Judge Haynes's opinion,[6] a majority holds that the Shareholders can only obtain a declaration that the FHFA's structure is unconstitutional.

We REVERSE the judgment dismissing Count I and REMAND that claim for further proceedings. We AFFIRM the judgment dismissing Counts II and III. The court REVERSES the judgment as to Count IV and REMANDS that claim for entry of judgment that the "for cause" removal limitation in 12 U.S.C. § 4512(b)(2) is unconstitutional.

I

During last decade's housing-market crisis, Congress passed and President George W. Bush signed the Housing and Economic Recovery Act of 2008 (HERA).[7] The statute created FHFA as an independent agency to oversee the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). Fannie and Freddie are government-sponsored entities (GSEs) that also have private shareholders, including the plaintiffs in this

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[6] Chief Judge Stewart, Judge Dennis, Judge Owen, Judge Southwick, Judge Graves, Judge Higginson, Judge Costa, and Judge Duncan join Judge Haynes's constitutional remedy opinion.

[7] Pub. L. No. 110-289, 122 Stat. 2654 (codified in various sections of 12 U.S.C.).

case. Some background on FHFA and the GSEs is useful.[8]

A

Congress created Fannie Mae in 1938.[9] Its purposes include "provid[ing] stability in the secondary market for residential mortgages," "increasing the liquidity of mortgage investments," and "promot[ing] access to mortgage credit throughout the Nation."[10] Congress created Freddie Mac in 1970 to "increase the availability of mortgage credit for the financing of urgently needed housing."[11] Among other activities, Fannie and Freddie purchase mortgages originated by private banks, bundle the mortgages into income-producing securities, and sell the securities to investors.

In 2007, mortgage delinquencies and defaults sparked a bank liquidity crisis that kindled a recession. At the time, Fannie and Freddie controlled combined mortgage portfolios of approximately $5 trillion—nearly half the United States mortgage market. They suffered multi-billion dollar losses. Indeed, the GSEs lost more in 2008 ($108 billion) than they had earned in the

[8] The facts relevant to Counts I-III (the APA claims) are taken from the Shareholders' complaint and are viewed in the light most favorable to them as the nonmovants. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The facts relevant to Count IV (the constitutional claim) are undisputed unless otherwise noted. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

[9] National Housing Act Amendments of 1938, Pub. L. No. 75-424, 52 Stat. 8, 23.

[10] 12 U.S.C. §§ 1716, 1717.

[11] Federal Home Loan Mortgage Corporation Act, Pub. L. No. 91-351, preamble, 84 Stat. 450.

previous thirty-seven years combined ($95 billion).[12] But they remained solvent because they had taken a relatively conservative mortgage-investing approach. They continued to support the United States home-mortgage system as distressed banks failed.

In 2008, the President signed HERA into law to protect the national economy from further losses. HERA established FHFA as an "independent agency of the Federal Government" and classified Fannie and Freddie as "regulated entit[ies]" under FHFA.[13]

B

A single Director leads FHFA.[14] He is "appointed by the President, by and with the advice and consent of the Senate."[15] The Director serves a term of five years, "unless removed before the end of such term for cause by the President."[16] The Director designates three Deputy Directors.[17] In case of a vacancy in the Director office, "the President shall designate [one of the Deputy Directors] to serve as acting Director until the

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[12] Office of Inspector General (OIG), FHFA, *Analysis of the 2012 Amendments to the Senior Preferred Stock Purchase Agreements* 5 (Mar. 20, 2013), https://www.fhfaoig.gov/Content/Files/WPR-2013-002_2.pdf.

[13] 12 U.S.C. § 4511(a), (b).

[14] *Id.* § 4512(a).

[15] *Id.* § 4512(b)(1).

[16] *Id.* § 4512(b)(2).

[17] *Id.* § 4512(c)-(e) (providing for Deputy Director of the Division of Enterprise Regulation, Deputy Director of the Division of Federal Home Loan Bank Regulation, and Deputy Director for Housing Mission and Goals).

return of the Director, or the appointment of a successor."[18]

Other features strengthen FHFA's independence. It runs on annual assessments collected from the GSEs, not public or appropriated money.[19] It is "advise[d]" by the Federal Housing Finance Oversight Board: the Secretary of the Treasury, the Secretary of Housing and Urban Development, the Chairman of the Securities and Exchange Commission, and the FHFA Director.[20] But the Board's power is Lilliputian. It "may not exercise any executive authority, and the Director may not delegate to the Board any of the functions, powers, or duties of the Director."[21]

FHFA regulates normal GSE operations. The Director must issue regulations, guidelines, or orders necessary to oversee the GSEs and ensure their sound operations.[22] FHFA also has enforcement authority. The Director may bring charges against a GSE for unsound practices or violating the law.[23] He may issue cease-and-desist orders, require the GSE to remedy any violations, and impose penalties.[24]

C

FHFA is not just a regulator. Under 12 U.S.C. § 4617 it may serve as conservator or receiver for the

[18] *Id.* § 4512(f).

[19] *Id.* § 4516.

[20] *Id.* § 4513a(a)-(c).

[21] *Id.* § 4513a(b).

[22] *Id.* § 4526(a); *see id.* § 4513.

[23] *Id.* § 4631(a)(1).

[24] *Id.* § 4631(c); *see id.* §§ 4632(e), 4635, 4636, 4641.

GSEs. FHFA has discretion to appoint itself conservator or receiver in some cases, and receivership is mandatory in other critical insolvency situations.[25] Conservatorship and receivership are mutually exclusive: Appointing FHFA as receiver "shall immediately terminate any conservatorship established for the regulated entity under this chapter."[26]

D

Section 4617 next provides FHFA's general powers as conservator or receiver. In either role, FHFA is a successor to the GSE:

> The Agency shall, as conservator or receiver, and by operation of law, immediately succeed to—
>
> (i) all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity. . . .[27]

Similarly, FHFA in either role may operate the GSE:

> The Agency may, as conservator or receiver—
>
> (i) take over the assets of and operate the regulated entity with all the powers of the shareholders, the directors, and the officers of the regulated entity and conduct all business of the regulated entity;

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[25] *Id.* § 4617(a)(3) (discretionary appointment), (a)(4) (mandatory receivership).

[26] *Id.* § 4617(a)(4)(D).

[27] *Id.* § 4617(b)(2)(A).

(ii) collect all obligations and money due the regulated entity;

(iii) perform all functions of the regulated entity in the name of the regulated entity which are consistent with the appointment as conservator or receiver;

(iv) preserve and conserve the assets and property of the regulated entity; and

(v) provide by contract for assistance in fulfilling any function, activity, action, or duty of the Agency as conservator or receiver.[28]

And FHFA in either role may exercise incidental powers to carry out those enumerated:

Incidental powers

The Agency may, as conservator or receiver—

(i) exercise all powers and authorities specifically granted to conservators or receivers, respectively, under this section, and such incidental powers as shall be necessary to carry out such powers; and

(ii) take any action authorized by this section, which the Agency determines is in the best interests of the regulated entity or the Agency.[29]

FHFA in either role may also order a shareholder, director, or officer to perform any function.[30] And in ei-

[28] *Id.* § 4617(b)(2)(B).

[29] *Id.* § 4617(b)(2)(J).

[30] *Id.* § 4617(b)(2)(C).

ther role it may transfer or sell any GSE asset or liability without consent.[31] FHFA in either role also benefits from an anti-injunction provision:

> Except as provided in this section or at the request of the Director, no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver.[32]

E

Other powers depend on capacity. Section 4617 grants some powers to FHFA as conservator only:

> Powers as conservator
>
> The Agency may, as conservator, take such action as may be—
>
> (i) necessary to put the regulated entity in a sound and solvent condition; and
>
> (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.[33]

It grants other powers to FHFA as receiver only:

> Additional powers as receiver
>
> In any case in which the Agency is acting as receiver, the Agency shall place the regulated entity in liquidation and proceed to realize upon the assets of the

[31] *Id.* § 4617(b)(2)(G).

[32] *Id.* § 4617(f).

[33] *Id.* § 4617(b)(2)(D).

> regulated entity in such manner as the Agency deems appropriate. . . .[34]

Receivership, then, grants a power and duty to liquidate the GSE. Unsurprisingly, § 4617 next provides a regime for the receiver's orderly processing of creditor claims.

It is extensive. As receiver FHFA must publish and mail notice to creditors to present their claims.[35] It generally must allow or disallow a claim within 180 days of filing.[36] It must expedite certain secured claims with potential for irreparable injury.[37] It may also make rules for allowing and disallowing claims.[38] And it must allow proven claims.[39] Creditors may alternatively pursue their claims in U.S. district court.[40] The receivership scheme qualifies the succession provision by carving out surviving shareholder and creditor rights:

> [T]he appointment of the Agency as receiver . . . and its succession, by operation of law, to the rights, titles, powers, and privileges described in subsection (b)(2)(A) shall terminate all rights and claims that the stockholders and creditors of the regulated entity may have against the assets or charter . . . except for their right to payment, resolution, or other

[34] *Id.* § 4617(b)(2)(E).

[35] *Id.* § 4617(b)(3)(B)-(C).

[36] *Id.* § 4617(b)(5)(A).

[37] *Id.* § 4617(b)(8).

[38] *Id.* § 4617(b)(4).

[39] *Id.* § 4617(b)(5)(B).

[40] *Id.* § 4617(b)(6).

satisfaction of their claims, as permitted under subsections (b)(9), (c), and (e).[41]

In short, FHFA as receiver must divide the GSEs' assets between creditors and shareholders according to law.

F

Congress also amended the GSEs' charters by giving Treasury temporary authority to purchase their securities.[42] In connection with any purchase, it required Treasury to make an "[e]mergency determination" that the purchase would "(i) provide stability to the financial markets; (ii) prevent disruptions in the availability of mortgage finance; and (iii) protect the taxpayer."[43] Congress also prescribed six mandatory considerations for exercising the authority, "[t]o protect the taxpayers."[44] The temporary purchase authority terminated on December 31, 2009, except for Treasury's rights under purchases already made.[45]

II

In September 2008, FHFA appointed itself a conservator for the GSEs. The next day, Treasury and the GSEs entered Preferred Stock Purchase Agreements. Treasury made a capital commitment, capped at $100 billion per GSE, to keep them from defaulting. In return, Treasury received one million senior preferred

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[41] *Id.* § 4617(b)(2)(K).

[42] *Id.* §§ 1455(*l*)(1) (authority as to Freddie Mac), 1719(g)(1) (authority as to Fannie Mae).

[43] *Id.* §§ 1455(*l*)(1)(B), 1719(g)(1)(B).

[44] *Id.* §§ 1455(*l*)(1)(C), 1719(g)(1)(C).

[45] *Id.* §§ 1455(*l*)(4), 1719(g)(4).

shares in each GSE. These shares entitled Treasury to:

- a $1 billion senior liquidation preference;
- a dollar-for-dollar increase in that preference each time a GSE drew on the capital commitment;
- quarterly dividends of either an amount equal to 10% of the liquidation preference, or a 12% increase in the liquidation preference itself;
- warrants allowing Treasury to purchase up to 79.9% of common stock;
- and periodic commitment fees.

The Agreements also prohibited the GSEs from declaring a dividend or making any other distribution without Treasury's consent.

Treasury and FHFA later amended the Agreements. In May 2009 they adopted the First Amendment: Treasury agreed to double its funding commitment to $200 billion per GSE. In December 2009 they adopted the Second Amendment: Treasury agreed to an increased, adjustable commitment to account for the GSEs' losses. As of August 2012, the GSEs had drawn approximately $187 billion from Treasury's funding commitment. But they lacked the cash to pay 10% dividends. So in August 2012 FHFA and Treasury adopted the Third Amendment to the Agreements.

The Third Amendment replaced the quarterly 10% dividend with variable dividends equal to the GSEs' entire net worth except a capital reserve. The Shareholders call this arrangement the "net worth sweep." The capital reserve buffer started at $3 billion. It decreased annually until it reached zero in 2018. This arrangement was a double-edged sword. The GSEs no longer struggled to make dividend payments, but they would also no longer accrue capital. Treasury also suspended the periodic commitment fees. Treasury announced that the Third Amendment would "expedite the wind down of Fannie Mae and Freddie Mac" and ensure that the GSEs "will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form."[46] A federal official commented privately that the Third Amendment was designed to prevent Fannie and Freddie from recapitalizing.[47]

The net worth sweep transferred a fortune from Fannie and Freddie to Treasury. When this suit was filed, the GSEs had paid $195 billion in dividends under the net worth sweep. Under the Agreements more broadly, Treasury had disbursed $187 billion and recouped $250 billion, thanks largely to the net worth sweep.

III

The Shareholders sued FHFA, its Director, Treasury, and its Secretary (the Agencies). They assert four causes of action, three statutory and one constitutional:

- In Count I, they allege the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(C), (D), affords relief because FHFA exceeded its statutory conservator authority under 12 U.S.C. § 4617(b)(2)(D).

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[46] Compl. ¶ 135 (quoting Press Release, Dep't of Treasury, Treasury Department Announces Further Steps to Expedite Wind Down of Fannie Mae and Freddie Mac (Aug. 17, 2012)).

[47] *Id.* ¶ 107.

- In Count II, they allege the APA, 5 U.S.C. § 706(2)(C), (D), affords relief because Treasury exceeded its securities-purchase authority under 12 U.S.C. §§ 1455(*l*), 1719(g). Specifically, they allege that Treasury purchased securities after the sunset period, failed to make the required "[e]mergency determination[s]," and disregarded statutory "[c]onsiderations."
- In Count III, they allege the APA, 5 U.S.C. § 706(2)(A), affords relief because Treasury's adoption of the net worth sweep was arbitrary and capricious.
- In Count IV, they allege FHFA violates Article II, §§ 1 and 3 of the Constitution because, among other things, it is headed by a single Director removable only for cause.

The Shareholders seek a declaration that the net worth sweep violates HERA and is arbitrary and capricious; a declaration that FHFA's structure violates the separation of powers; an injunction against Treasury to return net-worth-sweep dividends (or treat them as paying down the liquidation preference); vacatur of the net worth sweep; and an injunction against further implementation of the net worth sweep.

The Agencies each moved to dismiss all claims under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). And the Shareholders and FHFA both moved for summary judgment on Count IV, the constitutional claim. The district court granted the Agencies' motions to dismiss Counts I-III based on the anti-injunction provision. And it granted summary judgment to FHFA on the merits of Count IV. The Shareholders appealed.

A panel of this court affirmed as to the statutory claims and reversed as to the constitutional claim.[48] We then granted rehearing en banc, vacating the panel decision.[49] Before rehearing en banc, both FHFA and Treasury admitted the merits of Count IV: FHFA's structure violates the separation of powers. But, several months after rehearing en banc, FHFA reversed its position again. It now contends that FHFA's structure is constitutional. Treasury stands by its contrary position. And FHFA and Treasury maintain that for a number of other reasons the Shareholders are not entitled to relief on Count IV.

IV

The rules governing jurisdiction and our standard of review are familiar.

Jurisdiction. The district court had jurisdiction under 28 U.S.C. § 1331.

We have jurisdiction under 28 U.S.C. § 1291.

Standard of review. "We review de novo a district court's rulings on a motion to dismiss and a motion for summary judgment, applying the same standard as the district court."[50] "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its

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[48] *Collins v. Mnuchin*, 896 F.3d 640 (5th Cir. 2018) (per curiam).

[49] *Collins v. Mnuchin*, 908 F.3d 151 (5th Cir. 2018); 5TH CIR. R. 41.3.

[50] *TOTAL Gas & Power N. Am., Inc. v. FERC*, 859 F.3d 325, 332 (5th Cir. 2017).

face.'"[51] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[52] Summary judgment is proper if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[53] We may consider a fact undisputed "[i]f a party . . . fails to properly address another party's assertion of fact."[54]

V

We begin with Counts I-III, the Shareholders' statutory claims. Before reaching the merits, we must decide whether they are justiciable under HERA's anti-injunction provision and succession provision.

A

HERA's anti-injunction provision limits court action against FHFA's conservator or receiver powers:

> Except as provided in this section or at the request of the Director, no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver.[55]

To interpret this provision, we consult its plain meaning and its past judicial interpretations (including in predecessor statutes).

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[51] *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

[52] *Id.*

[53] FED. R. CIV. P. 56(a).

[54] FED. R. CIV. P. 56(e).

[55] 12 U.S.C. § 4617(f).

The Supreme Court instructs that plain meaning comes first: "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."[56] Under the anti-injunction provision's plain meaning, we may not grant any relief that interferes with—"restrain[s] or affect[s]"—FHFA's conservator powers. Logically, then, we may still grant relief against action taken outside those powers. The anti-injunction provision deflects claims about how the conservator used its powers, not claims it exceeded the powers granted. It distinguishes improperly exercising a power (not restrainable) from exercising one that was never authorized (restrainable).

Past judicial interpretations confirm this view. Congress borrowed much of HERA's text from the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).[57] FIRREA authorizes the Federal Deposit Insurance Corporation (FDIC) to act as conservator or receiver for distressed banks.[58] FIRREA's vintage conservator and receiver scheme, in-

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[56] *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)).

[57] Pub. L. No. 101-73, 103 Stat. 183 (codified at 12 U.S.C. § 1811 *et seq.*); *see* Michael Krimminger & Mark A. Calabria, *The Conservatorships of Fannie Mae and Freddie Mac: Actions Violate HERA and Established Insolvency Principles* 19 (Cato Inst., Working Paper No. 26, 2015) ("Staff quite literally 'marked-up' Sections 11 and 13 of the [Federal Deposit Insurance Act (FDIA), a FIRREA predecessor] as the base text for HERA.").

[58] 12 U.S.C. § 1821(c).

cluding the anti-injunction provision, is materially similar to HERA's.[59] So is one of FIRREA's own predecessors, the Financial Institutions Supervisory Act of 1966 (FISA), which governed conservatorship and receivership by the Federal Savings and Loan Insurance Corporation (FSLIC).[60] If FIRREA is HERA's parent, FISA is a grandparent.

The Supreme Court tells us that those provisions' judicial interpretations guide our analysis of HERA. "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."[61] "And when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well.'"[62]

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[59] *Compare* 12 U.S.C. § 4617(f) (HERA), *with id.* § 1821(j) (FIRREA) ("Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.").

[60] Pub. L. No. 89-695, 80 Stat. 1028, 1033 ("Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver.").

[61] *Lorillard v. Pons*, 434 U.S. 575, 581 (1978).

[62] *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006) (ellipsis omitted) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)).

The Supreme Court interpreted FISA's anti-injunction provision in *Coit*.[63] It held the provision did not strip federal jurisdiction over claims in a FSLIC receivership.[64] Rather, it "simply prohibit[ed] courts from restraining or affecting . . . those receivership 'powers and functions' that have been granted by other statutory sources."[65] So the anti-injunction provision didn't affect whether a particular power existed in the first place.[66]

We have applied *Coit* to FIRREA's anti-injunction provision. In *Onion* we held that the provision prevented a federal court from stopping a conservator's foreclosure and sale.[67] In *Ward*, relying on *Onion*, we held that the anti-injunction provision stopped a federal court from rescinding a receiver's sale.[68] We elaborated that there is a "difference between the exercise of a function or power that is clearly outside the statutory authority of the RTC on the one hand, and improperly or even unlawfully exercising a function or power that is clearly authorized by statute on the other."[69]

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[63] *Coit Indep. Joint Venture v. FSLIC*, 489 U.S. 561, 574-77 (1989) (interpreting FISA, 80 Stat. 1033).

[64] *Id.*

[65] *Id.* at 574.

[66] *Id.* ("[T]his language does not add adjudication of creditor claims to FSLIC's receivership powers.").

[67] *281-300 Joint Venture v. Onion*, 938 F.2d 35, 39 (5th Cir. 1991) (citing *Coit*, 489 U.S. at 574).

[68] *Ward v. RTC*, 996 F.2d 99, 103 (5th Cir. 1993).

[69] *Id.*; *see also Carney v. RTC*, 19 F.3d 950, 956 (5th Cir. 1994) (holding that FIRREA anti-injunction provision deprived court of jurisdiction because RTC's action was within statutory powers).

Ward is the anti-injunction provision's strongest expression. We declined to review even whether the receiver breached its express statutory duty to maximize the property's value.[70] But we did so based on the understanding that, even if the receiver sold the property for inadequate value, it had "improperly or unlawfully exercised an authorized power or function," not "engage[d] in an activity outside its statutory powers."[71] *Ward*'s facts are different from this case. In *Ward*, selling low instead of high was an improper use of the receiver's power to liquidate assets. But here, FHFA as conservator essentially liquidated assets without ever being appointed receiver. Improperly exercising a power is not restrainable, but exercising one beyond statutory authority is.

Other circuits follow the same interpretation. Even our sister courts that rejected claims like Counts I-III acknowledge the same rule: "Section 4617(f) will not protect the Agency if it acts either *ultra vires* or in some third capacity" besides conservator or receiver.[72] So have circuits deciding unrelated cases against FHFA.

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[70] *Ward*, 996 F.2d at 103.

[71] *Id.*

[72] *Roberts v. FHFA*, 889 F.3d 397, 402 (7th Cir. 2018); *see Jacobs v. FHFA*, 908 F.3d 884, 889 (3rd Cir. 2018) ("Section 4617(f) bars claims when 1) the government acts as a conservator, 2) it does not exceed its statutory authority, and 3) the remedy sought would affect the exercise of that authority."); *Saxton v. FHFA*, 901 F.3d 954, 957 (8th Cir. 2018) ("[T]his provision bars only equitable relief, and only does so if the challenged action is within the powers given FHFA by HERA."); *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 606 (D.C. Cir. 2017) ("The plain statutory text draws a sharp line in the sand against litigative interference . . . with FHFA's statutorily permitted actions as conservator or receiver.").

To quote the Ninth Circuit, "the anti-judicial review provision is inapplicable when FHFA acts beyond the scope of its conservator power."[73] And the Eleventh Circuit holds that "[t]he FHFA cannot evade judicial scrutiny by merely labeling its actions with a conservator stamp."[74]

The provision's plain meaning, FIRREA precedent, and HERA precedent show that we may grant relief if FHFA exceeded its statutory powers. The Agencies primarily contend that the Third Amendment falls within the conservatorship powers, 12 U.S.C. § 4617(b)(2). As we explain below, that is incorrect, at least at the pleading stage. But first, we address the Agencies' arguments from disconnected provisions.

The Agencies suggest Treasury's temporary purchase authority authorized the Third Amendment.[75] Congress authorized Treasury to "purchase any obligations and other securities issued by the [GSEs] . . . on such terms and conditions . . . and in such amounts as the Secretary may determine."[76] It also authorized Treasury "at any time[] [to] exercise any rights received in connection with such purchases."[77]

But these provisions cannot sustain the Agencies' argument. "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or

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[73] *County of Sonoma v. FHFA*, 710 F.3d 987, 992 (9th Cir. 2013).

[74] *Leon County v. FHFA*, 700 F.3d 1273, 1278 (11th Cir. 2012).

[75] *See* 12 U.S.C. §§ 1455(*l*)(1)(A), 1719(g)(1)(A).

[76] *Id.* §§ 1455(*l*)(1)(A), 1719(g)(1)(A).

[77] *Id.* §§ 1455(*l*)(2)(A), 1719(g)(2)(A).

ancillary provisions—it does not, one might say, hide elephants in mouseholes."[78] Authorizing Treasury to enter an open-ended category of transactions does not override the elaborate powers scheme in FHFA's enabling statute.[79]

The Agencies also contend that Congress ratified the Third Amendment in the Consolidated Appropriations Act of 2016.[80] This act restricted Treasury from disposing of certain shares, specifically including its rights under the Third Amendment, until 2018.[81] The statute's most favorable reading for Treasury is that, in directing Treasury to retain its Third Amendment interest, Congress recognized or enacted that interest's lawfulness.[82]

The Appropriations Act does not support that reading. In directing Treasury to retain preferred shares, it speaks to future conduct, not past action. The Supreme Court has "recognized congressional acquiescence

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[78] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

[79] *See id.*

[80] Pub. L. No. 114-113, § 702, 129 Stat. 2242, 3024-25 (2015).

[81] *Id.*

[82] The statute also included a "Sense of Congress" provision:

> It is the Sense of Congress that Congress should pass and the President should sign into law legislation determining the future of Fannie Mae and Freddie Mac, and that notwithstanding the expiration of subsection (b), the Secretary should not sell, transfer, relinquish, liquidate, divest, or otherwise dispose of any outstanding shares of senior preferred stock acquired pursuant to the Senior Preferred Stock Purchase Agreement until such legislation is enacted.

Id. § 702(c).

to administrative interpretations of a statute in some situations, [but] ha[s] done so with extreme care."[83] Treasury faces "a difficult task in overcoming the plain text and import of [HERA]" with a later enactment.[84] Here, the Appropriations Act only established a going-forward requirement to maintain the status quo. That is not enough to show that the Agencies' past actions accorded with HERA. The Agencies' conservatorship theory looms large over markets and federal conservatorships, so we presume Congress did not stealthily ratify it in an appropriations rider—hiding an elephant in a mousehole.[85]

It follows that whether the anti-injunction provision bars relief on Counts I-III depends entirely on whether the net worth sweep exceeded FHFA's statutory conservatorship powers.[86]

B

The Agencies next invoke HERA's succession provision as a defense. When appointed conservator, FHFA succeeds to certain shareholder rights:

> The Agency shall, as conservator or receiver, and by operation of law, immediately succeed to . . . all

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[83] *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169 (2001).

[84] *Id.* at 170.

[85] *See Whitman*, 531 U.S. at 468 ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

[86] *See, e.g.*, *Saxton*, 901 F.3d at 959 (concluding that anti-injunction analysis is similar for net-worth-sweep claims against both FHFA and Treasury).

> rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity. . . .[87]

The Agencies say that FHFA succeeded to the Shareholders' right to bring derivative suits, and Counts I-III are derivative. Generally speaking, "[t]he derivative form of action permits an individual shareholder to bring 'suit to enforce a *corporate* cause of action against officers, directors, and third parties,'" whereas a direct cause of action belongs to the shareholder himself.[88]

Other circuits have held that FHFA succeeded to derivative claims but not direct.[89] They have textual support: The succession provision transfers shareholders' rights "with respect to the regulated entity and [its] assets."[90] Simultaneously, under a separate provision, shareholders and creditors retain "their right to payment, resolution, or other satisfaction of their claims" in the receivership claim-processing scheme.[91] This means some claims survive the succession provision. And it makes sense to define those claims as direct ones. The ordinary meaning of claims "with respect to" a GSE and

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[87] 12 U.S.C. § 4617(b)(2)(A).

[88] *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95 (1991) (quoting *Ross v. Bernhard*, 396 U.S. 531, 534 (1970)).

[89] *See Roberts*, 889 F.3d at 408; *Perry Capital*, 864 F.3d at 624.

[90] 12 U.S.C. § 4617(b)(2)(A).

[91] *Id.* § 4617(b)(2)(K)(i).

its assets does not include a shareholder's personal claims. And FIRREA decisions took a similar view.[92]

To decide whether Counts I-III are direct or derivative, we begin with the cause of action. Counts I-III assert rights under the APA. Under 5 U.S.C. § 702, "[a] person suffering legal wrong . . . or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review." And under 5 U.S.C. § 706, "[t]he reviewing court shall . . . hold unlawful and set aside agency action" that is arbitrary and capricious, exceeds statutory authority, or is otherwise unlawful.

The APA cause of action is broad. The "Administrative Procedure Act . . . embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'"[93] "[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."[94] An APA claim must be justiciable under Article III, but otherwise who may sue is in

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[92] *Roberts*, 889 F.3d at 408 (citing *Levin v. Miller*, 763 F.3d 667, 669 (7th Cir. 2014); *Courtney v. Halleran*, 485 F.3d 942, 950 (7th Cir. 2007)).

[93] *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (quoting 5 U.S.C. § 702), *abrogated by statute in other part as recognized in Califano v. Sanders*, 430 U.S. 99, 105 (1977).

[94] *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) (quoting *Abbott Labs.*, 387 U.S. at 140); *see Barlow v. Collins*, 397 U.S. 159, 166 (1970) ("[P]reclusion of judicial review of administrative action adjudicating private rights is not lightly to be inferred. Indeed, judicial review of such administrative action is the rule, and

Congress's hands.[95] Congress has granted an APA claim to any party that alleges "the challenged action had caused them 'injury in fact,' and . . . the alleged injury was to an interest 'arguably within the zone of interests to be protected or regulated' by the statutes that the agencies were claimed to have violated."[96]

"Whether a plaintiff comes within the zone of interests . . . requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim."[97] The Supreme Court once considered the zone of interests a matter of "prudential standing," but now calls it one of statutory interpretation.[98] The Court "ha[s] said, in the APA context that the test is not 'especially demanding.'"[99] It has "conspicuously included the word 'arguably' in the test to indicate that

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nonreviewability an exception which must be demonstrated." (citations omitted)).

[95] *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972).

[96] *Id.* at 733 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)); *see Bennett v. Spear*, 520 U.S. 154, 175 (1997) ("In determining whether the petitioners have standing under the zone-of-interests test to bring their APA claims, we look . . . to the substantive provisions of the [Endangered Species Act of 1973], the alleged violations of which serve as the gravamen of the complaint.").

[97] *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014) (internal quotation marks omitted).

[98] *Id.* (applying zone-of-interests test and disapproving "prudential standing" label); *see Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1302 (2017) ("In *Lexmark*, we said that the label 'prudential standing' was misleading, for the requirement at issue is in reality tied to a particular statute.").

[99] *Id.* at 130 (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012)).

the benefit of any doubt goes to the plaintiff."[100] "[T]he test 'forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that' Congress authorized that plaintiff to sue."[101] The zone of interests "is to be determined not by reference to the overall purpose of the Act in question . . . but by reference to the particular provision of law upon which the plaintiff relies."[102]

Count I, to the extent it has merit, is a direct claim. The Shareholders suffered injury in fact—they were excluded from the GSEs' profits. And they are within the zone of interests HERA protects. Count I alleges that FHFA violated 12 U.S.C. § 4617(b)(2)(D)—the grant of conservator powers. The Shareholders' economic value is "arguably within the zone of interests" for this provision.[103] It is axiomatic that shareholders are the residual claimants of a firm's value.[104] They are among the first beneficiaries of the "sound and solvent condition" that a conservator is empowered to pursue.[105] And they ordinarily have a claim on the "assets and property" that a conservator is empowered to "preserve and

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[100] *Id.* (quoting *Patchak*, 567 U.S. at 225).

[101] *Id.* (quoting *Patchak*, 567 U.S. at 225).

[102] *Bennett*, 520 U.S. at 175-76.

[103] *City of Miami*, 137 S. Ct. at 1303.

[104] *Cf. FDIC v. Morley*, 867 F.2d 1381, 1391 (11th Cir. 1989) (stating that "Congress enacted the [Federal Deposit Insurance Act, a FIRREA precedessor] to protect depositors and bank shareholders").

[105] 12 U.S.C. § 4617(b)(2)(D); *see* Compl. ¶¶ 35-37, 44, 109, 114, 142-43 (alleging Shareholders' holdings, accompanying rights, and effect of net worth sweep).

conserve."[106] For example, in *James Madison*, the D.C. Circuit held a bank shareholder could challenge the FDIC's appointment as the bank's receiver under FIRREA.[107]

Plus, HERA elsewhere states that the succession provision does not extinguish the Shareholders' right to pursue their claims in receivership.[108] This matters because Count I essentially alleges that an improper conservatorship preempted rights that could have been redeemed in receivership.[109] Because the Shareholders are within the zone of interests protected by HERA's enumeration of conservator powers, they have a direct claim.

And the prudential shareholder-standing rule does not change this analysis. The rule is "a strand of the standing doctrine that prohibits litigants from suing to enforce the rights of third parties."[110] But for APA

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[106] 12 U.S.C. § 4617(b)(2)(D); *see* Compl. ¶ 114 ("The effect of the Net Worth Sweep is . . . to immediately nullify the rights of private shareholders to any return *of* their principal or any return *on* their principal (i.e., in the form of dividends).").

[107] *James Madison Ltd. ex rel Hecht v. Ludwig*, 82 F.3d 1085, 1094 (D.C. Cir. 1996).

[108] 12 U.S.C. § 4617(b)(2)(K)(i).

[109] *See, e.g.*, Compl. ¶¶ 7 ("Indeed, a receivership that liquidates the Companies would have more economic value to the private shareholders than the conservatorship as it was structured and operated in practice."), 56 (alleging no regulator before has imposed conservatorship on healthy company while "simultaneously avoiding the organized claims process of a receivership").

[110] *Nocula v. UGS Corp.*, 520 F.3d 719, 726 (7th Cir. 2008).

claims, "Congress itself has pared back traditional prudential limitations."[111] The APA does not abolish the shareholder-standing doctrine. But it limits it in some cases. *James Madison* is one example, because the court held it had jurisdiction to review the shareholder's APA action against appointment of a receiver.[112] The Supreme Court decisions *City of Miami* and *Lexmark* also support this point: For very broad statutory rights like the APA, an injury in fact and inclusion in the zone of interests can add up to a right of action, even if prudential standing limits would have blocked it.[113] That is the case here.

In so holding, we do not say that there is no direct-derivative distinction for APA claims. Nor is it true that any shareholder may obtain review of agency action affecting his holdings. In *Thompson v. North American Stainless, LP*, the Supreme Court rejected the "absurd" proposition that shareholders could sue under Title VII employment protections.[114] Shareholders are

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[111] *FAIC Secs., Inc. v. United States*, 768 F.2d 352, 357 (D.C. Cir. 1985) (Scalia, J.).

[112] 82 F.3d at 1094.

[113] *See City of Miami*, 137 S. Ct. at 1302 ("This Court has also referred to a plaintiff's need to satisfy 'prudential' or 'statutory' standing requirements. In *Lexmark*, we said that the label 'prudential standing' was misleading, for the requirement at issue is in reality tied to a particular statute. The question is whether the statute grants the plaintiff the cause of action that he asserts." (citations omitted)); *Lexmark*, 572 U.S. at 128 ("Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because 'prudence' dictates." (citation omitted)).

[114] 562 U.S. 170, 176-77 (2011).

not within Title VII's zone of interests because "the purpose of Title VII is to protect employees from their employers' unlawful actions."[115] But a corporate reorganization statute is a different animal. Shareholders may be within its zone of interests, and here they are.[116]

Counts II and III, however, are not within the asserted statutes' zone of interests. In Count II the Shareholders allege that Treasury violated 12 U.S.C. §§ 1455(*l*), 1719(g), which granted it authority to purchase securities in the GSEs. They say the net worth sweep effectively purchased securities after these provisions' 2009 sunset and otherwise exceeded the purchase authority.[117] In Count III they allege that Treasury acted arbitrarily and capriciously under those same sections because it never made the requisite "[e]mergency determination."[118]

Congress granted this purchase authority to protect markets, consumers, and taxpayers, not GSE stakeholders. The emergency determination asks whether a

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[115] *Id.* at 178.

[116] *See James Madison*, 82 F.3d at 1092-94 ("[R]equiring stockholders of wrongfully seized national banks to wait on the sidelines while the FDIC liquidates their institutions conflicts with Congress's apparent desire . . . that seized institutions act quickly in challenging the FDIC's appointment."); *Morley*, 867 F.2d at 1391 ("Congress enacted the FDIA [a FIRREA predecessor] to protect depositors and bank shareholders. . . . ").

[117] *See* 12 U.S.C. §§ 1455(*l*)(4) (providing that purchase authority "shall expire December 31, 2009"), 1719(g)(4) (same).

[118] *Id.* §§ 1455(*l*)(1)(B) ("In connection with any use of this authority, the Secretary must determine that such actions are necessary to—(i) provide stability to the financial markets; (ii) prevent disruptions in the availability of mortgage finance; and (iii) protect the taxpayer."), 1719(g)(1)(B) (same).

purchase will stabilize markets, prevent disruptions in mortgage finance, and protect taxpayers.[119] And the statutes' mandatory "[c]onsiderations" are likewise public-oriented: Treasury must consider the GSEs' condition, and any transaction's structure, "[t]o protect the taxpayers."[120] So we agree with the district court, though for a different reason, that Counts II and III must be dismissed.

VI

We now consider Count I's substantive allegation that the net worth sweep exceeded FHFA's conservator powers. Like any federal agency, FHFA "literally has no power to act . . . unless and until Congress confers power upon it."[121] This principle is enshrined in statute: "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations. . . . "[122] It is recognized in prominent Supreme Court decisions and implicit in countless others.[123] The warning that "[i]f we are to continue a government of limited powers, these

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[119] *Id.* §§ 1455(*l*)(1)(B), 1719(g)(1)(B).

[120] *Id.* §§ 1455(*l*)(1)(C), 1719(g)(1)(C).

[121] *New York v. FERC*, 535 U.S. at 18 (quoting *La. Pub. Serv. Comm'n*, 476 U.S. at 374).

[122] 5 U.S.C. § 706.

[123] *See, e.g.*, *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 134-35 (1990) (holding that agency "does not have the power to adopt a policy that directly conflicts with its governing statute"); *La. Pub. Serv. Comm'n*, 476 U.S. at 374 (holding that "a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority").

agencies must themselves be regulated" remains as fresh as ever.[124]

A

To define FHFA's statutory authority, we "follow the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context."[125] Emphasis on isolated provisions at the expense of other, more applicable ones is "hyperliteral and contrary to common sense."[126] As Learned Hand explained, "[w]ords are not pebbles in alien juxtaposition; they have only a communal existence."[127] Our analysis proceeds in three parts: HERA's plain meaning, its past judicial interpretations (including FIRREA precedent), and insight from common-law conservatorship.

1

Under HERA's plain meaning, FHFA as conservator has limited, enumerated powers. To begin with, conservator and receiver are distinct and mutually exclusive roles. HERA says FHFA may "be appointed as conservator *or* receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated

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[124] Felix Frankfurter, *The Growth of American Administrative Law*, 37 HARV. L. REV. 638, 639 (1924) (book review) (quoting Elihu Root, *Address of the President*, 41 AM. BAR ASS'N REP. 356-69 (1916)).

[125] *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (citation omitted).

[126] *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012).

[127] *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (quoted in *King*, 502 U.S. at 221).

entity."[128] In ordinary use, the word "or" is "almost always disjunctive, that is, the words it connects are to be given separate meanings."[129] So FHFA may not occupy both roles simultaneously. To the same point, "[t]he appointment of the Agency as receiver . . . shall immediately terminate any conservatorship."[130] Similarly, the incidental powers provision authorizes FHFA to "exercise all powers and authorities specifically granted to conservators or receivers, *respectively*, under this section, and such incidental powers as shall be necessary to carry out such powers."[131] In short, the FHFA Director may appoint the agency as either conservator or receiver, but once he does so, FHFA's powers depend on the role.

Some powers do overlap. HERA grants general powers to FHFA as either conservator or receiver. In either capacity, FHFA is a successor to the GSE.[132] It succeeds to the GSE's and its stakeholders' "rights, titles, powers, and privileges . . . with respect to the regulated entity and [its] assets."[133] Similarly, FHFA in either capacity has power to operate the GSE.[134] This includes taking over its assets, operating its business, collecting obligations, performing its functions, preserving and conserving its assets and property, and entering

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[128] 12 U.S.C. § 4617(a)(2) (emphasis added).

[129] *Loughrin v. United States*, 573 U.S. 351, 357 (2014) (quoting *United States v. Woods*, 571 U.S. 31, 45 (2013)).

[130] 12 U.S.C. § 4617(a)(4)(D).

[131] *Id.* § 4617(b)(2)(J) (emphasis added).

[132] *Id.* § 4617(b)(2)(A).

[133] *Id.* § 4617(b)(2)(A)(i).

[134] *Id.* § 4617(b)(2)(B).

contracts.[135] The list goes on: In either role FHFA may transfer assets or liabilities[136]; cause other stakeholders to perform functions[137]; pay obligations[138]; issue subpoenas[139]; and exercise incidental powers.[140]

But that list has an end. Other powers depend on which role FHFA occupies. The statute enumerates FHFA's separate "[p]owers as conservator":

> The Agency may, as conservator, take such action as may be—(i) necessary to put the regulated entity in a sound and solvent condition; and (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.[141]

Then it enumerates "[a]dditional powers as receiver":

> "In any case in which the Agency is acting as receiver, the Agency shall place the regulated entity in liquidation and proceed to realize upon the assets of the regulated entity in such manner as the Agency deems appropriate, including through the sale of assets. . . . "[142]

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[135] *Id.*

[136] *Id.* § 4617(b)(2)(G).

[137] *Id.* § 4617(b)(2)(C).

[138] *Id.* § 4617(b)(2)(H).

[139] *Id.* § 4617(b)(2)(I).

[140] *Id.* § 4617(b)(2)(J).

[141] *Id.* § 4617(b)(2)(D).

[142] *Id.* § 4617(b)(2)(E).

The receiver powers also include organizing a successor enterprise[143] and administering a detailed claim-processing scheme.[144]

The receiver powers stand in contrast to the conservator powers. As receiver, FHFA gains the power to liquidate the GSE and realize on its assets.[145] It also gains the power to notice, review, and determine creditors' claims.[146] A conservator does not have these powers. If it did, a conservator could liquidate the GSE's assets without following HERA's detailed claim-processing scheme.

The Agencies contend that the general powers to "operate the regulated entity" and "conduct all [its] business,"[147] or "transfer or sell any asset or liability of the regulated entity in default,"[148] authorize the net worth sweep. But if read so broadly, these provisions would obliterate the receivership claim-processing duties. If a conservator or receiver may enter *any* transaction as part of "operat[ing]" the GSE and "conduct[ing]" its business,[149] there is no bar to circumventing HERA's creditor and shareholder protections.

That would raze the receiver's duties to notice and adjudicate claims.[150] It would also be inconsistent with creditors' and shareholders' right to have their claims

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[143] *Id.* § 4617(b)(2)(F).

[144] *Id.* § 4617(b)(3), (b)(4), (b)(5), (b)(7), (b)(8), (b)(9).

[145] *Id.* § 4617(b)(2)(E).

[146] *Id.* § 4617(b)(3), (b)(4), (b)(5), (b)(7), (b)(8), (b)(9).

[147] *Id.* § 4617(b)(2)(B)(i).

[148] *Id.* § 4617(b)(2)(G).

[149] *Id.* § 4617(b)(2)(B)(i).

[150] *Id.* § 4617(b)(3), (b)(4), (b)(5), (b)(7), (b)(8), (b)(9).

paid in receivership.[151] So it cannot be a correct reading. "In construing a statute we are obliged to give effect, if possible, to every word Congress used."[152] And "the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."[153]

Rather than give the general powers their broadest possible meaning, we give them a meaning consistent with the separate conservator and receiver powers. A coherent interpretation of these provisions is not just reasonable, it is mandatory. In *RadLAX*, the Supreme Court held that when "a general authorization and a more limited, specific authorization exist side-by-side" in the same statute, "the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment."[154] In this situation "[t]he general/specific canon . . . avoids not contradiction but the superfluity of a specific provision that is swallowed by the general one."[155] Other

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[151] *Id.* § 4617(b)(2)(K)(i).

[152] *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *see* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 176 (2012).

[153] *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013).

[154] *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645-46 (2012) (quoting *United States v. Chase*, 135 U.S. 255, 260 (1890)).

[155] *Id.* at 645.

Supreme Court authority similarly warns against applying a general provision at the expense of more specific ones.[156]

Applying this to HERA, § 4617(b)(2)(D) enumerates the conservator's specific powers to "put the regulated entity in a sound and solvent condition," "carry on [its] business," and "preserve and conserve" its assets. The shared conservator-receiver powers are more general and would swallow the rest of the statute if interpreted broadly. So the more "particular enactment must be operative."[157] "[M]ay means may" and "'may' is, of course, 'permissive rather than obligatory.'"[158] But here "may" is a grant of power that enables FHFA to act. FHFA as conservator may not exercise a power beyond the ones granted.[159]

The incidental-powers provision does not change this. It gives FHFA other powers "necessary to carry out" its enumerated ones.[160] We doubt that Congress "in fashioning this intricate . . . machinery, would

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[156] *See Bloate v. United States*, 559 U.S. 196, 207 (2010) ("[G]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932))).

[157] *RadLAX*, 566 U.S. at 646 (quoting *Chase*, 135 U.S. at 260).

[158] *Perry Capital*, 864 F.3d at 607 (first quoting *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 608 (D.C. Cir. 2016); then quoting *Baptist Mem'l Hosp. v. Sebelius*, 603 F.3d 57, 63 (D.C. Cir. 2010)).

[159] *E.g.*, *La. Pub. Serv. Comm'n*, 476 U.S. at 374 ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.").

[160] 12 U.S.C. § 4617(b)(2)(J).

thus hang one of the main gears on the tail pipe."[161] Including near-unlimited conservatorship powers in this provision would swallow a large chunk of HERA. And incidental powers are those "necessary to carry out" the powers granted to "conservators or receivers, respectively."[162] This links incidental powers to enumerated ones and recognizes the conservator-receiver distinction. In short, any exercise of an incidental power must serve an enumerated power.[163] Beyond limited powers to "preserve and conserve" the GSEs' assets and property, FHFA would lack any intelligible principle to guide its discretion as conservator. This would permit essentially any action that could be characterized as "reorganizing" the GSEs and would eviscerate many pages of 12 U.S.C. § 4617.

The best-interests clause is also consistent with this reading. That clause, within the incidental-powers provision, authorizes FHFA to "take any action authorized by this section, which the Agency determines is in the best interests of the regulated entity *or the Agency*."[164] Permitting the conservator to act in its own interest may appear to depart from the traditional view of a conservator as fiduciary. But the best-interests clause modifies FHFA's authority "as conservator or receiver,"[165] and it only affects actions that are otherwise "authorized

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[161] *Brannan v. Stark*, 342 U.S. 451, 463 (1952).

[162] 12 U.S.C. § 4617(b)(2)(J)(i).

[163] *Cf. RadLAX*, 566 U.S. at 645 (holding that general authority should not be interpreted to make specific authority superfluous).

[164] 12 U.S.C. § 4617(b)(2)(J)(ii) (emphasis added).

[165] *Id.* § 4617(b)(2)(J).

by this section."[166] So FHFA may pursue its own interests only within the conservator's enumerated powers. It may not, for example, wind down a GSE and jettison receivership protections all in its own best interests. That would not be "authorized by this section." Instead, this clause is a modest addition to traditional conservatorship powers. It may permit related-party transactions that would otherwise be inconsistent with fiduciary duties.[167]

2

FIRREA decisions also demonstrate the conservator's limited, enumerated powers.[168] FIRREA's conservator-powers provision is materially identical to HERA's.[169] In *McAllister* we interpreted that provision to "state[] explicitly that a conservator only has the power to take actions necessary to restore a financially troubled institution to solvency."[170] We are in good company—the Fourth, Eighth, Ninth, Eleventh, and D.C. Circuits have articulated similar views.[171] Under

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[166] *Id.* § 4617(b)(2)(J)(ii).

[167] *See Perry Capital*, 864 F.3d at 643 (Brown, J., dissenting in part).

[168] *Cf. Merrill Lynch*, 547 U.S. at 85 (stating that incorporation of language from existing statute generally incorporates its judicial interpretations as well); *Lorillard*, 434 U.S. at 581 ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. . . . ").

[169] *Compare* 12 U.S.C. § 4617(b)(2)(D) (HERA), *with id.* § 1821(d)(2)(D) (FIRREA).

[170] 201 F.3d 570, 579 (5th Cir. 2000).

[171] *See Elmco Props., Inc. v. Second Nat'l Fed. Sav. Ass'n*, 94 F.3d 914, 922 (4th Cir. 1996) ("[A] conservator's function is to restore the bank's solvency and preserve its assets."); *James Madison*, 82 F.3d

FIRREA, a conservator has power to steward the bank's assets, not to make every conceivable use of them.

3

The common-law meaning of "conservator" also shows it has limited powers. The Supreme Court recognizes a "settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses."[172] And "absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them."[173]

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at 1090 ("The principal difference between a conservator and receiver is that a conservator may operate and dispose of a bank as a going concern, while a receiver has the power to liquidate and wind up the affairs of an institution."); *Del E. Webb McQueen Dev. Corp. v. RTC*, 69 F.3d 355, 361 (9th Cir. 1995) ("The RTC, as conservator, operates an institution with the hope that it might someday be rehabilitated. The RTC, as receiver, liquidates an institution and distributes its proceeds to creditors according to the priority rules set out in the regulations."); *RTC v. United Tr. Fund, Inc.*, 57 F.3d 1025, 1033 (11th Cir. 1995) ("The conservator's mission is to conserve assets which often involves continuing an ongoing business. The receiver's mission is to shut a business down and sell off its assets."); *RTC v. CedarMinn Bldg. Ltd. P'ship*, 956 F.2d 1446, 1450 (8th Cir. 1992) ("Had Congress intended RTC's status as a conservator or a receiver to be mere artifice, it would have granted all duties, rights, and powers to the Corporation.").

[172] *United States v. Castleman*, 572 U.S. 157, 162 (2014) (quoting *Sekhar v. United States*, 570 U.S. 729, 732 (2013)).

[173] *Morissette v. United States*, 342 U.S. 246, 263 (1952); *see Bond v. United States*, 572 U.S. 844, 861 (2014) ("In settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition.").

There is no shortage of authority for traditional conservatorship. Well before HERA, or even FIRREA, the Supreme Court recognized that a conservator has limited powers and must conserve the ward's property.[174] Under the Uniform Probate Code, a "conservator" is a fiduciary held to the same standard of care as a trustee.[175] And according to the Congressional Research Service, "[a] conservator is appointed to operate the institution, conserve its resources, and restore it to viability."[176] Black's Law Dictionary defines "conservator" as "[a] guardian, protector, or preserver . . . the modern equivalent of the common-law *guardian*," and it defines "managing conservator" as "[a] person appointed by a court to manage the estate or affairs of someone who is legally incapable of doing so."[177]

Tethering the conservator's powers to traditional principles of insolvency is both sound and indispensable. FHFA's present Director has explained that "[a] market economy depends upon predictable rules to govern competition. These rules must include . . . predictable and fair standards to allocate losses and rehabilitate

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[174] *See Deputy v. du Pont*, 308 U.S. 488, 496 (1940) (holding that purchasing stock for executive incentives is not an "expense which a conservator of an estate . . . would ordinarily incur"); *United States v. Chem. Found.*, 272 U.S. 1, 10-11 (1926) (holding that enemy-property custodian "was a mere conservator and was authorized to sell only to prevent waste").

[175] UNIF. PROB. CODE § 5-418(a).

[176] DAVID H. CARPENTER & M. MAUREEN MURPHY, CONG. RES. SERV., FINANCIAL INSTITUTION INSOLVENCY: FEDERAL AUTHORITY OVER FANNIE MAE, FREDDIE MAC, AND DEPOSITORY INSTITUTIONS 5 (2008), https://digital.library.unt.edu/ark:/67531/metadc795484/m1/1/high_res_d/RL34657_2008Sep10.pdf.

[177] *Conservator*, BLACK'S LAW DICTIONARY (11th ed. 2019).

or liquidate a company when it cannot pay its debts."[178] Considering this need for continuity, HERA's conservator powers must be interpreted in light of both FIRREA decisions and traditional conservatorship.[179] These authorities "reflect a fundamental difference between the missions of a conservator, which seeks to reorganize, and a receiver, which seeks to liquidate."[180]

Congress built FIRREA, and later HERA, on this common-law understanding. Until recently, FHFA agreed. It told Congress in 2010 that "[t]he purpose of conservatorship is to preserve and conserve each company's assets and property and to put the companies in a sound and solvent condition."[181] In 2011, it had a "statutory *mission* to restore soundness and solvency to insolvent regulated entities and to preserve and conserve their assets and property."[182] In a 2012 regulation, it said "FHFA's duties as conservator *require* the conservation and preservation of the Enterprises' assets. . . . [A]ny goal-setting must be closely linked

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[178] Michael Krimminger & Mark A. Calabria, *The Conservatorships of Fannie Mae and Freddie Mac: Actions Violate HERA and Established Insolvency Principles* 8 (Cato Inst., Working Paper No. 26, 2015).

[179] *See id.* at 26-27.

[180] *Id.* at 42.

[181] Fed. Hous. Fin. Agency, Report to Congress: 2009, at i (May 25, 2010), https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/2009_ AnnualReportToCongress_5 08.pdf.

[182] Conservatorship and Receivership, 76 Fed. Reg. 35724, 35726 (June 20, 2011) (emphasis added).

to putting the Enterprises in sound and solvent condition."[183] These contemporary statements align with the traditional understanding of conservatorship.

Congress did not repudiate common-law conservatorship in FIRREA or HERA. Instead, it consistently authorized the FDIC and then FHFA to put entities in a "sound and solvent condition," "carry on th[eir] business," and "preserve and conserve th[eir] assets and property."[184] Neither HERA's general powers, implied powers, nor right to act in FHFA's own best interest is the kind of "contrary direction" that quells common-law conservatorship.[185] A conservatorship of Fannie Mae or Freddie Mac (here, both) sways an entire industry. Given the potential effect on markets, firms, and consumers, partial suggestions are not enough to show that HERA inverted traditional conservatorship.[186] "Conservator" is an old role's anchor, not a new role's banner.[187]

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[183] 2012-2014 Enterprise Housing Goals, 77 Fed. Reg. 67535, 67549-50 (Nov. 13, 2012) (emphasis added); *see also* Fannie Mae and Freddie Mac Loan Purchase Limits: Request for Public Input on Implementation Issues, 78 Fed. Reg. 77450, 77451 (Dec. 23, 2013) (describing authority to "preserve and conserve" GSEs' assets as "FHFA's conservator obligation").

[184] 12 U.S.C. §§ 4617(b)(2)(D) (HERA), 1821(d)(2)(D) (FIRREA).

[185] *Morissette*, 342 U.S. at 263.

[186] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.").

[187] *See Castleman*, 572 U.S. at 162 (stating that Congress intends to incorporate settled meaning of common-law terms it uses); *Morissette*, 342 U.S. at 263 (holding that Congress, in using term of art, presumably adopts its legal tradition and meaning).

B

Now to apply this understanding of conservator powers to the Third Amendment. We hold the Shareholders stated a plausible claim that the Third Amendment exceeded statutory authority. Transferring substantially all capital to Treasury, without limitation, exceeds FHFA's powers to put the GSEs in a "sound and solvent condition," "carry on the[ir] business," and "preserve and conserve [their] assets and property."[188] We ground this holding in statutory interpretation, not business judgment.

In adopting the net worth sweep, the Agencies abandoned rehabilitation in favor of "winding down" the GSEs. Treasury announced that the Third Amendment would "expedite the wind down of Fannie Mae and Freddie Mac" and ensure that the GSEs "will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form."[189] The FHFA acting Director also said that the Third Amendment "reinforce[d] the notion that the [GSEs] will not be building capital as a potential step to regaining their former corporate status."[190] In a report to Congress, FHFA explained that it was "prioritizing [its] actions to move the housing industry to a new state, one without Fannie

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[188] 12 U.S.C. § 4617(b)(2)(D).

[189] Compl. ¶ 135 (quoting Press Release, Dep't of Treasury, Treasury Department Announces Further Steps to Expedite Wind Down of Fannie Mae and Freddie Mac (Aug. 17, 2012)).

[190] *Id.* ¶ 140 (quoting Edward J. DeMarco, Acting Director, FHFA, Statement Before the U.S. Sen. Comm. on Banking, Hous., & Urban Affairs (Apr. 18, 2013)).

Mae and Freddie Mac."[191] For reasons we are about to explain, this "wind down" exceeded the conservator's powers and is the type of transaction reserved for a receiver.

As a textual matter, the net worth sweep actively undermined pursuit of a "sound and solvent condition," and it did not "preserve and conserve" the GSEs' assets.[192] Treasury has collected $195 billion under the net worth sweep.[193] This alone exceeds the $187 billion it invested.[194] After paying back more than the initial investment, the GSEs remain on the hook for Treasury's entire $189 billion liquidation preference.[195] And under the net worth sweep, Treasury has a right to the GSEs' net worth in perpetuity.[196]

FHFA had authority, of course, to pay back Treasury for the GSEs' draws on the funding commitment. The funding commitment provided liquidity and took on risk, so Treasury was also entitled to compensation for the cost of financing. But the net worth sweep continues transferring the GSEs' net worth indefinitely, well after Treasury has been repaid and the GSEs returned to sound condition. That kind of liquidation goes beyond the conservator's powers.

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[191] *Id.* (quoting FHFA, Report to Congress 2012, at 13 (June 13, 2013)).

[192] 12 U.S.C. § 4617(b)(2)(D).

[193] Compl. ¶¶ 25, 87.

[194] *Id.*

[195] The $189 billion figure is $187 billion drawn, plus an initial $1 billion liquidation preference per GSE. *Id.* ¶¶ 8, 87, 152.

[196] *Id.* ¶ 25.

FIRREA precedent confirms that this exceeds statutory conservator powers. In *Elmco Properties*, the Fourth Circuit held that a creditor was unlawfully deprived of its claim because it never received notice of the receivership.[197] The creditor had notice of a conservatorship. But "the RTC as conservator cannot . . . liquidate a failed bank. Instead, the conservator's function is to *restore the bank's solvency* and *preserve its assets*."[198] Dividing up and distributing the institution's property is inconsistent with a conservator's powers, so the creditor in *Elmco* was not on inquiry notice to pursue its claim.[199] To "wind down" the GSEs' affairs here, FHFA needed to follow HERA's carefully crafted receivership procedures. But FHFA was never appointed receiver, so it lacked authority to bleed the GSEs' profits in perpetuity.

Finally, based on the Shareholders' allegations, the net worth sweep is inconsistent with conservatorship's common-law meaning. In *United States v. Chemical Foundation*, the Supreme Court characterized a wartime enemy-property custodian as "a mere conservator" with "the powers of a common-law trustee."[200] And a common-law conservator may not give the ward's assets to a single shareholder, just as a fiduciary or trustee

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[197] *Elmco Props., Inc. v. Second Nat'l Fed. Sav. Ass'n*, 94 F.3d 914, 922 (4th Cir. 1996).

[198] *Id.* (emphasis added).

[199] *See id.*

[200] 272 U.S. at 10 (interpreting Trading with the Enemy Act of October 6, 1917, Pub. L. No. 65-91, § 12, 40 Stat. 411, 423 (codified as amended at 50 U.S.C. § 4312)).

may not do so.[201] Admittedly, HERA modified the common-law meaning in some ways, such as by permitting use of enumerated powers in FHFA's best interest.[202] But in more relevant areas HERA provided no "contrary direction" against the common-law meaning:[203] It did not authorize a conservator to "wind down" the ward's affairs or perpetually drain its earnings. Under traditional principles of insolvency, investors and the market reasonably expect a conservator to "operate, rehabilitate, reorganize, and restore the health of the troubled institution," not summarily take its property.[204] The Third Amendment inverts traditional conservatorship.

It is worth noting that the facts at this stage are distinguishable from those in some sister-circuit decisions. The Shareholders appeal from a dismissal under Rule 12(b)(6). The complaint alleges facts showing ultra vires action that were not present in some other cases. For example, emails suggest that the Agencies designed the Third Agreement to prevent Fannie and Freddie from recapitalizing. National Economic Council advi-

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[201] *See* UNIF. PROB. CODE § 5-418(a) ("A conservator . . . is a fiduciary and shall observe the standards of care applicable to a trustee."); *Conservator*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "conservator" as "[a] guardian, protector, or preserver").

[202] 12 U.S.C. § 4617(b)(2)(J)(ii); *cf. Perry Capital*, 864 F.3d at 643 (Brown, J., dissenting in part) (stating limited interpretation of best-interests clause).

[203] *Morissette*, 342 U.S. at 263.

[204] Michael Krimminger & Mark A. Calabria, *The Conservatorships of Fannie Mae and Freddie Mac: Actions Violate HERA and Established Insolvency Principles* 42-43 (Cato Inst., Working Paper No. 26, 2015).

sor Jim Parrott, who worked with Treasury in developing the net worth sweep, allegedly wrote: "[W]e've closed off [the] possibility that [Fannie and Freddie] ever[] go (pretend) private again."[205] Similarly, when Bloomberg published a comment that "[w]hat the Treasury Department seems to be doing here, and I think it's a really good idea, is to deprive [Fannie and Freddie] of all their capital so that [they can not go private again]," Parrott emailed the source: "Good comment in Bloomberg—you are exactly right on substance and intent."[206] The emails reinforce that the Third Amendment "deprive[d]" the GSEs of their capital, keeping them in a permanent state of suspension, which is not authorized by statutory conservator powers.[207] The pleadings in *Jacobs v. Federal Housing Finance Agency*[208] and *Perry Capital LLC v. Mnuchin*[209] appear to lack similar allegations. That factual difference distinguishes them.

But *Saxton v. Federal Housing Finance Agency*[210] and *Roberts v. Federal Housing Finance Agency*[211] had facts similar to the Shareholders' allegations here. So we recognize that our decision conflicts with at least

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[205] Compl. ¶ 107 (alterations in original).

[206] *Id.*

[207] Compl. ¶ 107.

[208] 908 F.3d 884 (3d Cir. 2018).

[209] 864 F.3d 591 (D.C. Cir. 2017).

[210] 901 F.3d 954, 957 (8th Cir. 2018); *see* Amended Complaint ¶ 92, *Saxton v. FHFA*, No. 15-CV-47-LRR (N.D. Iowa Feb. 9, 2016), ECF No. 61 (alleging similar email communications).

[211] 889 F.3d 397, 402 (7th Cir. 2018); *see* Amended Complaint ¶ 106-07, *Roberts v. FHFA*, No. 1:16-cv-2107 (N.D. Ill. Apr. 5, 2016), ECF No. 22 (alleging similar email communications).

some other circuits. The conflict is whether HERA authorized FHFA to adopt the Third Amendment. We think that, in interpreting HERA's conservatorship and receivership scheme, FHFA's general powers should not render specific ones meaningless. This is especially true because, although HERA qualifies traditional conservatorship, it does not eviscerate it. So traditional principles of insolvency and FIRREA decisions remain relevant. And they counsel against a near-limitless view of FHFA's conservator powers.

The complaint states a plausible claim that FHFA exceeded its statutory authority. Judge Haynes's dissent suggests that the Shareholders could waive the legal standard for reviewing the grant of a motion to dismiss. But the Supreme Court explained in *Iqbal* that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[212] The standard is generally applicable, and we see no exception here. When we reverse the grant of a motion to dismiss, the district court may decide if fact issues require trial or if summary judgment should be granted.[213] The proper remedy is to reverse the motion-to-dismiss denial and remand Count I for further proceedings.

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[212] 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

[213] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (holding that trial court shall grant a motion for summary judgment if there is no genuine issue for trial); 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1349 (3d ed. 2019) ("These seven defenses [in Rule 12(b)(1)-(7)] are permitted to be asserted prior to service of a responsive pleading because they present preliminary or threshold matters that normally should be adjudicated early in the action.").

VII

We now turn to Count IV, the Shareholders' constitutional claim. Although the Shareholders could theoretically obtain full relief under Count I alone, they appeal from the dismissal of that count, so the parties have yet to litigate it to judgment. On the constitutional claim, in contrast, both sides moved for summary judgment in the district court. So we consider whether the Shareholders are entitled to some or all of their requested relief on this record alone. We first consider Count IV's justiciability based on standing and the succession provision.[214]

A

Federal courts have power to decide "Cases" and "Controversies."[215] "That case-or-controversy requirement is satisfied only where a plaintiff has standing."[216] At its "irreducible constitutional minimum," standing requires plaintiffs to show they suffered "an injury in fact," the injury is "fairly traceable" to the defendant's actions, and the injury will "likely . . . be redressed by a favorable decision."[217] "The party invoking federal jurisdiction bears the burden of establishing these

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[214] For completeness, we note the Agencies do not argue that the anti-injunction provision prevents relief on Count IV.

[215] U.S. CONST. art. III, § 2.

[216] *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273 (2008).

[217] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (alterations and internal quotation marks omitted).

elements."[218] Here, the summary-judgment standard applies to jurisdictional facts.[219]

The Shareholders suffered injury in fact. The required injury to challenge agency action is minimal: The Supreme Court has "allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax."[220] The Agencies contend that, by the time of the net worth sweep, the Shareholders had no rights to dividends and their shares were delisted from the New York Stock Exchange. But pumping large profits to Treasury instead of restoring the GSEs' capital structure is an injury in fact.[221]

The Shareholders' injury is traceable to the removal protection. The Agencies contend that the President's undisputed control over FHFA's counterparty, Treasury, shows that a President-controlled FHFA would have adopted the net worth sweep. But standing does not require proof that an officer would have acted differently in the "counterfactual world" where he was properly authorized.[222] In *Free Enterprise Fund*, the Supreme Court explained that "the separation of powers

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[218] *Id.* at 561.

[219] *See id.*

[220] *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (citations omitted).

[221] *See Perry Capital*, 864 F.3d at 632 (finding injury in fact because shareholders alleged that "the Third Amendment, by depriving them of their right to share in the Companies' assets when and if they are liquidated, immediately diminished the value of their shares").

[222] *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 512 n.12 (2010).

does not depend on the views of individual Presidents, nor on whether 'the encroached-upon branch approves the encroachment.'"[223] And in *Bowsher v. Synar*, the Court said that "[t]he separated powers of our Government cannot be permitted to turn on judicial assessment of whether an officer exercising executive power is" likely to be fired.[224] The Shareholders observe that FHFA's status as an "independent" counterparty could actually have boosted the Third Amendment's political salability. Fortunately, under *Synar* and *Free Enterprise Fund*, we need not weigh in on that counterfactual.

And the relief sought would redress the Shareholders' injury. The Agencies contend that vacating past agency action is improper in a removal case and in this case particularly. But the form of injunctive or declaratory relief is a merits question.[225] The Shareholders seek, among other things, vacatur of the net worth sweep. That would redress their injury.

The Shareholders have standing.

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[223] *Id.* at 497 (citations omitted) (quoting *New York v. United States*, 505 U.S. 144, 182 (1992)).

[224] 478 U.S. 714, 730 (1986); *see also Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000) ("There is certainly no rule that a party claiming constitutional error in the vesting of authority must show a direct causal link between the error and the authority's adverse decision. . . . *Bowsher v. Synar* extended this principle to general separation-of-powers claims." (citation omitted)).

[225] *See Warth v. Seldin*, 422 U.S. 490, 500-02 (1975) (presuming merits of complaint for purposes of standing analysis).

B

The succession provision does not bar Count IV because it does not bar any direct claims.[226] A plaintiff with Article III standing can maintain a direct claim against government action that violates the separation of powers.[227] In *Bond v. United States* the Supreme Court collected numerous separation-of-powers cases litigated by individuals with an otherwise-justiciable case or controversy.[228] "If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object."[229]

There is a separate reason the succession provision does not bar the Shareholders' constitutional claim. "[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear."[230] Only a "heightened showing" in the statute

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[226] *See* 12 U.S.C. § 4617(b)(2)(A) (providing that FHFA succeeds to shareholder rights "with respect to the regulated entity and the assets of the regulated entity"); *Roberts*, 889 F.3d at 408; *Perry Capital*, 864 F.3d at 624.

[227] *See Free Enter. Fund*, 561 U.S. at 487-91 (holding court had jurisdiction over declaratory judgment action alleging violation of separation of powers).

[228] 564 U.S. 211, 223 (2011) (citing *Free Enter. Fund*, 561 U.S. 477; *Clinton v. City of New York*, 524 U.S. 417 (1998); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

[229] *Id.*

[230] *Webster v. Doe*, 486 U.S. 592, 603 (1988).

may be interpreted to "deny any judicial forum for a colorable constitutional claim."[231] Here, the succession provision does not cross-reference the Administrative Procedure Act's general rule that agency action is reviewable.[232] It does not directly address judicial review at all. This is not the kind of "heightened showing"[233] or "'clear and convincing' evidence"[234] required for Congress to deny review of constitutional claims.

VIII

The Shareholders are entitled to judgment on Count IV.

A

HERA's for-cause removal protection infringes Article II. It limits the President's removal power and does not fit within the recognized exception for independent agencies. That exception, established in *Humphrey's Executor v. United States*, has applied only to multimember bodies of experts.[235] A single agency director lacks the checks inherent in multilateral decision making and is more difficult for the President to influence.[236] We reinstate Part II B 2 of the panel opinion, which holds that FHFA's structure is unconstitutional.[237] That

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[231] *Id.*

[232] 5 U.S.C. § 702.

[233] *Webster*, 486 U.S. at 603.

[234] *Johnson v. Robinson*, 415 U.S. 361, 373 (1974) (quoting *Abbott Labs.*, 387 U.S. at 141).

[235] 295 U.S. 602, 628-32 (1935).

[236] *See id.* at 624 (stating that the Federal Trade Commission is a "body of experts").

[237] *Collins*, 896 F.3d at 659-75. This opinion supersedes the panel opinion in remaining part. *See, e.g.*, *J.T. Gibbons, Inc. v. Crawford*

Part explains that the Director's removal protection, in combination with other FHFA features, is inconsistent with Article II and the separation of powers. It also distinguishes the D.C. Circuit's *PHH Corp.* decision.[238]

We disagree with Judge Higginson's attempt to distinguish this removal protection from those the Supreme Court has held unconstitutional. He cites scholarship that HERA's "for cause" removal provision gives less protection than statutes limiting removal to "inefficiency, neglect of duty, or malfeasance in office."[239] Initially, requiring "cause" for removal is well recognized as an independent agency's threshold feature.[240] And in *Synar*, when the Supreme Court considered a statute permitting Congress to remove an official for "inefficiency," "neglect of duty," or "malfeasance," it held this alternative language is quite broad.[241] True, the removal protection that *Free Enterprise Fund* held unconstitutional was exceptionally strict.[242] But the Court

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Fitting Co., 790 F.2d 1193, 1194 (5th Cir. 1986) (en banc) (reinstating parts of panel opinion).

[238] *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75 (D.C. Cir. 2018) (en banc).

[239] *Humphrey's Ex'r*, 295 U.S. at 619 (quoting Federal Trade Commission Act, 15 U.S.C. § 41).

[240] *See Free Enter. Fund*, 561 U.S. at 483 ("Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause.").

[241] *Synar*, 478 U.S. at 729.

[242] 561 U.S. at 503 ("A Board member cannot be removed except for willful violations of the Act, Board rules, or the securities laws; willful abuse of authority; or unreasonable failure to enforce compliance. . . . ").

held that the proper amount of second-level removal protection there was *none*, not a relaxed amount.[243]

Judge Higginson also points to uncertainty about whether and how a removal would unfold. But the Court in *Synar* "reject[ed] [the] argument that consideration of the effect of a removal provision is not 'ripe' until that provision is actually used."[244] In *Synar* this was because Congress's removal authority gave it effective control over the Comptroller in the status quo.[245] Although here the problem is an absence of control, not its misplacement, the same "ripeness" principle applies.

B

The Agencies contend the Shareholders are not entitled to relief for other reasons. They first say that the FHFA acting Director who adopted the Third Amendment was, unlike a normally appointed Director, not insulated from removal. Under 12 U.S.C. § 4512(b)(2), the Director serves for five years "unless removed before the end of such term for cause by the President." That provision does not explicitly address acting Directors. Under 12 U.S.C. § 4512(f), the President chooses any acting Director from among the Deputy Directors. And that provision does not explicitly address removal.

But HERA unequivocally says what kind of agency it creates: "There is established the Federal Housing Finance Agency, which shall be an independent agency of

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[243] *Id.* at 509 ("Concluding that the removal restrictions are invalid leaves the Board removable by the Commission at will, and leaves the President separated from Board members by only a single level of good-cause tenure.").

[244] 478 U.S. at 727 n.5.

[245] *Id.*

the Federal Government."[246] In history and Supreme Court precedent, Presidential removal is the "sharp line of cleavage" between independent agencies and executive ones.[247] So we do not read the procedural guidance for choosing an acting Director to override the removal restriction, much less FHFA's central character. Instead, we read these provisions together.[248] The removal restriction applied to the acting Director.

Judge Costa's contrary authorities are distinguishable. In *Swan v. Clinton*, the D.C. Circuit held that the President could remove a National Credit Union Administration Board member serving in a "holdover" capacity.[249] But here the FHFA acting Director was not a holdover serving past his term's end. So at least one of *Swan*'s concerns, that "the absence of any term limit in the NCUA holdover clause enables holdover members to continue in office indefinitely," is misplaced.[250] And, while HERA's general removal protection is unequivocal,[251] in *Swan* "[t]he NCUA statute d[id] not expressly prevent the President from removing NCUA Board members except for good cause."[252] The court simply assumed the statute protected Board Members during

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[246] 12 U.S.C. § 4511(a).

[247] *Wiener v. United States*, 357 U.S. 349, 353 (1958).

[248] *See King*, 502 U.S. at 221 (applying "the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context" (citation omitted)).

[249] 100 F.3d 973 (1996).

[250] *Id.* at 987.

[251] 12 U.S.C. § 4512 ("The Director shall be appointed for a term of 5 years, unless removed before the end of such term for cause by the President.").

[252] 100 F.3d at 981.

their normal terms, then held any such protection did not extend to holdover Members.[253] In short, *Swan* interprets a different statute and has limited value for generalizing a rule.

Judge Costa also cites the Office of Legal Counsel opinion *Designating an Acting Director of the Bureau of Consumer Financial Protection*.[254] That opinion is about filling a vacancy under the CFPB's enabling statute and the Federal Vacancies Reform Act. Its reasoning includes a general rule that statutory removal protection does not extend to anyone temporarily performing an office.[255] But it relies principally on *Swan* for that proposition, and it doesn't explain why the same rule cuts across different enabling statutes. As a matter of statutory interpretation, HERA's removal restriction applied to the acting Director here.

C

Treasury also contends that FHFA in its conservator capacity does not exercise executive power, so violating the separation of powers was harmless here. Treasury cites *Beszborn*, where we held that the RTC as receiver exercised nongovernmental power in suing on behalf of the institution in receivership.[256] "[T]he suit was purely

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[253] *Id.* at 983 ("[W]e will assume *arguendo* that Board members have removal protection during their appointed terms and focus instead on determining whether, even if that is so, holdover members are similarly protected.").

[254] 41 Op. O.L.C. ___, 2017 WL 6419154 (Nov. 25, 2017) (interpreting 12 U.S.C. § 5491 and 5 U.S.C §§ 3345-3349d).

[255] *Id.* at *7.

[256] *United States v. Beszborn*, 21 F.3d 62, 68 (5th Cir. 1994).

an action between private individuals."[257] So later criminal prosecution of the same defendants did not violate the Double Jeopardy Clause because the first "punishment," the civil suit, was not sought by a sovereign.[258] Treasury also observes that private parties are sometimes appointed as receivers.[259]

Whether an agency exercises government power as conservator or receiver "depends on the context of the claim."[260] In *Slattery*, the Federal Circuit held that the FDIC as receiver acted for the United States when it retained a surplus from the seized bank's assets.[261] "[T]he claims [we]re asserted against the government, seeking return of the monetary surplus obtained for the seized bank."[262] So the bank's former shareholders could maintain their claims against the United States.[263]

The Third Amendment has more in common with *Slattery* than with *Beszborn*, showing that it invoked executive power. In *Beszborn*, we took care to say the receiver's action on the bank's behalf benefited "all stockholders and creditors of the bank" rather than "the United States Treasury."[264] The Third Amendment reversed this precisely. It transferred the wards' assets

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[257] *Id.*

[258] *Id.*

[259] *See* 12 U.S.C. § 191 (authorizing Comptroller of the Currency to appoint receiver); 12 C.F.R. § 51.2 ("The Comptroller . . . may appoint any person, including the OCC or another government agency, as receiver for an uninsured bank.").

[260] *Slattery v. United States*, 583 F.3d 800, 827 (Fed. Cir. 2009).

[261] *Id.* at 828.

[262] *Id.* at 827.

[263] *Id.* at 827-28.

[264] 21 F.3d at 68.

to the government, similar to retaining the liquidation surplus in *Slattery*.[265] FHFA is a federal agency, empowered by a federal statute, enriching the federal government. It adopted the Third Amendment with federal governmental power. And that power was executive in nature. The Agencies do not contend, nor could they, that the Third Amendment was quasi-legislative or quasi-judicial.[266]

Treasury's remaining arguments do not budge this point. It cites 12 U.S.C. § 191 and 12 C.F.R. § 51.2 as evidence that private parties can be receivers. But every conservator or receiver relies on some public authority, whether court or agency.[267] Even in Treasury's example, "[t]he receiver performs its duties under the direction of the Comptroller."[268] In this case, Congress empowered FHFA as a federal agency.[269] Absent that authority there would be no conservatorship

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[265] *See* 538 F.3d at 827-28.

[266] *Cf. First Fed. Sav. Bank & Tr. v. Ryan*, 927 F.2d 1345, 1359 (6th Cir. 1991) ("[T]he appointment of a conservator or receiver is not a 'judicial power'. . . . We believe that the power given to the Director to appoint a conservator or receiver is an executive power.").

[267] *E.g. Booth v. Clark*, 58 U.S. 322, 331 (1854) ("The receiver is but the creature of the court; he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court. . . . "); *see* 28 U.S.C. § 959 (providing that actions against court-appointed receivers are "subject to the general equity power of such court so far as the same may be necessary to the ends of justice"); FED. R. CIV. P. 66 ("[T]he practice in administering an estate by a receiver . . . must accord with the historical practice in federal courts or with a local rule.").

[268] 12 C.F.R. § 51.2(a).

[269] 12 U.S.C. § 4511(a) ("There is established the Federal Housing Finance Agency, which shall be an independent agency of the Federal Government.").

and no Third Amendment. And every federal agency must function within the federal Constitution's checks and balances. As then-Judge Kavanaugh explained in his *PHH Corp.* dissent, a constitutional agency structure serves "to protect liberty and prevent arbitrary decisionmaking by a single unaccountable Director."[270]

Finally, Treasury's attempt to distinguish the Third Amendment from governmental power is not, in any event, a standing argument. In the Appointments Clause case *Freytag v. Commissioner*, the Supreme Court held that whether the official acted as an Officer of the United States in the particular decision challenged was "beside the point" for standing purposes.[271] The Court rejected the Commissioner's argument that the taxpayers lacked standing to complain about the special trial judge's role in other cases.[272] If by statute he performed at least some duties of an Officer of the United States, his appointment must accord with Article II.[273] This case is analogous.[274]

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[270] 881 F.3d at 186 (Kavanaugh, J., dissenting).

[271] 501 U.S. 868, 882 (1991).

[272] *Id.*

[273] *Id.*; *see also Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1232 (2015) (holding Amtrak was a government entity in part because "rather than advancing its own private economic interests, Amtrak is required to pursue numerous, additional goals defined by statute").

[274] *See Free Enter. Fund*, 561 U.S. at 497-98 (holding separation of powers requires Presidential oversight of the executive power).

The Constitution bounds Congress's power to create agencies, draw their structure, and grant them authority. Agencies with removal-protected principal officers were a unique, but recognized, blend of legislative, executive, and judicial powers long before the FHFA. Their unique position has also been relatively static, until recently. The removal-protected FHFA Director is a new innovation and falls outside the lines that *Humphrey's Executor* recognized. Granting both removal protection and full agency leadership to a single FHFA Director stretches the independent-agency pattern beyond what the Constitution allows.

HAYNES, Circuit Judge, joined by STEWART, Chief Judge, and DENNIS, OWEN, SOUTHWICK, GRAVES, HIGGINSON, COSTA, and DUNCAN, Circuit Judges:

Some of us[1] agree with the conclusion reached in Section VIII.A-C of the majority en banc opinion that the FHFA is unconstitutionally structured, and some of us[2] conclude otherwise, but we all agree that, given the holding of the majority of the en banc court reversing the district court on this point and finding the FHFA to be unconstitutionally structured, it is necessary to reach the question of what remedy is appropriate for the structure found to be unconstitutional by the majority. We now turn to the remedy question.

When addressing the partial unconstitutionality of a statute such as this one, we seek to honor Congress's intent while fixing the problematic aspects of the statute. Thus, in this case, the appropriate—and most judicially conservative—remedy is to sever the "for cause" restriction on removal of the FHFA director from the statute. *See* 12 U.S.C. § 4512(b)(2).

The remedial analysis here is informed by that in *Free Enterprise Fund*. We start from the "normal rule that partial, rather than facial, invalidation is the required course." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) ("'Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the

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[1] Judges Owen, Southwick, Haynes, Graves and Duncan agree that the FHFA is unconstitutionally structured. Judges Southwick, Haynes, and Graves concur in that conclusion only.

[2] Chief Judge Stewart and Judges Dennis, Higginson, and Costa.

problem,' severing any 'problematic portions while leaving the remainder intact.'" (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328-29 (2006))). Just as in *Free Enterprise Fund*, if we declare the "for cause" removal restriction unconstitutional, then the executive officer will immediately be subject to sufficient Presidential oversight. 561 U.S. at 509. Finally, nothing in the statutory scheme suggests that Congress would prefer a complete unwind of actions taken by the FHFA to an FHFA director removable at will. Thus, severance of the "for cause" restriction remedies the Shareholders' injury as found by the majority of this court of being overseen by an unconstitutionally structured agency.

Here it is also "true that the language providing for good-cause removal is only one of a number of statutory provisions that, working together, produce a constitutional violation." *Id.* But, as the Supreme Court recognized, we should not roam further to invalidate other provisions or modify the statute's requirements. The other options would be far more invasive and "editorial." *Id.* at 510. Instead, we pursue a path that respects the legislative decisions made by the Congress that passed HERA and the legislative power of the current Congress to amend the statute without unwarranted disruption.

The Shareholders ask that we also invalidate the Net Worth Sweep, claiming the remedy must resolve the injury. Assuming *arguendo* that an injury in the form of an unconstitutionally structured agency exists,[3]

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[3] As noted above, there are differing views surrounding the constitutionality issue.

the Shareholders may not pick and choose among remedies based on their preferences. The Shareholders' complaint requested that a court invalidate only the Net Worth Sweep. They never requested a declaratory judgment about the PSPAs as a whole or even the Third Amendment. That is because the rest of the deal is a pretty good one for them: who would not want a virtually unlimited line of credit from the Treasury? Yet the Shareholders' constitutional theory is that everything the FHFA has done since its inception is void because it was an unconstitutionally structured agency.[4] They never explain why if all acts were void (or voidable), they are entitled to pick and choose a single provision to invalidate. That is inconsistent with the usual course of remedies. *See Fed. Ins. Co. v. Singing River Health Sys.*, 850 F.3d 187, 198 n.5 (5th Cir. 2017) (noting that accepting the premise that a party to an invalid contract could pick which parts to enforce would lead to an "absurd result"); RESTATEMENT (SECOND) OF CONTRACTS § 383 (AM. LAW. INST. 1981) ("A party who has the power of avoidance must ordinarily avoid the entire contract, including any part that has already been performed. He cannot disaffirm part of the contract that is particularly disadvantageous to himself while affirming a more advantageous part. . . . ").

Generally, there are at least two classes of cases where the appropriate remedy is to invalidate an action taken by an unconstitutional agency or officer. First, the Supreme Court has invalidated actions by actors

[4] They attempt to temper that theory by arguing that legal challenges might still not succeed due to standing, statutes of limitations, and potential ratification of past actions. But their theory is nonetheless that everything the FHFA has done is void.

who were granted power inconsistent with their role in the constitutional program. For example, the Shareholders' marquee case for their theory is *Bowsher v. Synar*, 478 U.S. 714 (1986). There, Congress delegated executive authority to a congressional officer. *Id.* at 732-34. But "Congress [could not] grant to an officer under its control what it [did] not possess." *Id.* at 726. The Supreme Court declared unconstitutional the statutory power that impermissibly empowered the congressional officer to exercise executive authority. *Id.* at 734-36.[5] Because the officer never should have had the authority in the first place, courts would naturally invalidate exercises of the authority. *Id.*; *cf. Nguyen v. United States*, 539 U.S. 69, 71 (2003) (vacating and remanding a case where an officer appointed under Article IV exercised Article III judicial authority). The Supreme Court has also invalidated exercises of authority that steal constitutionally specified power from other branches. *See Clinton*, 524 U.S. 417; *INS v. Chadha*, 462 U.S. 919 (1983).

Second, the Court has invalidated actions taken by individuals who were not properly appointed under the Constitution. It has thus vacated and remanded adjudications by officers who were not appointed by the appropriate official, *see Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018), or who skipped Senate confirmation through misuse of the Recess Appointments Clause, *see NLRB v. Noel Canning*, 573 U.S. 513 (2014).

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[5] The Court in *Bowsher* determined that the "issue of remedy" for the separation-of-powers violation at issue was "a thicket we need not enter," because Congress had provided "fallback" provisions in the statute in case it was invalidated. *Id.* at 734-35.

A common thread runs through these two categories. In each, officers were vested with authority that was never properly theirs to exercise. Such separation-of-powers violations are, as the D.C. Circuit put it, "void *ab initio*." *Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013), *aff'd but criticized*, 573 U.S. 513.

Restrictions on removal are different. In such cases the conclusion is that the officers are duly appointed by the appropriate officials and exercise authority that is properly theirs. The problem identified by the majority decision in this case is that, once appointed, they are too distant from presidential oversight to satisfy the Constitution's requirements.

Perhaps in some instances such an officer's actions should be invalidated. The theory would be that a new President would want to remove the incumbent officer to instill his own selection, or maybe that an independent officer would act differently than if that officer were removable at will. We have found no cases from either our court or the Supreme Court accepting that theory.

But even if that theory is right, it does not apply here for two reasons. First, the action at issue is the adoption of the Net Worth Sweep, and the President had adequate oversight of that action. The entire PSPAs, including the Third Amendment's Net Worth Sweep, were created between the FHFA and Treasury. During the process, the Treasury was overseen by the Secretary of the Treasury, who was subject to at will removal by the President. The President, thus, had plenary authority to stop the adoption of the Net Worth Sweep. This is thus a unique situation where we need not speculate about whether appropriate presidential oversight would have stopped the Net Worth Sweep. We know that the

President, acting through the Secretary of the Treasury, could have stopped it but did not.[6]

Second, we can take judicial notice of this reality: subsequent Presidents have picked their own FHFA directors, allaying concerns that the removal restriction prevented them from installing someone who would carry out their policy vision. After the adoption of the Net Worth Sweep, President Obama selected a Director who was confirmed by the Senate. Once confirmed, that director authorized filings in this court that supported and defended the Net Worth Sweep. He never questioned its propriety. President Trump later selected an acting Director under the Vacancies Reform Act. He never questioned the propriety of the Net Worth Sweep and reaffirmed the previous administration's position. President Trump has since selected a new director. He has not filed anything in this court or made any judicially noticeable statement opposing the Net Worth Sweep. The Net Worth Sweep has thus transcended political affiliations and traversed presidential administrations—even when an issue like the constitutionality of the structure of the FHFA has divided different directors. Were these Presidents concerned about invalidating the Net Worth Sweep, they could have picked different Directors who would carry out that vision, either in action or in litigation. These subsequent picks' affirmation of the Net Worth Sweep

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[6] We do not hold that plaintiffs asserting a separation-of-powers claim bear the burden of proving a different outcome absent a removal restriction. *See Free Enter. Fund*, 561 U.S. at 512 n.12. We hold only that plaintiffs may not sue to invalidate an agency action due to lack of presidential oversight when their allegations show that the President had oversight of the action.

demonstrates without question that invalidating the Net Worth Sweep would actually erode executive authority rather than reaffirm it. *See Lucia*, 138 S. Ct. at 2055.

Our decision not to invalidate the Net Worth Sweep is thus grounded in our respect for the Constitution and our co-equal branches of government. Undoing the Net Worth Sweep, as suggested by the dissenting opinion, would wipe out an action approved or ratified by two different Presidents' directors under the guise of respecting the presidency; how does that make sense? Here, the Constitution commits executive authority to the President. The President had full oversight of the adoption of the Net Worth Sweep, and each President since has appointed FHFA Directors who have affirmed it. We should not invalidate those Presidents' executive actions by invoking their need to exercise executive authority.

One final point: any remedy that invalidates the Net Worth Sweep without a judgment that fixes the constitutional problems would be particularly perverse. The FHFA could not ratify any previous actions or even continue operating because it would still suffer the same separation-of-powers defects we have identified here—just without an explicit declaration fixing the issue. We would invalidate an entire agency without any precedent directing us to do so. Similarly, there is no virtue in declaring the agency action unlawful then punting the form that judgment should take back to the district court. The only judgment the Shareholders are entitled to is the one the Supreme Court has given in similar removal-restriction cases, which is a declaration removing the "for cause" provision found unconstitutional by a majority of this court. Sending the case back for further litigation would cast one of the most financially consequential agencies into chaos. It would also further muddy our precedent on the appropriate remedy in removal-restriction cases.

In summary, the Shareholders' ongoing injury, if indeed there is one,[7] is remedied by a declaration that the "for cause" restriction is declared removed. We go no further. We will not let the Shareholders pick and choose parts of the PSPAs to invalidate when the President had adequate oversight over their adoption and particularly when two different presidents have selected agency heads who have supported the Net Worth Sweep. The appropriate remedy is the one that fixes the Shareholders' purported injury. That is exactly what our declaratory judgment does. Consequently, we decline to invalidate the Net Worth Sweep or PSPAs.[8] Instead, we conclude, given that the majority of the court has found the FHFA unconstitutionally structured, that the appropriate remedy for that finding is to declare the "for cause" provision severed.

[7] *See* n.3 *supra*.

[8] Because we reject the Shareholders' request to unwind the Net Worth Sweep, we do not in this section address whether § 4617(f) would bar such relief if it were otherwise necessary.

STUART KYLE DUNCAN, Circuit Judge, joined by OWEN, Circuit Judge, concurring:

While I join all of Judge Willett's superb majority opinion, I do not join his separate opinion that concludes the proper remedy for the separation-of-powers violation here is to vacate the Third Amendment. To the contrary, the proper remedy—as Judge Haynes cogently explains in her separate majority opinion—is to sever the for-cause removal provision from the challenged statute. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) ("*PCAOB*") ("'Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.'") (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328-29 (2006)). I write separately to explain why I think the Supreme Court's precedents compel that narrower remedy.

To justify vacating the Third Amendment, Judge Willett asserts that "the action of an unconstitutionally-insulated officer . . . must be set aside." Willett Dissent at 1. I can find no support for that categorical proposition. Judge Willett relies principally on *Bowsher v. Synar*, 478 U.S. 714 (1986), but *Bowsher* is off-point. *Bowsher* involved a challenge—not to an executive-branch official "insulated" from presidential oversight—but to the Comptroller General, essentially a legislative officer, removable by Congress, who was purporting to exercise executive power. *See* 478 U.S. at 728 (noting Comptroller General was removable by joint resolution "at any time" so that the officer "should be brought under the sole control of Congress") (quotes omitted); *id.*

at 730 (noting "Congress has consistently viewed the Comptroller General as an officer of the Legislative Branch"). This Article I creature, *Bowsher* unsurprisingly told us, "may not be entrusted with executive powers." *Id.* at 732. And, in any event, *Bowsher* concluded that the "issue of remedy" for the separation-of-powers violation was "a thicket we need not enter," because Congress had provided a "fallback" provision should the act be invalidated. *Id.* at 734, 735; *see also id.* at 718-19 (describing "fallback" process). Thus, I do not read *Bowsher* as providing much, if any, guidance as to the remedy for an unconstitutionally insulated agency.

Putting *Bowsher* aside, more recent Supreme Court authority confirms my view that severance is the proper remedy for the separation-of-powers violation before us. In *PCAOB*, the petitioners argued that the agency's "freedom from Presidential oversight and control rendered it and all power and authority exercised by it in violation of the Constitution." 561 U.S. at 508 (quotes omitted). But the Court "reject[ed] such a broad holding" and deployed the narrower remedy of severing the unconstitutional culprit—there, the second layer of for-cause removal. *Id.* at 509-10. Moreover, for remedial purposes *PCAOB* contrasted an unconstitutionally *insulated* officer with an unconstitutionally *appointed* officer: The Court pointedly "[p]ut[ ] to one side petitioners' Appointments Clause challenges," *id.* at 508, which it addressed (and rejected) in another part of its opinion. *Id.* at 510-13. When the Court did later find an Appointments Clause violation in *Lucia*, its remedy was to vacate the prior actions of the invalidly appointed officers. *See Lucia v. S.E.C.*, 138 S. Ct. 2044, 2055

(2018) (concluding "the 'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official") (quoting *Ryder v. United States*, 515 U.S. 177, 183 (1995)). That is the kind of backward-looking remedy —vacating the Third Amendment—Judge Willett would apply here, but the Supreme Court's cases do not support applying it to fix an unconstitutionally insulated agency head.

Instead, as *PCAOB* indicates, the cure for that malady is narrower. Stripping away the FHFA Director's unconstitutional insulation is the "minimalist remedy" that "maintain[s] presidential control while leaving in place the regulatory functions of an agency." Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1261 (2014) (discussing *PCAOB*). Consequently, to remedy the separation-of-powers violation presented here, I would sever the for-cause removal provision, rendering the agency properly responsive to the President's "general administrative control of those executing the laws." *Myers v. United States*, 272 U.S. 52, 164 (1926).

ANDREW S. OLDHAM and JAMES C. HO, Circuit Judges, concurring in part and dissenting in part:

We join Judge Willett's opinion.[1] We write separately in response to the suggestion that there is no constitutional problem because this case does not involve the Public Company Accounting Oversight Board ("PCAOB"), the Comptroller General, or the Postmaster General. *Post*, at 97-107 (Higginson, J.). Our learned colleague suggests that: (I) the Constitution's original public meaning offers little guidance on the scope of the removal power; (II) the Supreme Court's precedents don't help the shareholders here; and (III) even if they did, we have the "judicial" power to rewrite Congress's law. With greatest respect, that's all wrong.

I.

The Constitution vests in the President the power to remove executive officers. Any intimation to the contrary must be rejected.

A.

Traditionally, the executive power allowed the head of state to appoint and remove his ministers, as well as his

[1] We have lingering doubts about the meaning of the Housing and Economic Recovery Act's so-called "succession provision," 12 U.S.C. § 4617(b)(2)(A)(i). But we agree with Judge Willett's opinion for the Court that, whatever the meaning of that provision, it's insufficiently clear to displace the presumption of reviewability under the Administrative Procedure Act. *See Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967), *abrogated by statute in other part as recognized in Califano v. Sanders*, 430 U.S. 99, 105 (1977).

judges, at will. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *260 [hereinafter BLACKSTONE'S COMMENTARIES] (describing English efforts to "remove all judicial power out of the hands of the king's privy council"); *id.* at *261-63 (explaining that "the king is . . . the fountain of honour, of office, and of privilege," that the king holds "the prerogative of erecting and disposing of offices," and that "the king . . . is the best and only judge, in what capacities, with what privileges, and under what distinctions, his people are the best qualified to serve, and to act under him"); 2 THOMAS RUTHERFORTH, INSTITUTES OF NATURAL LAW 60 (1756) (noting that officers "are the agents of the executive power; and consequently the appointment of them belongs to this power"). The American colonies chafed at the corrupting effects of this unbridled power. *See, e.g.*, DECLARATION OF INDEPENDENCE para. 11 (1776) ("[The King] has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries"); DECLARATION OF RIGHTS AND GRIEVANCES para. 4 (1774) (condemning as "impolitic, unjust, and cruel, as well as unconstitutional" the Massachusetts Government Act, 14 Geo. 3 c. 45, which empowered the King's representative to appoint and remove—at will—the Province's officers and judges).

In response, some early State constitutions limited the executive power to appoint judges and officers. *See, e.g.*, S.C. CONST. of Mar. 26, 1776 art. XXII (assigning to the legislature the power to choose "the commissioners of the treasury, the secretary of the colony, register of mesne conveyances, attorney-general, and powder receiver"); VA. CONST. of 1776 paras. 35, 36 (requiring legislative approval for the governor's judicial appointments). Others limited the removal power, and granted civil and judicial officers freedom from executive interference "during good behavior."[2] N.Y. CONST. of 1777, art. XXIV. *See also* MD. CONST. of 1776 art. XL (granting "good behaviour" tenure to the attorney-general); *id.* art. XLVIII (permitting the governor to remove only those "civil officer[s] who ha[ve] not a commission during good behavior"); MASS. CONST. of 1780 pt. 2, ch. III, art. 1 (providing that "[a]ll judicial officers . . . shall hold their offices during good behavior," but allowing the governor to remove them "with consent of the council . . . upon address of both houses of the legislature").

When the Framers drafted the federal Constitution, they had the same options before them. Ultimately, they chose to give Article III judges "good Behaviour" protection from presidential interference, *see* U.S. CONST. art. III, § 1, cl. 2, and mandated Senate approval for appointments of superior officers, *see* U.S. CONST. art. II, § 2, cl. 2. The Constitution therefore took away the traditional executive power to remove judges and to appoint officers unilaterally. But the Framers chose *not* to grant "good behavior" tenure to officers, as some States had done. By that omission, the Framers kept

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[2] This phrase derives from the English Act of Settlement, which stripped the Crown of the power to remove judges at will, and guaranteed judicial commissions "quamdiu se bene gesserint" ('during good behavior'). Act of Settlement, 1701, 12 & 13 Will. 3 c. 2 § 3.

for the President the executive's traditional at-will removal power over superior officers.[3] *See* Steven Calabresi & Saikrishna Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 597 (1994).

B.

What the text and structure of the Constitution provide, the historical practice confirms. Start with the very first Congress.

On March 4, 1789, Congress convened in New York City. 1 ANNALS OF CONG. 15, 95 (1789). One of its first orders of business was to propagate the Executive Branch. Representative James Madison moved "that there shall be established an Executive Department, to be denominated the Department of Foreign Affairs, at the head of which there shall be an officer, to be called the Secretary to the Department of Foreign Affairs, who shall be appointed by the President, by and with the advice and consent of the Senate; and to be removable by the President." *Id.* at 370-71.

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[3] Congress may also remove "civil officers" for "Treason, Bribery, or other High Crimes and Misdemeanors" through impeachment and conviction. U.S. CONST. art. II, § 4. But this provision was inserted to limit Congress's impeachment power, rather than to abrogate the executive's removal power: In Britain at the time, "all the king's subjects, whether peers or commoners, [we]re impeachable in parliament." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 283 (1833). Peers could be impeached "for any crime." 4 BLACKSTONE'S COMMENTARIES, *supra*, at *257. And some State constitutions permitted impeachment for "maladministration" in addition to misconduct. *See, e.g.*, MASS. CONST. of 1780 pt. 2, ch. I, § 2, art. VIII. The impeachment power in Article II therefore represents a narrowing of the legislature's traditional ability to interfere with executive affairs.

The motion sparked a debate "centered around whether the Congress 'should recognize and declare the power of the President under the Constitution to remove the Secretary of Foreign Affairs without the advice and consent of the Senate.'" *See Bowsher v. Synar*, 478 U.S. 714, 723 (1986) (quoting *Myers v. United States*, 272 U.S. 52, 114 (1926)). And it culminated in the famed "Decision of 1789" in which a majority of both legislative chambers agreed that "the Constitution's grant of executive power authorized the President to remove executive officers." Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1023 (2006) [hereinafter Prakash, *Decision of 1789*]; *see also* 1 ANNALS OF CONG. at 399.

Up until the Civil War, there was virtually no doubt that the Decision of 1789 was correct. Presidents Washington, Adams, and Jefferson relied on that power to remove over 170 officers. Prakash, *Decision of 1789*, *supra*, at 1066. In their respective Commentaries in the 1820s and 1830s, Chancellor James Kent and Justice Joseph Story considered the matter settled and beyond alteration. *See Myers*, 272 U.S. at 148-50.

Congress briefly flirted with revisiting the issue after the Civil War. In 1867, Congress passed the Tenure of Office Act (over the President's veto), reversed its longstanding position, and claimed for itself the power to condition removal on the advice and consent of the Senate. *See* Tenure of Office Act, ch. 154, 14 Stat. 430 (1867). But even then, it was questionable whether Congress considered the Act to be constitutional. *See Free Enterprise Fund*, 561 U.S. at 494 n.3 (noting that the law "was widely regarded as unconstitutional and void (as it is universally regarded today)"). Its passage was undoubtedly motivated by animus towards President Johnson. *See* GROVER CLEVELAND, THE INDEPENDENCE OF THE EXECUTIVE 29 (1913). Less than two months into President Grant's tenure, it was repealed in part to permit the President to suspend officers "until the end of the next session of the Senate." 16 Stat. 6, 7. It was repealed in its entirety in 1887. *See* 24 Stat. 500.

The history of the use of the removal power—and congressional acquiescence in that use—matters. In interpreting the Constitution, "we put significant weight upon historical practice," particularly where the issues "concern the allocation of power between two elected branches of Government." *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014). Indeed, "a practice of at least twenty years duration on the part of the executive department, acquiesced in by the legislative department, is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning." *The Pocket Veto Case*, 279 U.S. 655, 690 (1929) (quotation omitted). We should therefore be especially hesitant to interfere with an executive power that was exercised, unfettered by Congress, for over 75 years.

II.

The Supreme Court first squarely addressed the President's constitutionally vested removal power in 1926.[4] But once proved not enough. In the decades

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[4] As to the pre-*Myers* corpus, Judge Higginson rightly notes that *United States v. Perkins*, 116 U.S. 483 (1886), and *United States v. Shurtleff*, 189 U.S. 311 (1903), are not especially salient for present

since, the Court has offered varying takes on the limits of that power—all apparently still good precedent. *See Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 483 (2010) ("The parties do not ask us to reexamine any of these precedents, and we do not do so."). Yet none of those precedents supports the novel limits on removal found in the Housing and Economic Recovery Act ("HERA"). Indeed, the lack of historical precedent to support HERA may be "the most telling indication of the severe constitutional problem" with it. *Id.* at 505 (quoting *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)).

A.

Let's start at the beginning. In *Myers*, the Court addressed "whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate." 272 U.S. at 60. The Court noted "[t]here is no express

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purposes. *Post*, at 98 n.2 (Higginson, J.). That said, the Court's opinion in *In re Hennen*, 38 U.S. 230 (1839), offers insights into the Court's view of the Decision of 1789. Reflecting on the President's power to remove officers whom he appointed, the Court said "it was very early adopted, as the practical construction of the Constitution, that this power was vested in the President alone. And such would appear to have been the legislative construction of the Constitution." *Id.* at 259. And, by 1839, it had become "the settled and well understood construction of the Constitution, that the power of removal was vested in the President alone . . . although the appointment of the officer was by the President and Senate." *Ibid.*

provision respecting removals in the Constitution." *Id.* at 109. But it did not stop there.

Instead, the Court considered the original meaning of the "executive power," the Decision of 1789, and the President's duties under the Take Care Clause. As to the original meaning of the "executive power," the Court noted that both the Congress constituted under the Articles of Confederation and the British crown exercised executive power, and that as a part of that power, both the Congress and the crown could appoint and remove executive officers. *Id.* at 110, 118. The Court's extensive discussion of the Decision of 1789, *see id.* at 111-63, underscored the importance of that Congress's constitutional deliberation and the ensuing "clear affirmative recognition of [the Decision of 1789] by each branch of the government," *id.* at 163. And Chief Justice Taft considered the duties of his former post. Speaking from experience,[5] the Chief Justice explained that "when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal." *Id.* at 122; *see* Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1836 (2016) ("Chief Justice Taft invoked [the Take Care Clause] to hammer home the implication that a President charged with exercising all of the executive power must have the means to control subordinates

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[5] Notably, when serving as President, Taft fired two members of the Board of General Appraisers. According to Professor Bamzai, that "was the first presidential for-cause removal." Aditya Bamzai, *Taft, Frankfurter, and the First Presidential For-Cause Removal*, 52 U. RICH. L. REV. 691, 691-92 (2018).

through whom he or she would necessarily act[.]"). On this point, text, history, and structure all aligned:

> The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible. It was urged that the natural meaning of the term 'executive power' granted the President included the appointment and removal of executive subordinates. If such appointments and removals were not an exercise of the executive power, what were they? They certainly were not the exercise of legislative or judicial power in government as usually understood.

Myers, 272 U.S. at 117-18 (citations omitted).

As the Court's opinion drew to a close, it returned to the Decision of 1789. The Court again emphasized that the first Congress "was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument." *Id.* at

174-75. And because the Court "found [its] conclusion strongly favoring the view which prevailed in the First Congress," it "ha[d] no hesitation in holding that conclusion to be correct." *Id.* at 176. So the Court held "that the Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid." *Ibid.*

Under *Myers*, this would be an easy case: Any limit on the President's power to remove a principal executive officer is unconstitutional.

Our dissenting colleagues brush *Myers* aside based on this factual distinction: *Myers* dealt with a statute requiring "the 'advice and consent of the Senate'" before the President could remove the officer, whereas HERA does not. *Post*, at 99 (Higginson, J.) (quoting *Myers*, 272 U.S. at 60). True enough. But it was not the character of the limitation on the President's removal power that led the *Myers* Court to reject it. Rather, it was the existence of *any* limitation at all—it was the denial of "the unrestricted power of removal" that the Court found invalid. 272 U.S. at 176. *Myers* held the removal power belongs to the President alone, and Congress cannot constrain it. *Ibid.* Under *Myers*, HERA's removal restriction is unconstitutional.

B.

Of course, *Myers* was not the last word on the nature of the President's removal power. In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Supreme Court announced a different rule. The *Humphrey's Executor* Court maintained that Congress could not prevent the President from removing any (principal) officers exercising "purely" executive power. But it introduced the concept of administrative agencies that don't exercise executive power—a possibility *Myers* seemingly had not contemplated. *See also* Prakash, *Decision of 1789*, *supra*, at 1071 (arguing the Decision of 1789 did not resolve whether Congress could limit the President's removal power for non-executive officers). And for these non-executive administrative agencies, it approved greater restrictions on the President's removal power. *Humphrey's Executor*, 295 U.S. at 631-32.

The administrative agency at issue was the Federal Trade Commission. President Hoover appointed Humphrey as a Commissioner. Soon after his election in 1932, President Roosevelt removed Humphrey from office. *Id.* at 619. To his dying day, Humphrey maintained he was still a Commissioner. *Ibid.* Later, Humphrey's estate sued for his unpaid salary, claiming President Roosevelt lacked the power to remove an FTC Commissioner. *Ibid.* The estate pointed to the Federal Trade Commission Act, which provided that Commissioners would be appointed by the President, would serve for a certain term of years, and could be removed by the President "for inefficiency, neglect of duty, or malfeasance in office." *Id.* at 620 (citing Federal Trade Commission Act, ch. 311, § 1, 38 Stat. 717, 718 (1914) (codified as amended at 15 U.S.C. § 41)).

President Roosevelt had cited no "inefficiency, neglect of duty, or malfeasance in office" as cause for removing Humphrey. *Id.* at 620, 626. He simply wanted to appoint his own Commissioner with whom he "should have a full confidence." *Id.* at 620 (citing a letter from Roosevelt to Humphrey). Roosevelt's administration pointed to *Myers*. After all, *Myers* had recently confirmed that the Constitution grants the President unrestricted power to remove executive officers for any reason or no reason at all. *See* 272 U.S. at 176 (holding a statute that "attempted to prevent the President from removing executive officers who had been appointed by him . . . was invalid"). Roosevelt's administration argued that the *Myers* rule applied to the Federal Trade Commissioners, notwithstanding Congress's provision of a term of office and enumeration of causes justifying their removal. *Humphrey's Executor*, 295 U.S. at 626.

The Court disagreed. Relying on the FTCA's legislative history, it reasoned Congress had intended the FTC to function "wholly disconnected from the executive department." *Id.* at 630. The FTC was "to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality." *Id.* at 624. And the Court maintained that the FTC's "duties are neither political nor executive, but predominantly quasi judicial and quasi legislative." *Ibid.* Moreover, the Court had no "doubt[s]" about "[t]he authority of Congress" to create such agencies and "to require them to act in discharge of their duties independently of executive control." *Id.* at 629. "[T]hat authority includes, as an appropriate incident, power to fix the period during which the [officers] shall continue, and to forbid their removal except for cause in the meantime." *Ibid.* In short, *Humphrey's Executor* held that officials exercising quasi-legislative or quasi-judicial power could be insulated by for-cause-removal protection because of the need to keep such officials "independent" of the executive. *Id.* at 628. If an officer "exercises no part of the executive power vested by the Constitution in the President," it says, Congress can limit the President's removal power. *Ibid.* On the other hand, if the officer is "purely executive," Congress cannot limit that power. *Id.* at 631-32 (affirming the *Myers* rule for purely executive officers). Thus, the scope of the President's removal power "depend[s] upon the character of the office." *Id.* at 631.

Humphrey's Executor is difficult to apply for two reasons. First, its division between purely executive and quasi-legislative or quasi-judicial does not map neatly onto modern understandings of executive power. *See Morrison v. Olson*, 487 U.S. 654, 689 n.28 (1988) (discussing "[t]he difficulty of defining such categories of 'executive' or 'quasi-legislative' officials"); *see also Bowsher*, 478 U.S. at 762 n.3 (1986) (White, J., dissenting). And second, the Supreme Court itself limited *Humphrey's Executor* in *Bowsher*. There, the Comptroller General was subject to removal only by Congress and only for cause. *See Bowsher*, 478 U.S. at 727-28. The Court held this violated the Constitution's separation-of-powers principles by making an official exercising executive power subservient to the legislative branch. *See id.* at 726, 732-33. The Comptroller General's primary duty was to prepare a detailed report in accordance with a legislative mandate. *Id.* at 732. The Court held that this was an exercise of executive power: "Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law." *Id.* at 733. That was so even though Congress "ha[d] consistently viewed the Comptroller General as an officer of the Legislative branch." *Id.* at 731. And in reaching its conclusion, the Court pointed to the Decision of 1789 as "provid[ing] contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument." *Id.* at 723-24.

Given that *Bowsher* turned on Congress's control over the executive officer in question—a problem undisputedly not at issue here—the dissenters are tempted to ignore *Bowsher* as irrelevant. *Post*, at 99 (Higginson, J.). But *Bowsher* is highly relevant in the way it cabins *Humphrey's Executor*. After *Bowsher*, Congress cannot legislate around the nature of executive power by creating an office that reports to another branch, rather than (or in addition to) reporting solely to the Executive Branch. *See* 478 U.S. at 731-32; *cf. Humphrey's Executor*, 295 U.S. at 628 (reasoning the FTC is not an executive agency because it was "created by Congress to carry into effect legislative policies . . . in accordance with the legislative standard . . . and to perform other specified duties as a legislative or as a judicial aid").

So what does *Humphrey's Executor* by way of *Bowsher* mean here? Well, the Federal Housing Finance Agency ("FHFA") Director obviously exercises executive power. As relevant to this case, FHFA implemented a statute—HERA—by making factual findings that triggered authorization to take over and operate the Government Sponsored Entities ("GSEs"). That's an executive act. *Cf. Gundy v. United States*, 139 S. Ct. 2116, 2140 (2019) (Gorsuch, J., dissenting) (explaining that "condition[ing]" the application of statutes "on fact-finding" by the executive has been "long associated with the executive function"); *Department of Transportation v. Association of American Railroads*, 135 S. Ct. 1225, 1247 (2015) (Thomas, J., concurring in the judgment) (explaining that "conditional legislation does not seem to call on the President to exercise . . . legislative power" even though it makes the suspension or operation of statutory provisions "depend upon the action of the President based upon the occurrence of subsequent events, or the ascertainment by him of certain facts"); *Bushnell v. Leland*, 164 U.S. 684, 685 (1897) (rejecting the argument that "empowering [the comptroller] either to appoint a receiver or to make a ratable call upon the stockholders, is tantamount to vesting that officer with judicial power, in violation of the constitution"). Operating the GSEs in accordance with statutory directives is also executive. After all, "implement[ing] the legislative mandate is the very essence of 'execution' of the law." *Bowsher*, 478 U.S. at 733.

True, FHFA also has powers that might seem quasi-legislative. For example, it can promulgate regulations. *See, e.g.*, 12 U.S.C. §§ 4536, 4617(i)(8). But having that power cannot be enough to render an agency quasi-legislative for purposes of *Humphrey's Executor*. If it were, nearly every member of the President's cabinet would be a quasi-legislative official and could be given forcause removal protection. And that can't be. *See Morrison*, 487 U.S. at 690 ("*Myers* was undoubtedly correct in its holding, and in its broader suggestion that there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role.").

But wherever you draw the line between "executive" and "quasi-legislative" power, the exercise of power at the heart of this case is executive.[6] FHFA executed a contract and enforced its terms; that is the heartland of executive power. *See also* Part II.E, *infra*. In deciding this case or controversy, our constitutional analysis should focus on the nature of the agency action being challenged—not the agency's power in the abstract. Thus, in relevant part, "the character of the office" held by the FHFA Director is executive. *Humphrey's Executor*, 295 U.S. at 631. Again, the for-cause removal restriction is invalid.[7]

C.

In *Morrison v. Olson*, 487 U.S. 654 (1988), the Supreme Court arranged the removal precedents around a new organizing principle: Removal restrictions cannot unduly interfere with the President's fulfillment of his constitutional obligations—including the power to take

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[6] Judge Higginson agrees that our inquiry should focus on the particular exercise of power at issue—here, "the FHFA's conservatorship function." Post, at 107. Our disagreement is whether FHFA's "conservatorship function" is executive or something else. Our colleagues evidently think it is something else, but exactly what it is they do not say. *See ibid.*

[7] And even if we considered the FHFA Director to be both "quasi-legislative" and executive, then the FHFA's Director would fall into the "field of doubt" that *Humphrey's Executor* left for "future consideration." 295 U.S. at 632. And insofar as the "nature of the function" test discussed in *Wiener v. United States*, 357 U.S. 349, 353 (1958), was rooted in the "philosophy of *Humphrey's Executor*," *id.* at 356, applying that test here would yield similar results. The "intrinsic judicial character of the task" of the War Claims Commissioners led the Court to decide that case against President Eisenhower. *Id.* at 355. The executive function at issue here would command the opposite result.

care that the laws be faithfully executed. *Morrison* involved the Ethics in Government Act's provision for the appointment of an independent counsel to "investigate, and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws." *Id.* at 660 (discussing 28 U.S.C. §§ 591-99). The independent counsel, once appointed, could only be removed "by the personal action of the Attorney General and only for cause." *Id.* at 663 (quoting 28 U.S.C. § 596(a)(1)).

There was "no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch." *Id.* at 691. But the *Morrison* majority treated the categories used in *Humphrey's Executor* (executive vs. quasi-legislative or quasi-judicial) as relevant but not dispositive. We agree with our dissenting colleagues on this point: "*Morrison* downgraded *Wiener*'s and *Humphrey's Executor*'s inquiries from a determinative to a subsidiary level." *See post*, at 106 (Higginson, J.).

The *Morrison* Court instead concluded that the constitutionality of limitations on the President's removal power is not "define[d] [by] rigid categories of those officials who may or may not be removed at will by the President, but" aims to "ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II." *Morrison*, 487 U.S. at 689-90. So, under *Morrison*, removal restrictions that do not limit "the President's ability to perform his constitutional duty" are permissible. *Id.* at 690.

The *Morrison* Court concluded the independent counsel's office survives this test. First, the Court deemed the independent counsel an inferior office "with limited jurisdiction and tenure and lacking policymaking or significant administrative authority." *Id.* at 691; *see also id.* at 671-72. Second, the Court noted that the President retained the ability to remove the independent counsel for cause (through the Attorney General). *Id.* at 692-93; *see also id.* at 696. Congress limited the removal power "to establish the necessary independence of the office," the Court concluded. *Id.* at 693. And in light of the independent counsel's status as an inferior officer accountable to the Attorney General, such a limitation didn't unduly "interfere" with the President's constitutional duties. *Ibid.*

So what of the FHFA Director? Like the independent counsel, the FHFA Director exercises the executive power of implementing the laws. *See* Part II.B, *supra*. But unlike the independent counsel, the FHFA Director is a principal officer with significant authority, and he is not subject to significant presidential control through any other executive officer. FHFA's insulation from the ordinary appropriations process means its Director does not even answer to Congress. *Cf. Humphrey's Executor*, 295 U.S. at 628 (explaining the FTC is quasi-legislative because it acts "in aid of the legislative power" where it makes "investigations and reports . . . for the information of Congress"). And that also deprives the President of the control he exercises over most independent agencies, who "must participate in the annual budget cycle" under the oversight of the Office of Management and Budget.[8] Perhaps it's true that "[n]o man is an island." JOHN DONNE, DEVOTIONS UPON EMERGENT OCCASIONS, *Meditation XVII* 108 (Ann Arbor Paperback ed., 1959) (1624). But FHFA's Director comes pretty close.

To satisfy *Morrison*, "the Executive Branch" must have "sufficient control over" the independent officer "to ensure that the President is able to perform his constitutionally assigned duties." 487 U.S. at 696. Here, it's not clear the Executive Branch has any control at all.

D.

In *Free Enterprise Fund*, the Supreme Court made clear that *Morrison* only extends so far. The *Free Enterprise Fund* Court dealt with the members of the Public Company Accounting Oversight Board ("PCAOB") who could be removed only by the Securities and Exchange Commission ("SEC"). 561 U.S. at 483. The PCAOB board members could only be removed by the SEC for cause, and the members of the SEC are principal officers who can only be removed by the President for cause. *Id.* at 486-87. The Court concluded this double for-cause protection arrangement violates the Constitution:

> This novel structure does not merely add to the Board's independence, but transforms it. Neither

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[8] Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2203-04 (2016); *see also* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 42-43 (2010) ("If agencies must rely on OMB for budget requests, the President has a huge lever of power over the agency, whether or not the head of the agency is removable at will.").

> the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board.

Id. at 496. So the Court found PCAOB Commissioners could not constitutionally exercise executive power. *See ibid.*

The Court reaffirmed its focus on the importance of the relevant office by distinguishing principal officers from inferior officers and inferior officers from mere employees. *Id.* at 506 ("We do not decide the status of other Government employees, nor do we decide whether 'lesser functionaries subordinate to officers of the United States' must be subject to the same sort of control as those who exercise 'significant authority pursuant to the laws.'"). Thus, the above analysis concerning the status of a principal officer under *Morrison* applies here in much the same way.

But *Free Enterprise Fund* also emphasized a suspicion of novel agency structures. Before the case came before the Supreme Court, then-Judge Kavanaugh had dissented from the D.C. Circuit's opinion upholding the PCAOB:

> *Humphrey's Executor* and *Morrison* represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power. Therefore, given a choice between drawing the line at the holdings in *Humphrey's Executor* and *Morrison* or extending those cases to authorize novel structures such as the PCAOB that further attenuate the President's control over executive officers, we should opt for the former. We should resolve questions about the scope of those

> precedents in light of and in the direction of the constitutional text and constitutional history. In this case, that sensible principle dictates that we hold the line and not allow encroachments on the President's removal power beyond what *Humphrey's Executor* and *Morrison* already permit.

Free Enterprise Fund, 537 F.3d at 698 (Kavanaugh, J., dissenting) (citations omitted). The Supreme Court shared his concern: "Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity." *Free Enterprise Fund*, 561 U.S. at 505 (quoting 537 F.3d at 699 (Kavanaugh, J., dissenting)).

The novel agency structure at issue in this case raises similar suspicions. Granting that the protections here are not a "Matryoshka doll of tenure protections," *id.* at 497, Congress nevertheless insulated the FHFA Director in an unprecedented way. The FHFA Director is a principal officer, not an inferior one or an employee; he exercises significant executive authority; and he does so by himself, not as part of a multi-member body. *Cf. PHH Corp. v. CFPB*, 881 F.3d 75, 198 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting) (noting that another agency's "single-Director structure departs from settled historical practice, threatens individual liberty, and diminishes the President's Article II authority to exercise the executive power.").[9] HERA thereby grants

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[9] Many have discussed the unique ways an independent agency headed by a single Director could undermine the President's Article II powers. *See ante*, at 46-47 (Willett, J.); *PHH Corp.*, 881 F.3d at 156-57 (Henderson, J., dissenting); *id.* at 183-84 (Kavanaugh, J., dissenting). When the Founders vested a single President with the

"executive power without the Executive's oversight" and "subverts the President's ability to ensure that the laws are faithfully executed." *Free Enterprise Fund*, 561 U.S. at 498. Thus, FHFA fails under *Free Enterprise Fund* too.

E.

Judge Higginson's principal response to all of this is that "FHFA's conservatorship function" is "a role one would be hard-pressed to characterize as near the heart of executive power." *Post*, at 107. We disagree. To our minds, you'd be hard-pressed to characterize it as anything *other than* executive power.

"The executive power" vested by Article II, Section 1, is the power of "*enforcing* the laws." 1 BLACKSTONE'S COMMENTARIES, *supra*, at *146. At the Founding, the "executive power" was understood in contradistinction to the "legislative" power of "making the laws." *Ibid.*; *see also id.* at *261; MATTHEW HALE, THE PREROGATIVES OF THE KING 176 (D.E.C. Yale ed. 1976). Without an executive to enforce, administer, or otherwise execute the law, legislation was a mere parchment barrier: "[T]he Vigour of the Laws consists in their Executive Power; Ten thousand Acts of Parliament signify no more than One Single Proclamation, unless the Gentlemen, in whose hands the Execution of those Laws is placed, take

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executive power in Article II of the Constitution, they recognized that one person had the potential to act with greater speed, decisiveness, and secrecy than a multi-member body. *See* THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number. . . . ").

care to see them duly made use of. . . . " DANIEL DEFOE, THE POOR MAN'S PLEA 23 (2d ed. 1693). Thus, the power to execute the law is the power to follow a legislative instruction and "transform [legislative] intentions into reality." Julian Davis Mortensen, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1236 (2019).

There can be no doubt that FHFA purported to "execute" HERA here—even if it did so unlawfully. *See ante*, at 50-52 (Willett, J.). It "made use of" the statute to adopt the Third Amendment. And it made use of the statute (and the Third Amendment) to sweep the GSEs' profits. That plainly constitutes "the executive power."

But suppose we're wrong that FHFA is an executive branch agency—where would you put it instead? FHFA is an agency of the federal government. *See* 12 U.S.C. § 4511(a) (establishing FHFA as "an independent agency of the Federal Government"); *id.* § 4617(b)(2)(J)(ii) (granting FHFA power to "take any action authorized by this section, which the Agency determines is in the best interests of . . . the Agency"). Surely Judge Higginson does not mean to suggest FHFA is exercising "legislative or judicial power in government as usually understood." *Myers*, 272 U.S. at 117-18.

It's irrelevant that the Secretary of the Treasury—the other party to the Net Worth Sweep—could veto the deal. *Cf. post*, at 105 (Higginson, J.); *post*, at 112-13 (Costa, J.). It has never been true that setting aside an officer's action in a case involving the removal power requires proof that an uninsulated officer would not have taken the challenged action. Such counterfactual causation is alien to the Supreme Court's interpretation of Article II. Neither appointment cases nor removal cases require it. *See Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000) ("There is certainly no rule that a party claiming constitutional error in the vesting of authority must show a direct causal link between the error and the authority's adverse decision.").[10]

Take *Free Enterprise Fund*, for example. That case implicated both appointment and removal. As to

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[10] For the same reasons, it's irrelevant that the Third Amendment was adopted by an Acting Director of FHFA, rather than a Senate-confirmed Director. *See post*, at 109 (Costa, J.). The Acting Director serves until the appointment of a Director—the latter of whom is insulated by the for-cause removal restriction. *See* 12 U.S.C. §§ 4512(b), 4512(f). The President's power to replace the Acting Director with a for-cause insulated Director is a Damoclean sword that hardly solves the constitutional problem with the latter. After we granted rehearing en banc, FHFA argued for the first time that the Acting Director can be replaced under the Federal Vacancies Reform Act ("FVRA"). That argument is forfeited under our longstanding rules. *See Excavators & Erectors, Inc. v. Bullard Engineers, Inc.*, 489 F.2d 318, 320 (5th Cir. 1973) ("While these contentions may have had merit if timely raised in the district court, it is well established that . . . issues not raised or presented in the lower court will not be considered for the first time on appeal."). It's also ironic because the Government argues the FHFA Director is not exercising executive power while justifying its constitutionality under a statute—the FVRA—that applies *only* to "an officer of an Executive Agency." 5 U.S.C. § 3345(a). In all events, this point now appears moot because the Senate confirmed a permanent Director who enjoys for-cause insulation. And almost immediately after his confirmation, that insulated Director revoked FHFA's prior concession regarding the unconstitutionality of the for-cause removal restriction, instead defended its constitutionality, and continued sweeping the GSEs' profits.

the former, the Court refused to require counterfactual causation as an element of standing to bring an appointment claim. 561 U.S. at 512 n.12 ("[S]tanding does not require precise proof of what the Board's policies might have been in that counterfactual world."). And as to the latter, the Court likewise rejected counterfactual causation. The Court granted prospective relief requiring officers to be properly removable before exercising executive authority. *Id.* at 513. And it did so without analyzing whether less-insulated officers would make different decisions than the unconstitutionally insulated officers did. If a plaintiff must show that a removable officer would make a different decision, then *Free Enterprise Fund* would not have granted relief without considering whether a more accountable officer would make different decisions.

Or take *NLRB v. Noel Canning*, 573 U.S. 513 (2014). By the time that case reached the Supreme Court, the NLRB already had new, validly appointed members. There was no evidence the new Board members were inclined to overturn the actions of the old, unconstitutionally appointed members. In fact, the litigants challenging the appointments told the Supreme Court that "going forward the government can solve the problem through agency ratification of past decisions." Transcript of Oral Argument at 66, *Noel Canning*, 573 U.S. 513 (No. 12-1281). Nevertheless, the Court invalidated the old members' decisions. *See Noel Canning*, 573 U.S. at 522 ("[T]hat the Board now unquestionably has a quorum does not moot the controversy about the validity of the previously entered Board order.").

The best support we can find for counterfactual causation is in the *Bowsher dissent*. It argued the unconstitutional removal provision was "unlikely to be" invoked, meaning in "political realit[y]" the officer's decisionmaking was unaffected. 478 U.S. at 730 (discussing Justice White's dissent). But the majority rejected that analysis: "The separated powers of our Government cannot be permitted to turn on judicial assessment of whether an officer exercising executive power is" likely to be fired. *Ibid*. "The Framers did not rest our liberties on such bureaucratic minutiae." *Free Enterprise Fund*, 561 U.S. at 500. Thus, there is no reason for us to speculate about what a more-accountable officer would have thought about the Net Worth Sweep. And the Treasury Secretary's agreement to the Net Worth Sweep doesn't tell us anything about the propriety of insulating the FHFA Director.

III.

A majority of our Court believes that the appropriate remedy for the constitutional violation is to delete the offending statutory text. We respectfully disagree, because we do not think our limited Article III power to decide cases and controversies permits such a remedy.

The judicial power vested by Article III of the Constitution extends to "Cases" and "Controversies." U.S. CONST. art. III, § 2, cl. 1. It generally does not include the legislative power to erase, rewrite, or otherwise "strike down" statutes: "[U]nder our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973).

Rather, "[c]onstitutional judgments, as Mr. Chief Justice Marshall recognized, are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court." *Ibid.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803)); *see also United States v. Godoy*, 890 F.3d 531, 539-40 (5th Cir. 2018) (explaining that the Supreme Court's declining to apply an unlawful statutory provision does not purge that provision from existence).

When then-Judge Scalia was sitting as a member of the three-judge district court in *Synar v. United States*, he recognized the importance of choosing a remedy that redresses the plaintiffs' injury-in-fact. *See Synar v. United States*, 626 F. Supp. 1374, 1393 (D.D.C.) (per curiam), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986). In that case, the constitutional violation was caused by a "combination" of statutes: one authorizing an officer to exercise executive power and another governing the appointment or removal of the officer in question. *Ibid.* Justice Scalia was faced with the question: Which statute should the court refuse to apply when either one would be constitutional in isolation? His answer was the statute that "allegedly authorizes the injury-in-fact that confers standing upon the plaintiff." *Ibid.* (synthesizing numerous Supreme Court precedents). Because the injury-in-fact in that case was caused by the statutory grant of executive power, that grant had to "yield." *Id.* at 1393-94.

In this case, Plaintiffs are injured by the Net Worth Sweep—an exercise of executive power unconstitutionally granted by HERA. Plaintiffs lost the value of their investments because FHFA used the Net Worth Sweep to transfer their money to the Treasury. They ask us to "[v]acat[e] and set[] aside the [contract's] Net Worth Sweep" provision. Our Article III powers permit us to grant this remedy, as it would redress Plaintiffs' injury-in-fact. Such a remedy finds support in precedent. *See, e.g.*, *Noel Canning v. NLRB*, 705 F.3d 490, 493, 514-15 (D.C. Cir. 2013), *aff'd*, 134 S. Ct. 2550 (2014) (vacating the NLRB's order because the Board was unconstitutionally constituted); *see also Dresser-Rand Co. v. NLRB*, 576 F. App'x 332, 33-34 (5th Cir. 2014) (vacating Board's order that was issued by only two lawfully appointed members).

Instead of granting this remedy, a majority of our Court charts a different path. They seek to blue-pencil the statute by deleting the unconstitutional statutory provision. Such a remedy is improper for two reasons.

First, it affords Plaintiffs no relief whatsoever. On these facts, editing the statute would not resolve any case or controversy. Plaintiffs do not complain about the possibility of future regulatory activity. Instead, they complain only about a past decision made by the FHFA Director: contractually agreeing to the Net Worth Sweep. A complaint based solely on past violations cannot justify prospective relief ordering an agency to disregard a statutory provision going forward. In a case seeking redress for past harms such as this one, prospective relief is no relief at all. *Cf. Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018) (explaining that Appointments Clause remedies should be designed to preserve the separation of powers and "to create '[]incentive[s] to raise Appointments Clause challenges'" (quoting *Ryder v. United States*, 515 U.S. 177, 183 (1995)).

Free Enterprise Fund is the principal precedent for the majority's blue-pencil remedy. But there, the plaintiffs sought an injunction against future audits and investigations by the unconstitutionally insulated agency. To remedy the plaintiffs' prospective injury-in-fact, the Court refused to apply the statute insulating the officers from removal. *See* 561 U.S. at 508-10. The Court recognized that the statutory provision was "only one of a number of statutory provisions that, working together, produce a constitutional violation." *Id.* at 509. In refusing to apply the for-cause protection provision that insulated the PCAOB commissioners from removal, it applied the most modest remedy it could to redress the plaintiffs' injuries. Thus, the *Free Enterprise Fund* remedy was effectively an injunction ordering the agency to disregard the second layer of for-cause removal protection going forward, unless and until Congress chose to fix the constitutional violation in a different way. In this case, Plaintiffs did not complain about the threat of future harm, so blue-penciling the statute would not redress any injury they have alleged.

Strangely, our colleagues who argue that Plaintiffs lack standing to bring their constitutional claim also join a majority of the Court in endorsing a blue-penciling remedy. Nowhere in their opinion do they explain how our Court could purport to delete a statutory provision when there is no active case or controversy within the meaning of Article III. We think Plaintiffs do have standing, yet we cannot identify how deleting the FHFA Director's removal protection would redress any harm Plaintiffs have alleged. On what basis could our colleagues possibly believe that a blue-penciling remedy is constitutionally permissible? We can see none.

The second problem we have with the remedy endorsed by a majority of our Court is that we do not believe Article III of the Constitution permits us to "strike" the FHFA Director's for-cause protection from the statute. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1485 (2018) (Thomas, J., concurring) (explaining that "[e]arly American courts did not have a severability doctrine" because "[t]hey recognized that the judicial power is, fundamentally, the power to render judgments in individual cases"); Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 936 (2018) (explaining "federal courts have no authority to erase a duly enacted law from the statute books" but have only the power "to decline to enforce a statute in a particular case or controversy" and "to enjoin executive officials from taking steps to enforce a statute"); Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 756 (2010) (explaining that the Founders did not conceive of judicial review as the power to "strike down" legislation).

At the Constitutional Convention, several delegates, including James Wilson and James Madison, argued for a "Council of Revision" comprised of federal judges and the executive. Mitchell, *supra*, at 954. The Council would have had the power to veto legislation passed by Congress, subject to congressional override. *Ibid.* A veto of legislation would render it "void," without any legal effect. *Ibid.* That proposal was defeated at the Convention on June 4, 1787. *Id.* at 957. Wilson and Madison tried again on July 21, but again they were defeated. *Id.* at 958. Finally, on August 15, they made one last attempt to give the judiciary a veto over federal legislation, proposing that the Supreme Court be given the power to veto legislation independent of the President, subject to congressional override. *Id.* at 958-59. Again, they were defeated. *Id.* at 959.

In the final Constitution, the judiciary was given only the power to decide cases and controversies—to resolve legal disputes between parties and order remedies to redress injuries. Thus, when a court concludes that a statute is unconstitutional, it is not "striking down" or "voiding" or "invalidating" the law. It is merely holding that the law may not be applied to the parties in the dispute. The Constitution does not empower courts to delete sections of state and federal codes. The Founders expressly considered the possibility of a judicial veto, and they rejected it multiple times during the Constitutional Convention.

This history has been obscured by rhetoric that Chief Justice Marshall used in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), to explain judicial review. In that case he famously declared that a statute found unconstitutional by a court becomes "entirely void," "invalid," and "not law." *Id.* at 177-78. Subsequent cases have compounded the confusion. *See, e.g.*, *The Civil Rights Cases*, 109 U.S. 3, 26 (1883) (holding "void" sections 1 and 2 of the Civil Rights Act of 1875). Nevertheless, it is indisputable that courts do not have the power to erase duly enacted statutes. Instead, they may decline to enforce them or enjoin their future enforcement to resolve cases and controversies.

Our Court should not add to the confusion about the judiciary's limited powers by claiming to "sever" a statute based on open-ended speculation about how Congress would have solved the separation-of-powers problem. And we certainly should not rewrite the statute while pretending such *legislative* activity is the most modest *judicial* remedy. We would instead remand to the district court with instructions to fashion a remedy that actually redresses Plaintiffs' harms.

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Whether we apply the Constitution's original public meaning, *Myers*, *Humphrey's Executor*, *Morrison*, or *Free Enterprise Fund*, the conclusion in this case is the same. The FHFA Director cannot exercise the executive power of the United States because he is unconstitutionally insulated from presidential control and accountability. And our Court does not have the power under Article III to order a remedy that does not redress Plaintiffs' injuries.

HAYNES, Circuit Judge, joined by STEWART, Chief Judge, and DENNIS, SOUTHWICK, GRAVES, HIGGINSON, and COSTA, Circuit Judges, dissenting with respect to statutory claims:

I conclude—as the panel in this case and five other circuits have held—that 12 U.S.C. § 4617(f) bars us from granting the relief that the Shareholders seek on their statutory claims. *See Jacobs v. FHFA*, 908 F.3d 884 (3d Cir. 2018); *Saxton v. FHFA*, 901 F.3d 954 (8th Cir. 2018); *Roberts v. FHFA*, 889 F.3d 397 (7th Cir. 2018); *Robinson v. FHFA*, 876 F.3d 220 (6th Cir. 2017); *Perry Capital LLC v. Mnuchin*, 864 F.3d 591 (D.C. Cir. 2017). This court's role is not to question why as to the benefits and detriments of the Net Worth Sweep. Instead, under a statutory challenge to the FHFA's conduct, our court must examine the statute in question and apply it.

Every court to address the issue agrees that the core question is whether the FHFA acted within its statutory authority. It is the core question because § 4617(f) states that "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver" unless otherwise specified by statute or requested by the Director. The Shareholders argue that the FHFA has exceeded its statutory "powers or functions . . . as a conservator or a receiver" such that the bar does not apply. So I examine whether adopting the Net Worth Sweep was within those statutory powers.

Given HERA's grant of extensive powers to the FHFA, I conclude that the FHFA acted within its statutory powers when it adopted the Net Worth Sweep. The FHFA's "powers are many and mostly discretionary." *Jacobs*, 908 F.3d at 889. To begin with, once a conservator, the FHFA takes over the rights and powers of the shareholders, officers, and directors. 12 U.S.C. § 4617(b)(2)(A)(i). It is then free to then "conduct all business of the regulated entity" without any restriction on that grant of power. *See id.* § 4617(b)(2)(B)(i).

Most importantly, when the FHFA conducts a company's business, it does not have to consider the interests of shareholders. HERA dictates that the Director "ensure that . . . the activities of each regulated entity and the manner in which such regulated entity is operated are consistent with the public interest." *Id.* § 4513(a)(1)(B)(v). Most sweepingly, the FHFA may "take any action authorized by [§ 4617], which the [FHFA] determines is in the best interests of the regulated entity [e.g., the GSEs] *or the Agency* [i.e., *the FHFA*]." *Id.* § 4617(b)(2)(J)(ii) (emphasis added). As Judge Stras said, "That is no typo. The FHFA can operate critically important businesses, with trillions of dollars in assets and the financial support of the federal government, in its own best interests—apparently to the exclusion of the interests of the American people, Fannie and Freddie, and their shareholders." *Saxton*, 901 F.3d at 960 (Stras, J., concurring). On top of that, the decision about what is in the FHFA's best interest is committed to the FHFA.

This broad statutory grant of authority undermines the Shareholders' core arguments. To begin with, the Shareholders argue that the statute requires the FHFA to pursue the goal of "preserving and conserving" assets and operating the GSEs in a "sound and solvent" manner. But those quoted terms are snippets from only some of the provisions in § 4617 granting the FHFA authority. *See* 12 U.S.C. § 4617(b)(2)(B)(iv), (b)(2)(D). When reviewed in context, each of those provisions is written as a permissive grant of authority. For example, § 4617(b)(2)(D) begins, "The Agency may, as conservator, take such action as may be. . . . " Other provisions, like § 4617(b)(2)(B)(i) and § 4617(b)(2)(J)(ii), grant the FHFA authority unrestricted by the goals of asset preservation and solvency.

Undeterred, the Shareholders argue that though the snipped provisions use "may," they are actually mandatory and constrain all other grants of authority. Their theory is that "may" is "a simple concession to the practical reality that a conservator may not always succeed in rehabilitating its ward." *See Perry Capital*, 864 F.3d at 638 n.1 (Brown, J., dissenting). But when "may" and "shall" appear in the section, "the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory." *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947). Congress uses "shall" to note mandatory responsibilities, even when the officer carrying them out cannot possibly succeed. *See, e.g.*, 28 U.S.C. § 547 ("[E]ach United States attorney, within his district, shall . . . prosecute for all offenses against the United States. . . . "). For instance, in the very same section, the FHFA is told it "shall seek to develop incentives for claimants to participate in the alternative dispute resolution process." 12 U.S.C. § 4617(b)(7)(B). "Shall" makes the command mandatory, while "seek" signals that the FHFA might still fail. Congress could have used similar language to constrain the FHFA's actions, but it chose not to.

The Shareholders also argue that the word "conservator" connotes a requirement that the FHFA "conserve" assets. They rely on the common law meaning of the term, which they believe Congress reflected in the statute. Congress is free to use common law terms in statutes, which courts then look to when interpreting the statute in the absence of statutory definitions. But that general rule gives way when the statute dictates otherwise. *See, e.g.*, *Taylor v. United States*, 495 U.S. 575, 594 (1990). Here, HERA's statutory scheme is inconsistent with the traditional notions of a conservator. Common law conservators are supposed to look out for the rights of shareholders or other beneficiaries. But the FHFA looks out for the public's and its own interests, a key difference from common law conservatorships. So this court cannot read any common law principles into Congress's use of the word "conservator."

During oral argument before the en banc court, a member of our court suggested that this claim should not be resolved on a motion to dismiss because it includes factual allegations beyond what appeared before other courts of appeals. However, neither party had previously argued this point, each proceeding from the assumption that this was purely a legal issue that could be resolved on a motion to dismiss. Indeed, the term "plausible" as it relates to the Shareholders' complaint appears nowhere in their briefing. Instead, the Shareholders focused their assertions on the contention that the FHFA exceeded its statutory powers as a matter of *law*. They certainly never argued that there are "fact issues" that need to be litigated or more fully developed as it pertains to their statutory arguments regarding

§ 4617(f). It is hardly novel law that an appellant's failure to brief an issue waives it. *See, e.g.*, *Singh v. RadioShack Corp.*, 882 F.3d 137, 149 (5th Cir. 2018).

Despite the clear waiver, that en banc oral argument question has now morphed into the holding of the majority opinion on this issue. The majority opinion concludes that the Shareholders stated a "plausible" claim that the FHFA exceeded its statutory authority in enacting the Third Amendment and remands for "further proceedings." Now, due to the majority opinion's departure from the Shareholders' arguments, will the district court be required to hold a trial on FHFA's intent? That makes little sense.

Even if this argument were not waived, it still does not pass muster as a distinction from the other circuits' decisions. First, the complaints in the previous suits all alleged that the FHFA did not have the intent of conserving the GSEs' capital, even if they did not cite every piece of evidence supporting that view. Second, and more importantly, the statute permits the FHFA to act in the public's or its own interest, and the statute commits the decision of what is in the FHFA's best interest to itself. So even if those agencies' subjective intent—whatever that means—was to operate Fannie Mae and Freddie Mac for its or the public's benefit, the statute allows the FHFA to do so.

Nothing about this case alters the robust case law from other circuits. I would join all our sister circuits that have considered this question and rejected the Shareholders' statutory claim. The Shareholders have not shown that the FHFA exceeded its enormous grant of authority. I conclude that § 4617(f) bars us from "tak[ing] any action to restrain or affect the exercise of powers or functions of the [FHFA] as a conservator or a receiver." Because the Shareholders' statutory claims would "restrain or affect" the FHFA's acting in its role as conservator, the Shareholders' claims should fail. I would affirm the district court's order granting the Agencies' motions to dismiss the Shareholders' APA claims because such claims are barred by 12 U.S.C. § 4617(f). I respectfully dissent from the contrary decision to remand.

STEPHEN A. HIGGINSON, Circuit Judge, joined by STEWART, Chief Judge, and DENNIS and COSTA, Circuit Judges, dissenting in part:

It is wrong to declare the FHFA unconstitutionally structured. Neither the parties nor the majority has addressed the statutory text central to the constitutional issue: the provision establishing the FHFA Director's five-year term "unless removed before the end of such term for cause by the President." 12 U.S.C. § 4512(b)(2). For-cause removal provisions typically enumerate the specific grounds that would justify removal, such as "inefficiency, neglect of duty, or malfeasance in office." *See Humphrey's Executor v. United States*, 295 U.S. 602, 619 (1935) (quoting 15 U.S.C. § 41). This one does not. Thus, it is concerning that no one in this litigation has addressed why or how § 4512(b)(2) is an undue impediment to removal in practice; indeed, no one has even suggested what § 4512(b)(2)'s text means.[1] Furthermore, no one has identified an entity empowered to block a presidential removal under § 4512(b)(2).

It is unwise to base a momentous constitutional ruling on the expected effects of a statutory provision no one has made the effort to construe.

* * *

The Constitution affords sparse materials to resolve this question—only broad pronouncements that "[t]he

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[1] The en banc D.C. Circuit's decision on the constitutionality of the Consumer Financial Protection Bureau's design elicited varying views on this question as to the for-cause removal protection of that agency's director. *Compare PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 122-24 (D.C. Cir. 2018) (Wilkins, J., concurring), *with id.* at 124- 37 (Griffith, J., concurring).

executive Power shall be vested" in the President and that "he shall take Care that the Laws be faithfully executed." Art. II §§ 1, 3. These clauses say nothing about removal of executive-branch officers, and there is little that is tractable or manageable in them compared, for instance, to the Appointments Clause. *See* Art. II § 2. That clause distinguishes between categories of officers and specifies who may appoint so-called "inferior" officers. *Id.* These specifications helpfully structure a well-developed case law on presidential appointments. *See, e.g.*, *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2051-56 (2018); *Edmond v. United States*, 520 U.S. 651, 658-66 (1997). No such specificity guides us here.

What we have instead is a relatively limited body of modern Supreme Court decisions. Only six cases, decided over eighty-five years, comprise the corpus of relevant precedential material. On the one side, three cases identify unconstitutional limits on the presidential removal power. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Myers v. United States*, 272 U.S. 52 (1926). On the other, three cases uphold limits on the presidential removal power. *See Morrison v. Olson*, 487 U.S. 654 (1988); *Wiener v. United States*, 357 U.S. 349 (1958); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).[2] As with the

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[2] One might also place *United States v. Perkins*, 116 U.S. 483 (1886), concerning a cadet engineer in the Navy, and *United States v. Shurtleff*, 189 U.S. 311 (1903), concerning a "general appraiser of merchandise," in the corpus of removal cases, but their remoteness in time and the simplicity of the positions at issue—relative to the complexity of modern administrative agency design—make them minor parts of that corpus for present purposes. Presidential removal was at issue also in *Mistretta v. United States*, 488 U.S. 361

sparseness of constitutional text, the limited extent of this caselaw counsels, at minimum, caution before we announce from the bench that Congress has violated the Constitution.[3]

Two of the three cases striking down limits on the presidential removal power are plainly beyond the circumstances here, because they addressed provisions that located control over removal wholly or partly in the legislative branch. *Bowsher* concerned a law assigning executive functions to the Comptroller General, an official removable only by Congress. 478 U.S. at 728-34. *Myers* concerned a postmaster whose removal by the President was subject to the "advice and consent of the Senate." 272 U.S. at 60. Congress gave itself no such control over removal of the FHFA Director, so neither case furnishes a basis on which to find the FHFA unconstitutionally structured.

Appellants' constitutional challenge therefore stands or falls on *Free Enterprise Fund*, the only other Supreme Court decision fashioning the Constitution's

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(1989), regarding the U.S. Sentencing Commission, but the Court's animating concern in that instance was interference with judicial power, not executive.

[3] The concurring opinion that responds to my views misses that my dissent is fundamentally rooted in the principle of judicial restraint. This principle must be our guide "in cases of peculiar delicacy," such as those that challenge the constitutionality of Congress's enactments. *See McCulloch v. Maryland*, 17 U.S. 316, 401 (1819) (Marshall, C.J.). Moreover, I do not recognize my views in the paraphrases that the concurring opinion gives of them. At the very beginning, for instance, the concurring opinion imputes views to me about "original public meaning" and "'judicial' power to rewrite Congress's law," yet neither is an argument I elaborate here.

scant textual materials into a rule by which we might invalidate an agency's structure. In *Free Enterprise Fund*, the Court affirmed the principle that "Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause." 561 U.S. at 483. *Free Enterprise Fund* addressed "something quite different": vesting the for-cause removal decision in officials who were themselves protected against removal without cause, thereby creating "two layers of good-cause tenure." *Id.* at 495, 497. Appellants thus have the difficult task of showing that *Free Enterprise Fund*, which affirmed one layer of good-cause tenure while condemning two, somehow requires us to invalidate the one layer protecting the FHFA Director.

In addition to showing that *Free Enterprise Fund* implicitly negated a principle it explicitly affirmed, Appellants must also confront three cases *approving* good-cause tenure: *Humphrey's Executor*, *Wiener*, and *Morrison*. These cases each affirmed Congress's power to insulate officials against presidential removal. The cases affirmed that power in widely varying institutional contexts and despite circumstances that, under then-existing precedent, would make curtailment of Congress's power the expected outcome.

Humphrey's Executor came first, nine years after *Myers*'s ringing vindication of the President's "unrestricted power of removal." *See Myers*, 272 U.S. at 176. The case concerned the protection of Federal Trade Commission members from removal unless for "inefficiency, neglect of duty, or malfeasance in office." 295 U.S. at 619. Given *Myers*'s emphatic declaration of principle, this insulation of FTC commissioners would surely fall. But it did not. A unanimous Supreme Court ruled that *Myers* "cannot be accepted as controlling [the] decision here." 295 U.S. at 627. The Court recognized Congress's power to create "quasi legislative or quasi judicial agencies" that could act "independently of executive control." *Id.* at 629. It read *Myers* as "confined to purely executive officers" and stated a new principle: that Congress's power to "preclud[e] a removal except for cause will depend upon the character of the office." *Id.* at 631-32.

Two decades later, the Supreme Court considered the removal of a member of the War Claims Commission, an adjudicatory body for claims of injury or property damage in the Second World War. *Wiener*, 357 U.S. at 350-51. Unlike the FTC statute at issue in *Humphrey's Executor*, the statute creating the War Claims Commission said nothing about removal. *Id.* at 352. One would think, therefore, that the President's removal power would operate unrestricted, per *Myers*. On the contrary, *Wiener* adhered to *Humphrey's Executor*'s distinction between purely executive officers and those meant to exercise independent judgment. Focusing on the "nature of the function that Congress vested in the War Claims Commission," the Court read for-cause removal protection into the statute. *Id.* at 353-56.

Three decades after *Wiener*, the Supreme Court considered the constitutionality of the independent counsel authorized by the Ethics in Government Act of 1978. *Morrison*, 487 U.S. at 660. The independent counsel was appointed by a special three-judge panel upon a referral from the Attorney General, and the office held a panoply of prosecutorial powers. *Id.* at 660-63. The Attorney General could remove the independent counsel "only for good cause, physical disability, mental incapacity," or other substantially impairing condition, with judicial review thereafter. *Id.* at 663. Because the independent counsel wielded the quintessentially executive power of criminal prosecution, one would expect the office's insulation from presidential removal would be unconstitutional, under either *Wiener*'s "nature of the function" or *Humphrey's Executor*'s "character of the office" inquiries. But that was not the Court's conclusion. *Morrison* reasoned that Congress's power "to impose a 'good cause'-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.'" *Id.* at 689. Instead it applied a new test: whether "the Act, taken as a whole, violates the principle of separation of powers by unduly interfering with the role of the Executive Branch." *Id.* at 693. The Court ruled that the independent counsel statute did not cause such interference. Indeed, it listed the Attorney General's ability to remove the independent counsel for cause among the mechanisms adequately preserving presidential control. *Id.* at 693, 696.

Appellants thus confront a precedential barrier they cannot surmount: three cases affirming good-cause tenure in a variety of circumstances; and a fourth case affirming it again while invalidating a form of double good-cause tenure not present here.[4]

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[4] The concurring opinion tries to sidestep the precedential barrier by turning to scholarship on the Decision of 1789 and other primary sources that reveal founding-era viewpoints on presidential removal

Appellants' approach is to draw attention to a purportedly "unique constellation of independence-enhancing features" in the FHFA's design. This claim derives from phrases that the Court used in *Free Enterprise Fund*. *E.g.*, 561 U.S. at 483 (asking whether two "separate layers of protection may be *combined*"); *id.* at 510 (describing the PCAOB members' "good-cause removal" as "only one of a number of statutory provisions that, *working together*, produce a constitutional violation") (emphasis added). The majority opinion picks up on this language, deeming the FHFA's structure unconstitutional due to the "combined effect" of its "unique constellation of insulating features."[5] But these phrases in *Free Enterprise Fund* were used to describe the novel problem of two-layered good-cause tenure. The Court was clear that the problematic novelty at issue in *Free Enterprise Fund* was in contrast to the long-standing legitimacy of single-layered good-cause tenure:

> As explained, we have previously upheld limited restrictions on the President's removal power. In those cases, however, only one level of protected tenure separated the President from an officer exercising executive power. It was the President—or a subordinate he could remove at will—who decided

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power. The concurring opinion relies on one side of a vigorous scholarly debate about these materials. Amici scholars have helpfully shown another, quite different side. *See* Brief of Harold H. Bruff, Gillian E. Metzger, Peter M. Shane, Peter L. Strauss, and Paul R. Verkuil, as *Amici Curiae* in Support of Defendants-Appellees, *Collins v. Mnuchin*, No. 17-20364 (5th Cir. Jan. 17, 2019).

[5] *See Collins v. Mnuchin*, 896 F.3d 640, 661, 670 (5th Cir. 2018) (per curiam). The en banc majority opinion incorporates the panel opinion's analysis. *See* Section VIII(A).

> whether the officer's conduct merited removal under the good-cause standard.
>
> The Act before us does something quite different. It not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists. That decision is vested instead in other tenured officers —the Commissioners [of the SEC]—none of whom is subject to the President's direct control. The result is a Board that is not accountable to the President, and a President who is not responsible for the Board.
>
> *The added layer of tenure protection makes a difference.*

591 U.S. at 495 (emphasis added). Thus, to import *Free Enterprise Fund*'s phrases describing novel structures into this case is to erase the distinction those descriptions were meant to draw.[6]

Appellants' challenge rests on a tenuous interpretation not only of *Free Enterprise Fund* but also of the scholarly literature on administrative agency design.[7] Appellants argue, and the majority opinion agrees, that

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[6] For a thoughtful discussion of the significance that novelty should have in constitutional analysis of agency design, see Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407 (2017).

[7] *See, e.g.*, Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 CORNELL L. REV. 769 (2013); Rachel Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEXAS L. REV. 15 (2010). One can only imagine the feelings of scholars who were motivated by the "urgent need" for better institutional design against the threat of agency capture, Barkow, 89 TEXAS L. REV. at 18, upon seeing their work turned into a constitutional cudgel against that design.

various otherwise unremarkable agency design features, through undescribed alchemy, combine to make the FHFA Director unduly insulated from presidential control. But upon a closer look, these assertions are little more than debatable empirical claims—hardly the firm footing judges need to take the bold step of declaring Congress's agency design choices unconstitutional.

The majority opinion for the en banc D.C. Circuit addressing the constitutionality of the Consumer Financial Protection Bureau has already surveyed the dubious empirical propositions on which Appellants and the majority opinion depend. *See PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 92-110 (D.C. Cir. 2018).[8] That wheel need not be reinvented here,[9] but a few points may usefully be added.

The majority opinion gives weight to the purportedly insulating effect of the FHFA's single-headed structure, but that structure may just as readily promote accountability as inhibit it, by spotlighting the obstacle in the way of the President's will. The majority opinion values the internal checks of a multimember structure, particularly when bipartisan balance is required, but such structures tie a President's hands as much as free them. If the constitutional concern here is undue interference with presidential control, an agency structure requiring

[8] The majority opinion expresses no disagreement with the en banc D.C. Circuit's analysis affirming the constitutionality of the CFPB, instead identifying "salient distinctions" between the CFPB and FHFA. *Collins*, 896 F.3d at 673. With that lack of disagreement I quite agree.

[9] *Cf. Consumer Fin. Prot. Bureau v. Seila Law LLC*, 923 F.3d 680, 682 (9th Cir. 2019), *petition for cert. docketed* (June 28, 2019) (No. 19-7) (likewise declining to "re-plow the same ground").

the President to appoint a political opponent can hardly be said to enhance presidential sway. Such a structure could not be said to have constitutional significance either. The Supreme Court never suggested in *Free Enterprise Fund* that the internal dynamics fostered by the PCAOB's multimember structure might avoid a constitutional violation.[10] The dubiousness of these various claims in turn makes their "combined effect" yet more questionable.[11]

As I suggested at the outset, Appellants have not elaborated how for-cause removal protection itself is an undue barrier to presidential control, rather than a useful tool thereof, as *Morrison* held. 487 U.S. at 696. In this connection, it warrants mention that *Humphrey's Executor* and *Wiener*, in which the removed officials prevailed, were suits for backpay in the Court of Claims, not emergency suits for injunctions to block removal. *See Wiener*, 357 U.S. at 350-51; *Humphrey's Executor*,[12]

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[10] A common argument from parties and judges skeptical of agency insulation is that the multi-member structure of the FTC—a "body of experts"—was an essential part of the Court's decision in *Humphrey's Executor* affirming the FTC's structure. *See, e.g.*, *PHH Corp.*, 881 F.3d at 98-99 (majority opinion's explanation of challengers' argument); *id.* at 143, 150-51 (Henderson, J., dissenting). But that quote appeared in *Humphrey's Executor*'s treatment of a preliminary statutory issue, not in its constitutional analysis. *Compare* 295 U.S. at 621-26 (statutory); *id.* at 626-32 (constitutional); *see PHH Corp.*, 881 F.3d at 98-99 (making this observation).

[11] Relatedly, it is debatable that the FHFA's features are in fact unique. One scholarly treatment of "indicia of independence" identified seven salient features, of which the FHFA and eight other agencies had five, ten agencies had six, and four agencies had seven. *See* Datla & Revesz, 98 CORNELL L. REV. at 825.

[12] Humphrey had died; hence that case's unusual name.

295 U.S. at 618-19. No one has put forward an example of the President being blocked from removing an official at the FHFA Director's level. Thus, the actuality of the protection in practice is anyone's guess.[13]

Moving from generalities to specifics, the FHFA does not exhibit undue insulation. As Judge Costa's opinion explains, the FHFA undertook every action at issue here by agreement with the Secretary of the Treasury, a purely executive officer serving at the pleasure of the President. The President thus had direct control via the bargaining power of the Secretary.

Moreover, two unusual features present in *Free Enterprise Fund* are not present here. First, the statutory grounds for removal of PCAOB members set an "unusually high standard." 561 U.S. at 502-03.[14] By contrast, the FHFA's authorizing statute, as noted above,

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[13] Justice Scalia's noted dissent in *Morrison* delved into the difficult political dynamics likely to engulf presidential removal of an official statutorily protected against removal without cause. *See* 487 U.S. at 702-03 (intuiting that "[t]he context of this statute is acrid with the smell of threatened impeachment," and noting the "bitter power dispute" giving rise to the case). Concededly, we have a duty to determine the constitutionality of statutes. *See Zivotovsky ex rel. Zivotovsky v. Clinton*, 566 U.S. 189, 197 (2012) (relating removal jurisprudence to the political-question doctrine). But, to the extent we find ourselves basing constitutional reasoning on hypothesized trajectories of interbranch politics, it is cause for reflection on the wisdom of what we are doing. For a nuanced and somewhat contrary view of how such hypothesizing might be factored into adjudication, see Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013).

[14] "A [PCAOB] member cannot be removed except for willful violations of the [Sarbanes-Oxley] Act [of 2002], Board rules, or the securities laws; willful abuse of authority; or unreasonable failure to enforce compliance—as determined in a formal Commission order,

says merely that the Director shall serve a five-year term "unless removed before the end of such term for cause by the President." 12 U.S.C. 4512(b)(2). Though this provision is the centerpiece of Appellants' constitutional claim and of the majority opinion's constitutional remedy, no party and no part of the majority opinion suggests what this text should mean. It is at least quite plain that the text sets a lower bar than the PCAOB statute.[15] Second, members of the PCAOB were removable only by formal order of the SEC, and such orders are subject to judicial review. *Free Enter. Fund*, 561 U.S. at 502 (citing 15 U.S.C. § 78y(a)(1)). The President would thus have to persuade not only the SEC commissioners but also an Article III court that removal was appropriate. No such obstacle exists here.

Finally, the nature of the FHFA's function and the character of the Director's office matter, even though *Morrison* downgraded *Wiener*'s and *Humphrey's Executor*'s inquiries from a determinative to a subsidiary level. *See Morrison*, 487 U.S. at 691. The majority and dissenting opinions on Appellants' statutory claims cover the relevant ground. As their discussions make

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rendered on the record and after notice and an opportunity for a hearing. [15 U.S.C.] § 7217(d)(3); see § 78y(a). The Act does not even give the Commission power to fire Board members for violations of *other* laws that do not relate to the Act, the securities laws, or the Board's authority. The President might have less than full confidence in, say, a Board member who cheats on his taxes; but that discovery is not listed among the grounds for removal under § 7217(d)(3)." 561 U.S. at 503.

[15] *See* Datla & Revesz, 98 CORNELL L. REV. at 788 ("Statutes that specify that an appointee cannot be removed except for 'good cause' confer the weakest protection," in contrast to statutes enumerating specific grounds).

clear, the FHFA Director wields no prosecutorial power as the independent counsel in *Morrison* had. The Director has powers of regulation and enforcement, like the PCAOB, though only over the government-sponsored enterprises, Fannie Mae and Freddie Mac, and affiliated entities. *See Free Enter. Fund*, 561 U.S. at 485-86 (PCAOB's powers); 12 U.S.C. § 4631 (Director's cease-and-desist proceedings). This appeal does not arise from the use of those powers, nor has any party shown us examples of their misuse. Instead, this appeal arises from the FHFA's conservatorship function,[16] a role one would be hard-pressed to characterize as near the heart of executive power.[17] To the extent that the Supreme Court's removal doctrine has been animated by a concern for preserving presidential control over the core of that power, this is not a case that should stir us to act.

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Regarding Appellants' constitutional claim against the FHFA, I see only reasons for caution and skepticism, and none for action. Neither the Constitution's text, nor the Supreme Court's constructions thereof, nor

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[16] The Secretary of the Treasury, an appellee in this matter, relies on our caselaw distinguishing the "non-governmental" power wielded by agencies acting as conservators or receivers of struggling financial institutions from the power wielded by agencies acting as regulators. *See, e.g.*, *United States v. Bezborn*, 21 F.3d 62, 68 (5th Cir. 1994) (concerning the Resolution Trust Corporation, a model for the FHFA's design).

[17] *Cf.* A. Michael Froomkin, Note, *In Defense of Administrative Agency Autonomy*, 96 YALE L.J. 787, 809-12 (1987) (identifying a given power's enumeration in Article I versus Article II as the key criterion in determining whether Congress may insulate from presidential control an agency acting pursuant to that power).

the adversary process in this litigation has given us much ground on which to declare the FHFA's design unconstitutional. If so thin a record may be made the basis for invalidating Congress's considered response to a major crisis in American life, I am apprehensive about the responsible use of our nullification power henceforth.

GREGG COSTA, Circuit Judge, joined by STEPHEN A. HIGGINSON, Circuit Judge, dissenting in part:

In a separation-of-powers case, our vigilance should first be directed at the constitutional limits on our own power. *Raines v. Byrd*, 521 U.S. 811, 819 (1997) ("[O]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."). We have failed in that duty. In concluding that unravelling the Net Worth Sweep is not the remedy for the allegedly unconstitutional insulation of the FHFA, the court recognizes that the President has always maintained "oversight" of the Net Worth Sweep. Majority Op. (Remedy) 58. But that conclusion does not just resolve the final question for the constitutional claim. It also answers the first question any case poses: Is there jurisdiction?

The answer is "no" because presidential control of the Net Worth Sweep means there is no connection between the good-cause removal provision for FHFA Directors that plaintiffs challenge and the injury from the New Worth Sweep they allege. In other words, the limitation on the removal power did not cause their injury.

The requirement that an alleged constitutional defect caused the plaintiff's injury is part of the threshold standing inquiry—the standing lingo is "traceability"—that ensures we are only deciding constitutional issues when they arise in "cases" or "controversies." *Raines*, 521 U.S. at 818-19. For numerous reasons described below (some of which are recognized in the court's remedial ruling), the Net Worth Sweep is not traceable to the for-cause limitation on the President's power to remove the FHFA Director. In deciding whether Congress has violated the separation of powers at the behest of plaintiffs who lack standing, we violate the separation of powers ourselves. *See Clapper v. Amnesty Int'l*, 568 U.S. 398, 408 (2013) ("The law of Article III standing . . . is built on separation-of-powers principles.").

This is not just a case in which plaintiffs fail to prove standing; the history and nature of the Net Worth Sweep, as well as the Shareholders' own allegations, disprove standing. Let us count the ways the record refutes the required causal link.

For starters, the Acting Director of the FHFA who agreed to the Third Amendment was subject to full removal power. *See* 12 U.S.C. § 4512(f) (allowing Acting Directors with no limits on the President's ability to remove them). Recognizing the problem for this lawsuit if the FHFA was not insulated from presidential control at the Net Worth Sweep's inception, the majority opinion contends that the for-cause limit on removal also applies to Acting Directors. Maj. Op. 48. This novel reading is a stark departure from textualist principles. Unlike the tenure protection the statute provides the FHFA's Senate-confirmed Directors, 12 U.S.C. § 4512(b)(2), it does not impose a forcause limitation on the removal of Acting Directors. 12 U.S.C. § 4512(f). "[I]t is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002) (quotations omitted).

That Congress created the FHFA as "an independent agency," Majority Op. at 48 (citing 12 U.S.C. § 4511(a)), is no license for us to graft onto the statute a for-cause limitation on removal of Acting Directors that Congress did not include.[1] As the Office of Legal Counsel recently pointed out, "Congress does not, by purporting to give tenure protection to a Senate-confirmed officer, afford similar protection to an individual who temporarily performs the functions and duties of that office when it is vacant." *Designating an Acting Director of the Bureau of Consumer Financial Protection*, 41 Op. O.L.C. ___, 2017 WL 6419154, Slip Op. at 11 (Nov. 25, 2017). The D.C. Circuit agrees that courts should not create for-cause removal restrictions for officers Congress does not explicitly protect. *Swan v. Clinton*, 100 F.3d 973, 988 (D.C. Cir. 1996) (refusing to assume certain officials retained removal protection after their terms expired because the statute allowing those officials to continue in a "holdover capacity" made no mention of such protection). No authority has ever read in tenure protection for acting officials not subject to Senate confirmation.[2]

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[1] The court is looking in the wrong place for the removal power over Acting Directors when it states that Section 4512(f) "does not explicitly address removal." Majority Op. at 48. That power comes from the Constitution, not Congress. *Myers v. United States*, 272 U.S. 52, 163-64 (1926). One would thus search in vain for a statute giving the President authority to remove the Attorney General, the Secretary of Defense, or any other cabinet secretary.

[2] *Wiener v. United States* read in tenure protection only for Senate-confirmed officials, not for acting officials, who in another respect are already exclusively the product of presidential power because they do not go through the advice-and-consent process. 357 U.S. 349, 350 (1958). And unlike the FHFA statute and the

Doing so for the first time here is particularly problematic because penciling in a for-cause limitation on the removal of Acting Directors creates a constitutional issue. In interpreting statutes, we are supposed to avoid constitutional difficulties, not create them. *Edward J. Bartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

Why turn these cardinal rules of statutory construction upside down? Because the implication is quite clear when the statute governing Acting Directors is read according to its plain language: If the FHFA agreed to the Net Worth Sweep when its leader was fully accountable to the President, then any injury that policy caused is not traceable to the for-cause removal limitation the Shareholders seek to challenge. Indeed,

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CFPB statute OLC addressed, *Wiener* was not a case in which Congress extended for-cause protection to one kind of officer and not to another. The "expressio unius est exclusio alterius" canon thus had no role in *Wiener*. Instead, it was addressing a complete silence as to removal. Here there is no "congressional failure of explicitness"—Congress explicitly gave tenure protection only to Senate-confirmed Directors. *Id.* at 352. Finally, *Wiener* predates *Morrison v. Olson*'s shift in removal power cases from a focus on the nature and function of the office in question (that is, whether the officer performing purely executive functions and therefore in need of greater presidential control) to one about the degree to which the president's prerogative is impaired. *See* 487 U.S. 654, 691 (1988). The "intrinsic judicial character" of the War Claims Commission made its members one of the stronger candidates for tenure protection under the then-governing conception of removal power. *Wiener*, 357 U.S. at 355.

this may be why none of the numerous other statutory challenges to the Net Worth Sweep that courts of appeals have decided included the constitutional claim about the removal power. *See Jacobs v. FHFA*, 908 F.3d 884 (3d Cir. 2018); *Saxton v. FHFA*, 901 F.3d 954 (8th Cir. 2018); *Roberts v. FHFA*, 889 F.3d 397 (7th Cir. 2018); *Robinson v. FHFA*, 876 F.3d 220 (6th Cir. 2017); *Perry Capital LLC v. Mnuchin*, 864 F.3d 591 (D.C. Cir. 2017). As for the only other case that challenged the removal power in connection with the Net Worth Sweep, a court dismissed it for lack of standing, recognizing that the policy came from an Acting Director subject to full presidential control. *Bhatti v. FHFA*, 332 F. Supp. 3d 1206, 1213-14 (D. Minn. 2018), appeal docketed, No. 18-2506 (8th Cir. July 16, 2018).

The role of a presidentially accountable FHFA official in agreeing to the Net Worth Sweep is enough to reject traceability. But there is more.

The Shareholders' allegations confirm that the Third Amendment was not the product of any improper insulation of the FHFA from presidential control. In fact, their theory is the opposite—that the Third Amendment was a "deliberate strategy" of the Obama Administration. The complaint often refers FHFA and Treasury collectively as "the Agencies," not as independent actors. The Shareholders allege that "those *Agencies* initiated a long-term policy of seeking to seize control of Fannie and Freddie." They further contend that the Net Worth Sweep was part of "*the Administration's* plans to keep Fannie and Freddie in perpetual conservatorship."

Treasury's role provides even more proof that the Net Worth Sweep is not traceable to the for-cause removal limitation. The necessary and ongoing involvement of an agency not suffering from any alleged constitutional defect is an unusual feature in a separation-of-powers case.[3] Ever since Treasury was established in 1789 as the third department in the executive branch,[4] its secretary has been subject to at-will removal. So even if the President could not express any disapproval of the Net Worth Sweep policy through the FHFA once a Senate-confirmed Director replaced the Acting Director, the Treasury Secretary was always an outlet for any such views. Yet Treasury has continued to accept the dividends for each of the past 27 quarters (since the Third Agreement was signed in August 2012), showing that Treasury's leadership has not viewed the Net Worth Sweep as out of step with the preferred policy of either the Obama or Trump Administration. If that stance ever changes, all it would take is for the President to direct the Treasury Secretary to stop accepting the dividends.

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[3] Indeed, the Treasury Secretary is the lead defendant in this case, demonstrating that the executive branch is enforcing the policy that the Shareholders contend is the product of an improperly insulated bureaucrat.

[4] The First Congress created Treasury on September 2, 1789. An Act to Establish the Treasury Department, 1 Stat. 65, Ch. 12, 65-67 (1789). Earlier in that first year of the republic, the State Department (then called the Department of Foreign Affairs) was created on July 27 and the War Department on August 7. An Act for Establishing an Executive Department, to Be Denominated the Department of Foreign Affairs, 1 Stat. 28, Ch. 4, 28-29 (1789); An Act to Establish an Executive Department, to Be Denominated the Department of War, 1 Stat. 49, Ch. 7, 49-50 (1789).

Looking at the government officials involved in both the creation and continuation of the Net Worth Sweep leads to one conclusion: The injury Shareholders complain about in no way flows from any limits on the President's ability to influence FHFA policy.

Nor can the Shareholders rely on "regulated entity" standing. That doctrine describes removal power cases in which courts have found standing because the party bringing the challenge is under investigation. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 487-88 (2010); *Morrison v. Olson*, 487 U.S. 654, 667-68 (1988); *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 82 (D.C. Cir. 2018). But those cases were brought by the individuals or corporations subject to agency authority. In contrast, the FHFA is not "overseeing" or regulating the Shareholders. To the extent it is engaged in ongoing oversight of anything, it is of the government sponsored entities. Corporate law distinguishes between a corporation and its shareholders for standing purposes; a shareholder, or even a majority of them, cannot litigate in the shoes of the corporation.[5]

[5] A derivative suit is the notable exception. As noted in the majority opinion, our sister circuits have determined that the FHFA, not the Shareholders, has sole authority to bring a derivative suit. Maj. Op. 21-22. *See also Roberts*, 889 F.3d at 408; *Perry Capital*, 864 F.3d at 624. And while two circuits have found an exception in an analogous situation—when the FDIC as conservator of a bank has a conflict of interest with respect to a particular claim—no such exception to HERA's grant of "all rights, titles, powers, and privileges of the regulated entity, and of any stockholder" to the FHFA as conservator appears in the statutory text. 12 U.S.C. § 4617(b)(2)(A)(i); *Roberts*, 889 F.3d at 409-10.

But those issues arise in the context of whether Shareholders can bring their statutory claim. The majority opinion concludes that

See Dole Food Co. v. Patrickson, 538 U.S. 468, 474-75 (2003) ("A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities. An individual shareholder, by virtue of his ownership of shares, does not own the corporation's assets. . . . " (citations omitted)); *Fox v. Harbottle*, 2 Hare 461 (Eng. 1843) (seminal corporate law case holding that the proper plaintiff in an action alleging an injury to the corporation is the corporation). Think of the potential for chaos if the law were otherwise. Any shareholder of a corporation—for major ones like Wal-Mart or GE we are talking about tens of thousands of potential plaintiffs—could claim to represent the company despite shareholders holding widely varying views on issues affecting the corporation. Consistent with the long-established rule that a business entity has to litigate on its own behalf, no case has recognized that the shareholders of a regulated entity have standing to bring constitutional challenges to the structure of the regulator. That astonishingly expansive view of regulated entity standing cannot be the law.

So if Shareholders have standing at all, it must be founded on harms the Net Worth Sweep directly inflicts on them. On that score, while the standing requirements are sometimes relaxed in separation-of-powers cases,[6] they are not removed. *See Bond v. United*

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this is a direct shareholder action. That analysis does not carry over to standing for the constitutional claims based on regulated *entity* status. For that, it has always been the entity being regulated —not its shareholders—that has standing to challenge the structure of the regulating agency.

[6] One important way standing is relaxed is that we do not require the branch of government whose powers are being encroached to

States, 564 U.S. 211, 225 (2011) (continuing to require that a plaintiff must show an "actual or imminent harm that is concrete and particular, fairly traceable to the conduct complained of, and likely to be redressed by a favorable decision"). The Supreme Court has loosened the standing inquiry when it was not possible to know if the allegedly unconstitutional structure of an agency caused the challenger's injury. *See Free Enter. Fund*, 561 U.S. at 512 n.12. Given the usual difficulty of proving that "counterfactual world," plaintiffs do not have to prove that causation is more than a possibility when the alternative reality is unknowable. *Id; see also Landry v. F.D.I.C.*, 204 F.3d 1125, 1131 (D.C. Cir. 2000) (explaining the traceability requirement is relaxed when it is "difficult or impossible for someone subject to a wrongly designed scheme to show that the design . . . played a causal role in his loss").[7] But it is one thing to give plaintiffs the benefit of the doubt when we cannot know

bring the separation-of-powers claim. Because structural limitations in the Constitution protect individual liberty, affected individuals can bring such claims. *See Bond v. United States*, 564 U.S. 211, 222-23 (2011) (discussing the rationale). But that does not mean they don't have to be affected by the allegedly unconstitutional law.

[7] In its standing discussion, court cites another line from *Free Enterprise*—that "the separation of powers does not depend on the views of individual Presidents, nor on whether 'the encroached-upon branch approves the encroachment.'" Majority Op. 44 (quoting *Free Enter. Fund*, 561 U.S. at 497 (quoting *New York v. United States*, 505 U.S. 144, 182 (1992))). But the Supreme Court did not make that comment in discussing standing. It instead was directed at the merits, pointing out that presidential acquiescence in a limit on removal power does not eliminate the constitutional defect. *Free Enter. Fund*, 561 U.S. at 496. The standing inquiry requires us to answer not whether "the encroached-upon branch approves the encroachment," but instead whether the encroachment caused the injury.

if a properly structured agency would have taken the same action. It is quite another to ignore the traceability requirement when there is no doubt that the alleged constitutional error did not cause the plaintiffs' injury. That is the case here. We know the Net Worth Sweep is a presidentially-sanctioned policy because a Treasury Secretary and Acting Director of FHFA subject to full removal authority adopted the policy, and the presidentially-controlled Treasury has continued to enforce it. If there is standing even in this situation when real world events disprove traceability, then there is nothing left of the Article III limitation.[8]

[8] Two other cases the Shareholders rely on are inapposite. *Noel Canning* arose directly from an enforcement action brought by the challenged agency, so standing was not even discussed. *N.L.R.B. v. Noel Canning*, 573 U.S. 513 (2014). Beyond that, the case involved an unconstitutional appointment, not an improperly insulated agency. That is an important distinction—any action an improperly appointed agency official takes is "void *ab initio*." *Noel Canning v. N.L.R.B.*, 705 F.3d 490, 493 (D.C. Cir. 2013), *aff'd*, 573 U.S. 513 (2014). Whereas a lack of authority permeates every agency action, a lack of oversight only injures a regulated party if the required oversight would have made a difference. *Compare Lucia v. S.E.C.*, 138 S. Ct. 2044, 2055 (2018) (vacating and remanding decision of an improperly appointed ALJ) *with Free Enter. Fund*, 561 U.S. at 508 (rejecting the "broad holding" that improper insulation rendered the challenged agency "and all power and authority exercised by it in violation of the Constitution" (quotation omitted)).

Bowsher v. Synar may provide even less assistance. 478 U.S. 714 (1986). For one, as Judge Higginson points out, that case is less about limiting the President's ability to control an agency and more about placing executive authority in the hands of a legislative officer. Higginson Op. at 3. And in any case, unlike here, in *Bowsher* there was evidence that the constitutional defect prevented the President from carrying out his preferred policy. *See* Brief for the United States, *Bowsher v. Synar*, 478 U.S. 714 (1986), Because presidential control over the creation and enforcement of the Net Worth Sweep refutes any link between it and the challenged limits on presidential oversight of the FHFA, Shareholders have little more claim to litigate the structure of that agency than any taxpayer would. *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 609-10 (2007) (recognizing that taxpayer standing generally does not exist). If they could be parties to this case, most taxpayers would present a different perspective on the Net Worth Sweep. It has helped repay the roughly $190 billion taxpayers lent to bail out Fannie and Freddie before the 2008 financial collapse—a key component of the recovery from the Great Recession given the outsized role of Fannie and Freddie in the housing market.[9] Plaintiffs who invested before the collapse would have lost their entire investment were it not for the bailout. Those who have invested since have paid "pennies on the dollar" in a speculative play based on hopes that either the Treasury Department would change the Net Worth Sweep policy or that the courts would undo it for them. *See* Robert Stowe England, *Against All Odds: The Long Bet on*

1986 WL 728082, at *44-51. Indeed, the central purpose of the statute challenged in *Bowsher* was to tie the President's hands and force him to sequester funds hand-selected by a Comptroller General who answered directly to Congress. *Bowsher*, 478 U.S. at 718. So standing for union members whose cost of living adjustments were withheld as a result of sequestration was easily satisfied—their money was sequestered at the behest of a Comptroller General who never should have had that authority in the first place. *Id.* at 721.

[9] Shareholders point out that now, more than a decade later, the dividends have repaid the billions lent. But looking only at the principal ignores the return one would expect based on the risk the enormous sum would not be repaid and the time value of money.

Fannie Mae and Freddie Mac, Institutional Investor, Sept. 6, 2013.[10] The former may happen. Treasury is reviewing whether to end the conservatorship, yet another reminder that the President has always held full policymaking authority over this issue. Andrew Ackerman, *Administration Nears Plan to Return Fannie, Freddie to Private Ownership*, WALL ST. J., May 30, 2019.[11] But if we were to grant Shareholders that relief based on their separation-of-powers claim, they would be receiving not just a financial windfall. Unravelling the Net Worth Sweep because of limits on the removal power that had nothing to do with the creation or continuation of that financial policy would also be giving Shareholders a constitutional windfall.

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[10] Available at https://www.institutionalinvestor.com/article/b14zbcy3kts0t7/againstallodds-the-long-bet-on-fannie-mae-and-freddie-mac.

[11] Available at https://www.wsj.com/articles/administration-nears-plan-to-returnfannie-mae-freddie-mac-to-private-ownership-1155925207.

WILLETT, Circuit Judge, joined by JONES, SMITH, ELROD, HO, ENGELHARDT, and OLDHAM, Circuit Judges, dissenting in part:

In my view, the proper remedy for Count IV is to vacate the Third Amendment. I respectfully dissent from the court's decision to instead grant a prospective remedy.

I

When a plaintiff with Article III standing challenges the action of an unconstitutionally-insulated officer, that action must be set aside. In *Bowsher v. Synar*, the Supreme Court held the Comptroller General could not prescribe budget reductions because he was not removable by the President.[1] "Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey."[2] The Comptroller General exercised executive power: His role required him to "interpret" the law and "exercise judgment" in applying it.[3] Because he did so outside the President's supervision, the Court set aside his sequestration order. The Court affirmed the district court's judgment "that the presidential sequestration order issued . . . pursuant to the unconstitutional automatic deficit reduction process be, and hereby is, declared without legal force and effect."[4]

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[1] 478 U.S. 714, 736 (1986).

[2] *Id.* at 726 (quoting *Synar v. United States*, 626 F. Supp. 1374, 1401 (D.D.C. 1986)).

[3] *Id.* at 733.

[4] *Synar*, 626 F. Supp. at 1404, *aff'd*, 478 U.S. at 736.

Synar's remedial approach applies here. It is the only Supreme Court case that presented the issue. In *Myers v. United States*, the Court upheld a postmaster's removal, so it had no need to grant relief against past government action.[5] In *Morrison v. Olson*, the Court found no constitutional defect in the independent counsel's removal protection, so it granted no relief.[6]

In *Free Enterprise Fund*, the Court held the Public Company Accounting Oversight Board's double for-cause removal protection unconstitutional.[7] But no Board action had become final against the plaintiff, an accounting firm.[8] So the Court "excised" the offending removal protection from the statute going forward.[9] The plaintiff had standing for prospective relief because the challenged agency "regulate[d] every detail of an accounting firm's practice."[10] The unconstitutionally-insulated regulator inflicted an ongoing injury.

Here, in contrast, FHFA generally regulates the GSEs, not their shareholders. And the Third Amendment, which became final in 2012, caused the Shareholders' injury. So I disagree with Judge Duncan's view that *Free Enterprise Fund*, or any Supreme Court decision, counsels against a vacatur remedy in this case. And the Shareholders' lack of "regulated party" standing separates me from Judge Haynes's remedial theory.

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[5] 272 U.S. 52, 176 (1926); *see id.* at 106.

[6] 487 U.S. 654, 691-92 (1988).

[7] *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 496 (2010).

[8] *Id.* at 490.

[9] *Id.* at 509.

[10] *Id.* at 485.

Despite having no occasion to vacate agency action, *Free Enterprise Fund* reinforces *Synar*'s principle that an unconstitutionally-insulated officer may not exercise executive power. "[T]he Framers sought to ensure that 'those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.'"[11] "By granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts. The Act's restrictions are incompatible with the Constitution's separation of powers."[12]

II

Unconstitutional protection from removal, like unconstitutional appointment, is a defect in authority. Appointments Clause decisions routinely set aside agency action. In *Lucia v. SEC*, the Court held that administrative law judges must be appointed by a "head of department," not by staff.[13] As remedy, the Court granted a new hearing before a different ALJ.[14] It disapproved curing the defective appointment by a quick (already-issued) ratification of the ALJ's appointment.[15] Similarly, in *NLRB v. Noel Canning*, the Court held

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[11] *Id.* at 498 (quoting 1 Annals of Cong. 499 (J. Madison)).

[12] *Id.*

[13] 138 S. Ct. 2044, 2051 (2018).

[14] *Id.* at 2055.

[15] *Id.* at 2055 nn.5 & 6.

that three NLRB Members were unconstitutionally appointed without Senate advice and consent.[16] It affirmed the Court of Appeals's decision that the NLRB order, issued without a properly-appointed quorum, was "invalid."[17]

These cases are apt because there, as here, a defect in authority made agency action unlawful. In debating the first executive agencies, James Madison insisted the President naturally had "the power of appointing, overseeing, and controlling those who execute the laws."[18] Unlike judicial power or (arguably) legislative power, executive power can be delegated.[19] But if an unconstitutional removal protection breaks the "chain of depend-

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[16] 573 U.S. 513, 519 (2014) (interpreting U.S. CONST. art. II, § 2, cl. 3, Recess Appointments Clause).

[17] *Id.* at 521; *see id.* at 557.

[18] 1 Annals of Cong. 463 (1789).

[19] *See Mistretta v. United States*, 488 U.S. 361, 424 (1989) (Scalia, J., dissenting) (citing *Wolsey v. Chapman*, 101 U.S. 755 (1880); *Williams v. United States*, 42 U.S. 290 (1843)) ("Although the Constitution says that '[t]he executive Power shall be vested in a President of the United States of America,' Art. II, § 1, it was never thought that the President would have to exercise that power personally. He may generally authorize others to exercise executive powers, with full effect of law, in his place.").

ence" between the officer and the President, the delegation breaks down too.[20] An unconstitutionally-insulated officer lacks authority to act.[21]

Treasury contends that when agency action is held unlawful, vacatur is not mandatory but subject to equitable remedial authority.[22] And it maintains that the case for such relief here is weak. The Shareholders waited four years to sue; vacatur might disrupt the GSEs' operations or the housing market generally; and the Shareholders wielded 20/20 hindsight to target an initially risky, but now astute, Treasury bargain. It also says the case for equitable relief here is worse than *Synar*, where the statutory fallback provision was ready at hand.[23]

These arguments do not defeat vacatur here. Appointments Clause cases refute the point that vacatur is too disruptive. As a remedial matter, *Lucia* granted

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[20] *Free Enter. Fund*, 561 U.S. at 498 (quoting 1 Annals of Cong. 499 (J. Madison)); *see Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019) (opinion of Kagan, J.) ("[A]gencies . . . have political accountability, because they are subject to the supervision of the President, who in turn answers to the public.").

[21] *See Free Enter. Fund*, 561 U.S. at 498; Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1242 (2014) ("Removal . . . provides the constitutionally requisite presidential control.").

[22] *Cf. Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967) (stating in APA context that "the declaratory judgment and injunctive remedies are equitable in nature, and other equitable defenses may be interposed"); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-19 (1982) (holding that traditional equitable principles apply to injunctive relief unless Congress intervenes to guide the courts' discretion).

[23] *Cf.* 478 U.S. at 734-36.

the petitioner a new hearing based on an appointment defect that was common to every single SEC ALJ.[24] *Noel Canning* held an NLRB order invalid because of three defective appointments, which infected all the Board's actions during those Members' tenure.[25] If setting aside agency action was proper in those cases, it is proper here. FHFA and Treasury have other tools to arrange their affairs going forward. The FHFA Director, constitutionally supervised by the President, generally can enter new agreements or ratify past ones that are not challenged here. As for the Third Amendment, it must be aside. The Shareholders have invoked judicial review of agency action that injured them in fact and violated the separation of powers.[26]

Treasury's cases urging equitable discretion are distinguishable. They discuss prospective remedies like prohibitory or mandatory injunctions, not vacatur of agency action that violated the separation of powers.[27]

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[24] 138 S. Ct. at 2049, 2055.

[25] 573 U.S. at 520-21, 557.

[26] *See Bond v. United States*, 564 U.S. 211, 223 (2011) ("If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object."); *Synar*, 478 U.S. at 736 (setting aside sequestration order because "the powers vested in the Comptroller General . . . violate the command of the Constitution").

[27] *See North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) (per curiam) (reversing special-election injunction in redistricting case); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 12 (2008) (reversing preliminary injunction against Navy sonar training); *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 394 (2006) (holding that traditional four-factor test applies to injunctions against patent infringement); *Weinberger*, 456 U.S. at 320 (holding that Federal Water Pollution Control Act did not mandate injunctions against its violation).

In contrast, neither *Synar*, *Lucia*, nor *Noel Canning* discusses equitable-discretion principles or applies the four-factor test for granting an injunction.

III

Although setting aside agency action is not subject to the four-factor injunction standard, it remains an equitable remedy. Doing so here is like rescinding a contract. "A transfer by an agent, trustee, or other fiduciary outside the scope of the transferor's authority, or otherwise in breach of the transferor's duty to the principal or beneficiary, is subject to rescission and restitution."[28] The Third Amendment is the smallest independent agreement that caused the Shareholders' injury, so that is what to rescind. When a contract is rescinded, restitution is generally in order, and the plaintiff may also need to return benefits it received.[29] I would recognize the district court's authority, on remand, to decide the parties' rights and duties to restore their rightful position. So I don't share Judge Haynes's concern that this remedy resembles a "pick-and-choose approach" and grants Shareholders a windfall.

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The Shareholders are entitled to declaratory judgment that the Third Amendment exceeded FHFA's lawful authority because the agency adopted it outside the

[28] RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 17 (AM. LAW INST. 2011).

[29] *See id.* ("The transferee is liable in restitution to the principal or beneficiary as necessary to avoid unjust enrichment.").

President's supervision.[30] This analysis also supports an injunction vacating the Third Amendment.[31] In light of recent developments, I would remand Count IV to the district court for entry of a judgment consistent with this opinion.[32]

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[30] *See Free Enter. Fund*, 561 U.S. at 513 (holding petitioners were entitled to declaratory relief that PCAOB standards "will be enforced only by a constitutional agency accountable to the Executive"); *see also Kisor*, 139 S. Ct. at 2413 (opinion of Kagan, J.) ("[A]gencies . . . have political accountability, because they are subject to the supervision of the President, who in turn answers to the public.").

[31] *See Synar*, 478 U.S. at 736, *aff'g Synar*, 626 F. Supp. at 1404 (ordering "that the presidential sequestration order issued . . . pursuant to the unconstitutional automatic deficit reduction process be, and hereby is, declared without legal force and effect").

[32] FHFA's newly appointed Director has publicly indicated he is considering renegotiating FHFA's agreements with Treasury. Andrew Ackerman & Ben Eisen, *Push to Overhaul Fannie, Freddie Nudges Up Mortgage Costs*, WALL STREET J. (June 25, 2019, https://www.wsj.com/articles/trump-push-on-housing-finance-nudges-up-mortgage-costs-11561474203?mod=searchresults&page=1&pos=2).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-20364

PATRICK J. COLLINS; MARCUS J. LIOTTA;
WILLIAM M. HITCHCOCK, PLAINTIFFS-APPELLANTS

v.

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

Filed: Nov. 12, 2018

Appeal from the United States District Court
for the Southern District of Texas

ON PETITITIONS FOR REHEARING EN BANC

Before: STEWART, Chief Judge, JONES, SMITH, DENNIS, OWEN, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, COSTA, WILLETT, HO, DUNCAN, ENGELHARDT, and OLDHAM, Circuit Judges.

BY THE COURT:

A member of the court having requested a poll on the petitions for rehearing en banc, and a majority of the circuit judges in regular active service and not disqualified having voted in favor, IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX C

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OF TREASURY; DEPARTMENT OF THE TREASURY;
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MELVIN L. WATT, DEFENDANTS-APPELLEES

[Filed: July 16, 2018]

Appeal from the United States District Court
for the Southern District of Texas

Before: STEWART, Chief Judge, and HAYNES and WILLETT, Circuit Judges.

PER CURIAM:[1]

A decade ago, the United States was engulfed in perhaps the worst financial crisis since the Great Depres-

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[1] Chief Judge Stewart joins in the entire opinion and judgment except for Section II.B.2 and the judgment on the constitutional issue; Judge Haynes joins in the entire opinion and judgment; Judge Willett joins in the entire opinion and judgment except for Section II.A and the judgment on the statutory issue.

sion. Toxic mortgage debt had poisoned the global financial system. Hoping to reverse a national housing-market meltdown, Congress passed the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654 (codified in various sections of 12 U.S.C.). Among other things, HERA created a new independent federal entity—the Federal Housing Finance Agency ("FHFA")—to oversee two of the nation's largest financial companies, government-chartered mainstays of the U.S. mortgage market: the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac").

Since their inception, these twin mortgage-finance giants have always been government-sponsored entities ("GSEs"). But Fannie and Freddie are also private corporations with private stockholders, and many investors are disenchanted with the Federal Government's management. This case is the latest in a series of shareholder challenges to an agreement between the FHFA, as conservator to Fannie and Freddie, and the Treasury Department. Under the 2012 agreement, Treasury provided billions of taxpayer dollars in capital. In exchange, Fannie and Freddie were required to pay Treasury quarterly dividends equal to their entire net worth. This exchange is known as the "net worth sweep," and aggrieved investors are unhappy with the bailout terms.

Plaintiffs-Appellants Patrick J. Collins, Marcus J. Liotta, and William M. Hitchcock (collectively "Shareholders") are Fannie Mae and Freddie Mac shareholders. They sued the FHFA and its Director, as well as Treasury and its Secretary, arguing that the agreement rendered their shares valueless. They contend that Treasury and the FHFA (collectively the "Agencies") exceeded their statutory authority under HERA and that the agreement was arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) ("APA"). They also claim that the FHFA is unconstitutionally structured in violation of Article II, §§ 1 and 3 of the Constitution because, among other things, the agency is headed by a single Director removable only for cause, does not depend on congressional appropriations, and evades meaningful judicial review. The district court dismissed the Shareholders' statutory claims and granted summary judgment in favor of the Agencies on the constitutional claim.

Because we find that the FHFA acted within its statutory authority by adopting the net worth sweep, we hold that the Shareholders' APA claims are barred by § 4617(f). But we also find that the FHFA is unconstitutionally structured and violates the separation of powers. Accordingly, we AFFIRM in part and REVERSE in part.

I. BACKGROUND

A. Fannie and Freddie

The foundation of the United States housing market is built on two entities: Fannie Mae and Freddie Mac. Congress created Fannie Mae in 1938 to "provide stability in the secondary market for residential mortgages," to "increas[e] the liquidity of mortgage investments," and to "promote access to mortgage credit throughout the Nation."[2] Congress created Freddie Mac in 1970

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[2] 12 U.S.C. §§ 1716, 1717.

to "increase the availability of mortgage credit for the financing of urgently needed housing."[3] Both Fannie and Freddie are now publicly traded, for-profit corporations. Together, they purchase and guarantee mortgages originating in private banks and bundle them into mortgage-backed securities. In doing so, these GSEs leverage shareholder investments to provide liquidity to the residential mortgage market, ensuring that homeownership is a realistic goal for American families.

B. The Recession

In 2007, the housing market collapsed,[4] and the United States economy fell into a severe recession. At the

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[3] Federal Home Loan Mortgage Corporation Act, Pub. L. No. 91-351, preamble, 84 Stat. 450 (1970).

[4] The financial crisis was caused, in part, by a series of mortgage loans to borrowers with poor credit, known as "subprime" mortgages. *Crash Course: The Origins of the Financial Crisis*, ECONOMIST (Sept. 7, 2013), https://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article. Lenders eased their standards for subprime mortgages, requiring little or no down-payment or income documentation, and loans often came with discounted interest rates that reset after two years. JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, *The State of the Nation's Housing: 2008*, at 2 (2008), https://web.archive.org/web/20100630164105/http://www.jchs.harvard.edu/publications/markets/son2008/son2008.pdf. Even the GSEs relaxed their lending standards to compete with private banks. *See* Charles Duhigg, *Pressured to Take More Risk, Fannie Reached Tipping Point*, N.Y. TIMES (Oct. 4, 2008), https://www.nytimes.com/2008/10/05/business/05fannie.html. Subprime mortgages were then pooled together to back securities that received deceptively high credit ratings. ECONOMIST, *supra*. Home prices suffered a steep decline in 2006. *Justin Lahart, Egg Cracks Differ in Housing, Finance Shells*, WALL ST. J. (Dec. 24, 2007), https://www.wsj.com/articles/

time, Fannie and Freddie controlled combined mortgage portfolios valued at approximately $5 trillion—nearly half of the United States mortgage market. As essential players in the housing market, Fannie and Freddie suffered multi-billion dollar losses. Indeed, the GSEs lost more in 2008 ($108 billion) than they had earned in the previous thirty-seven years combined ($95 billion).[5] Yet the GSEs remained solvent. Because they had taken a relatively conservative approach to the riskier mortgages that were issued in the years preceding the recession, they remained in comparatively sound financial condition. As a result, Fannie and Freddie continued to support the United States home mortgage system as distressed banks failed.

C. The FHFA and HERA

During the summer of 2008, President Bush signed HERA into law in an effort to protect the fragile national economy from further losses. HERA established the FHFA as an "independent" agency and classified Fannie and Freddie as "regulated entit[ies]" subject to the direct "supervision" of the FHFA.[6] Separately, HERA granted Treasury temporary authority "to purchase any obligations and other securities" issued by the GSEs,[7] so long as Treasury determined that the

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SB119845906460548071?mod=googlenews_wsj. As a result, subprime borrowers defaulted on their mortgages, and foreclosures drastically increased. *See* HARVARD UNIVERSITY, *supra* at 3.

[5] Office of Inspector General (OIG), FHFA, *Analysis of the 2012 Amendments to the Senior Preferred Stock Purchase Agreements* 5 (Mar. 20, 2013), https://www.fhfaoig.gov/Content/Files/WPR-2013-002_2.pdf.

[6] 12 U.S.C. § 4511(a), (b).

[7] *Id.* §§ 1455(l)(1)(A), 1719(g)(1)(A).

terms of purchase would "protect the taxpayer,"[8] and imposed "limitations on the payment of dividends."[9] HERA terminated Treasury's authority to purchase securities on December 31, 2009.[10] After that, Treasury was only authorized to "hold, exercise any rights received in connection with, or sell, any obligations or securities [it] purchased."[11]

How Congress chose to structure the FHFA through HERA is central to this appeal.

1. Authority

The FHFA possesses broad discretion to exercise regulatory and enforcement authority over the GSEs' operations.

We first outline the FHFA's regulatory authority. HERA charges the FHFA Director with the broad duty to "oversee the prudential operations" of the GSEs and to ensure that: the GSEs "operate[] in a safe and sound manner, including maintenance of adequate capital and internal controls;" "the operations and activities of each regulated entity foster liquid, efficient, competitive, and resilient national housing finance markets;" and the GSEs' activities "are consistent with the public interest."[12] The Director may issue "any regulations, guidelines, or orders necessary to carry out" this duty.[13]

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[8] *Id.* §§ 1455(l)(1)(B)(iii), 1719(g)(1)(B)(iii).

[9] *Id.* §§ 1455(l)(1)(C)(vi), 1719(g)(1)(C)(vi).

[10] *Id.* §§ 1455(l)(4), 1719(g)(4).

[11] *Id.* §§ 1455(l)(2)(D), 1719(g)(2)(D).

[12] *Id.* § 4513(a)(1)(A), (B)(i), (B)(ii), (B)(v).

[13] *Id.* § 4526(a).

Next, we turn to FHFA's enforcement authority. For one, the Director may issue and serve a "notice of charges" to the GSE or an entity-affiliated party if the party is, or is reasonably suspected of, engaging in "unsafe or unsound practice[s] in conducting the business" of the GSE or otherwise violating laws, rules, or regulations imposed by the Director.[14] The notice of charge schedules a formal hearing, during which the FHFA determines whether to issue a cease and desist order.[15] After the hearing, the Director may issue the order and may require the entity to take "affirmative action to correct or remedy" the violation.[16] The Director can also: (1) obtain an injunction[17] in federal court to enforce his cease and desist orders; (2) seek judicial enforcement of outstanding notices or orders that the FHFA issued;[18] and (3) issue subpoenas,[19] which may be enforced in federal court.[20] Finally, the Director may "require the regulated entity to take such other action as the Director determines appropriate."[21]

Under certain circumstances, the Director may impose civil monetary penalties "on any regulated entity

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[14] *See id.* § 4631(a)(1). The statute does impose some limits to the Director's authority, such as restrictions on the ability to enforce compliance with achieving housing goal provisions, among other things. *See id.* § 4631(a)(2).

[15] *Id.* at § 4631(c)(1).

[16] *Id.* at § 4631(c)(2).

[17] *Id.* § 4632(e).

[18] *See id.* § 4635.

[19] *Id.* § 4641(a).

[20] *See id.* § 4641(c).

[21] *Id.* at § 4631(d).

or any entity-affiliated party."[22] The Director must abide by certain conditions before imposing a penalty, such as providing notice to the entity and providing the opportunity for a hearing[23] before the FHFA. There are tiers of potential penalties depending on the severity of the offense, and the Director has wide discretion to determine the appropriate penalty.[24] The penalty "shall not be subject to review, except" by the D.C. Circuit.[25] If the penalized entity does not comply, the Director may sue to obtain a monetary judgment and "the validity and appropriateness of the order of the Director imposing the penalty shall not be subject to review."[26]

HERA also authorizes the FHFA Director to appoint the FHFA as either conservator or receiver for the GSEs, "for the purpose of reorganizing, rehabilitating, or winding up the[ir] affairs."[27]

Once appointed conservator or receiver, the FHFA enjoys sweeping authority over GSE operations. For example, the FHFA "may . . . take over the assets of and operate the regulated entity with all the powers of the shareholders, the directors, and the officers of the

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[22] *Id.* § 4636(a).

[23] The FHFA may conduct hearings regarding certain enforcement decisions; parties may appeal the outcome of the hearing to the D.C. Circuit. *See id.* §§ 4633, 4634(a).

[24] *Id.* § 4636(b), (c).

[25] *Id.* § 4636(c), (d).

[26] *Id.* § 4636(d).

[27] *Id.* § 4617(a)(2).

regulated entity and conduct all business of the regulated entity."[28] The FHFA may also "collect all obligations and money due," "perform all functions of the regulated entity in the name of the regulated entity which are consistent with the appointment as conservator or receiver," "preserve and conserve the assets and property of the regulated entity," and "provide by contract for assistance in fulfilling any function, activity, action, or duty of the Agency as conservator or receiver."[29] And upon appointment, the FHFA "immediately succeed[s] to all rights, titles, powers, and privileges of such regulated entity with respect to the regulated entity and the assets of the regulated entity."[30] The FHFA also has discretion to "transfer or sell any asset or liability of the regulated entity in default, and may do so without any approval, assignment, or consent."[31]

More specifically, as conservator, HERA authorizes the FHFA to "take such action as may be . . . (i) necessary to put the regulated entity in a sound and solvent condition; and (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity."[32]

The FHFA also has broad incidental powers when it acts as conservator or receiver. The FHFA may "exercise all powers and authorities specifically granted to conservators or receivers, respectively, under this section, and such incidental powers as shall be necessary to

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[28] *Id.* § 4617(b)(2)(B)(i).

[29] *Id.* § 4617(b)(2)(B)(ii)-(v).

[30] *Id.* § 4617(b)(2)(A)(i).

[31] *Id.* § 4617(b)(2)(G); *see also id.* § 4617(b)(2)(H).

[32] *Id.* § 4617(b)(2)(D).

carry out such powers," and it may "take any action authorized by this section, which the Agency determines is in the best interests of the regulated entity or the Agency."[33] The FHFA also has independent litigation authority; it may issue subpoenas,[34] "disaffirm or repudiate [certain] contract[s] or lease[s],"[35] and impose civil fines.[36]

2. Structure

The FHFA is led by a single Director, "appointed by the President, by and with the advice and consent of the Senate."[37] The Director must be a United States citizen who has "a demonstrated understanding of financial management or oversight, and ha[s] a demonstrated understanding of capital markets, including the mortgage securities markets and housing finance."[38] The Director is appointed for a five-year term[39] and may only be removed "for cause by the President."[40]

The Director is also responsible for picking three Deputy Directors.[41] And the Director has substantial

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[33] *Id.* § 4617(b)(2)(J).

[34] *Id.* § 4617(b)(2)(I).

[35] *Id.* § 4617(d)(1).

[36] *See id.* § 4585.

[37] *Id.* § 4512(a), (b)(1).

[38] *Id.* § 4512(b)(1).

[39] *Id.* § 4512(b)(2).

[40] *Id.*

[41] *Id.* § 4512(c)(1) (Deputy Director of the Division of Enterprise Regulation), (d)(1) (Deputy Director of the Division of Federal Home Loan Bank Regulation), (e)(1) (Deputy Director for Housing Mission and Goals).

influence over how the Deputy Directors may exercise their authority.[42]

The statute establishes the process for replacing a Director whose service terminates early due to "death, resignation, sickness, or absence."[43] In such case, "the President shall designate" a Deputy Director "to serve as acting Director until the return of the Director, or the appointment of a successor."[44] The newly appointed Director only serves the remainder of the former Director's term.[45] "An individual may serve as the Director after the expiration of the term for which appointed until a successor has been appointed."[46]

3. Oversight

Congress structured the FHFA as an independent agency.[47] The FHFA's operations as conservator are insulated from judicial review: "[N]o court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver."[48] Plus, the FHFA is funded through annual assessments

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[42] *Id.* § 4512(c)(2), (d)(2), (e)(2).

[43] *Id.* § 4512(f).

[44] *Id.*

[45] *Id.* § 4512(b)(3).

[46] *Id.* § 4512(b)(4).

[47] Agencies may be classified as either independent or executive. Where the agency head is removable at will, the agency is "executive." *In re Aiken Cty.*, 645 F.3d 428, 439 (D.C. Cir. 2011), *subsequent mandamus proceeding*, 725 F.3d 255 (D.C. Cir. 2013) (Kavanaugh, J., concurring). But where the head or heads of an agency are removable only for cause, the agency "is an independent agency that operates free of presidential direction and supervision." *Id.*

[48] 12 U.S.C. § 4617(f).

collected from the "regulated entities" for reasonable costs and expenses of the running the FHFA.[49] The assessments are "not . . . subject to apportionment,"[50] and are "not . . . construed to be Government or public funds or appropriated money."[51]

The FHFA is overseen by the Federal Housing Finance Oversight Board ("Board"), which "advise[s] the Director with respect to the overall strategies and policies in carrying out" his duties.[52] The four-member Board includes two cabinet-level Executive Branch officials—the Secretary of the Treasury and the Secretary of Housing and Urban Development—the FHFA Director, and the Securities and Exchange Commission ("SEC") Chairperson.[53] The FHFA Director is the Board's Chairperson.[54] The Board meets at least quarterly, but it can meet more frequently by notice of the Director.[55] Beyond that, Board members may require a special meeting through written notice to the Director.[56] The Board is responsible for testifying annually before Congress about, among other things, the "safety and soundness" of the GSEs, "their overall operational status," and the "performance of the [FHFA]."[57] The Board may not "exercise any executive authority, and

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[49] *Id.* § 4516(a).

[50] *Id.* § 4516(f)(3).

[51] *Id.* § 4516(f)(2).

[52] *Id.* § 4513a(a).

[53] *Id.*

[54] *Id.*

[55] *Id.* § 4513a(d)(1).

[56] *Id.* § 4513a(d)(2).

[57] *Id.* § 4513a(e).

the Director may not delegate to the Board any of the functions, powers, or duties of the Director."[58] That is, the Board cannot *require* the FHFA or Director to do much of anything; the Board can only order "a special meeting of the Board."[59]

D. The Underlying Dispute

On September 6, 2008, the FHFA's Acting Director placed the GSEs into conservatorship. The next day, Treasury entered into Preferred Stock Purchase Agreements ("PSPAs") with the GSEs. Under the PSPAs, Treasury purchased large amounts of stock, infusing the GSEs with additional capital to ensure liquidity and stability. Treasury also provided the GSEs with access to a capital commitment, initially capped at $100 billion per GSE, to keep them from defaulting. In return, Treasury received one million senior preferred shares in each GSE. Those shares entitled Treasury to (1) a $1 billion senior liquidation preference; (2) a dollar-for-dollar increase in that preference each time Fannie or Freddie drew on Treasury's funding commitment; (3) quarterly dividends the GSEs could pay either at a rate of 10% of Treasury's liquidation preference or as a commitment to increase the liquidation preference by 12%; (4) warrants allowing Treasury to purchase up to 79.9% of common stock; and (5) the possibility of periodic commitment fees over and above any dividends. The PSPAs prohibited the GSEs from "declar[ing] or pay[ing] any dividend (preferred or otherwise) or mak[ing] any other distribution (by reduction of capital or otherwise)" without Treasury's consent.

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[58] *Id.* § 4513a(b).

[59] *Id.* § 4513a(d)(2).

Treasury and the FHFA subsequently amended the PSPAs. In May 2009, Treasury agreed to double its funding commitment to $200 billion for each GSE under the First Amendment. On December 24, 2009, Treasury agreed to further raise its commitment cap under the Second Amendment. This time, the cap was raised to an adjustable figure determined in part by the GSEs' quarterly cumulative losses between 2010 and 2012. On December 31, 2009, Treasury's authority to purchase GSE securities expired, leaving Treasury authorized only to "hold, exercise any rights received in connection with, or sell, any obligations or securities purchased."[60]

As of August 8, 2012, the GSEs had drawn approximately $189 billion from Treasury's funding commitment. Yet the GSEs still struggled to generate capital to pay the 10% dividend owed to Treasury. As a result, the FHFA and Treasury adopted the Third Amendment to the PSPAs on August 17, 2012.

The Third Amendment replaced the quarterly 10% dividend formula, with a requirement that the FHFA pay Treasury quarterly variable dividends equal to the GSEs' excess net worth after accounting for prescribed capital reserves. The capital reserve buffer started at $3 billion and decreased annually until it reached zero in 2018. Under the net worth sweep, the GSEs would no longer incur debt to make dividend payments, but they would also no longer accrue capital. Treasury also suspended the periodic commitment fee. Treasury believed this would "support a thoughtfully managed wind down" of the GSEs and observed that the GSEs "will not

[60] *Id.* §§ 1455(l)(2)(D), 1719(g)(2)(D); *see also id.* §§ 1455(l)(4), 1719(g)(4).

be allowed to retain profits, rebuild capital, [or] return to the market in their prior form."[61]

The net worth sweep transferred significant capital from Fannie and Freddie to Treasury. In 2013, the GSEs paid Treasury $130 billion in dividends. The following year, they paid $40 billion. And in 2015, they paid $15.8 billion. In the first quarter of 2016, Fannie Mae paid Treasury $2.9 billion, and Freddie Mac paid no dividend at all. Between the final quarter in 2012 and the first quarter of 2017, the GSEs generated over $214 billion. Thus, under the net worth sweep Treasury essentially recovered what the GSEs had drawn on Treasury's funding commitment.

E. Procedural History

In October 2016, shareholders of Fannie Mae and Freddie Mac sued the FHFA and its Director, as well as Treasury and its Secretary, challenging the net worth sweep on both statutory and constitutional grounds. First, the Shareholders brought a claim under the APA claiming that the FHFA, in agreeing to the Third Amendment net worth sweep provision, exceeded its statutory authority as conservator under HERA, 12 U.S.C. § 4617(b)(2)(D). Second, the Shareholders brought claims against Treasury under the APA, 5 U.S.C. §§ 702, 706(2)(C), (D), arguing that Treasury exceeded its statutory authority under HERA, 12 U.S.C. §§ 1455(*l*)(4), 1719(g)(1)(B), (g)(4), by (1) purchasing securities after the sunset provision period,

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[61] *Treasury Department Announces Further Steps to Expedite Wind Down of Fannie Mae and Freddie Mac*, U.S. DEP'T OF TREASURY (Aug. 17, 2012), https://www.treasury.gov/press-center/press-releases/Pages/tg1684.aspx.

(2) failing to make the required determinations of necessity before purchasing securities, and (3) agreeing to the net worth sweep. Third, the Shareholders brought claims under the APA, 5 U.S.C. §§ 702, 706(2)(A), alleging that Treasury acted in an arbitrary and capricious manner by agreeing to the net worth sweep. Finally, the Shareholders brought a constitutional claim under Article II, §§ 1 and 3, alleging that the FHFA is unconstitutionally structured because, among other things, it is headed by a single Director removable only for cause. The Shareholders sought both declaratory and injunctive relief invalidating the Third Amendment and returning all dividend payments made to Treasury under the net worth sweep.

The Agencies moved to dismiss the three statutory claims under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) based on HERA's limitation on judicial review, 12 U.S.C. § 4617(f). Plaintiffs and Defendants filed cross-motions for summary judgment on the constitutional claim. The district court concluded, based on the D.C. Circuit's reasoning in *Perry Capital L.L.C. v. Mnuchin*, 848 F.3d 1072 (D.C. Cir. 2017), *amended by* 864 F.3d 591 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 978 (2018), *and cert. denied sub nom. Cacciapalle v. Fed. Hous. Fin. Agency*, 138 S. Ct. 978 (2018), that the Shareholders "fail[ed] to demonstrate that the FHFA's conduct was outside the scope of its broad statutory authority as conservator." And that "the effect of any injunction or declaratory judgment aimed at Treasury's adoption of the Third Amendment would have just as direct and immediate an effect as if the injunction operated directly on FHFA." Thus, the district court granted the Agencies' motions to dismiss the statutory claims as "precluded by § 4617(f)." Finally, the court found that

"FHFA's removal provision, when viewed in light of the agency's overall structure and purpose, does not impede the President's ability to perform his constitutional duty to take care that the laws are faithfully executed." The court therefore granted the FHFA's motion for summary judgment on the constitutional claim. The Shareholders timely appealed.

II. DISCUSSION

This court "review[s] de novo a district court's rulings on a motion to dismiss and a motion for summary judgment, applying the same standard as the district court."[62] To survive a motion to dismiss, the Shareholders' complaint must state a valid claim for relief, viewed in the light most favorable to the plaintiff.[63] "[A] complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'"[64] "[M]ere conclusory statements" are insufficient to state a claim.[65] A claim is facially plausible only when a plaintiff pleads facts "allow[ing] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[66]

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[62] *TOTAL Gas & Power N. Am., Inc. v. Fed. Energy Reg. Comm'n*, 859 F.3d 325, 332 (5th Cir. 2017).

[63] *Copeland v. Wasserstein, Perella & Co., Inc.*, 278 F.3d 472, 477 (5th Cir. 2002).

[64] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

[65] *Id.*

[66] *Id.*

A. Statutory Claims

The Shareholders' statutory claims mirror the claims made against the FHFA that the D.C., Sixth, and Seventh Circuits have all rejected.[67] We reject the Shareholders' statutory claims based on the same well-reasoned basis common to those courts' opinions.[68] HERA bars courts from taking "any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver."[69] Because the FHFA acted within its statutory authority, any potential exception to that bar does not apply.[70] The bar similarly applies to claims against the Department of Treasury that would "affect the exercise of powers or functions of the Agency as a conservator or receiver."[71] Consequently, we lack authority to grant relief on any of the Shareholders' statutory claims.

B. The Constitutional Claim

The Shareholders claim the FHFA's structure violates the separation of powers because it is headed by a single Director removable only for cause. Despite statutory limitations on judicial review, we may exercise

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[67] *See Roberts v. Fed. Hous. Fin. Agency*, 889 F.3d 397, 399 (7th Cir. 2018); *Robinson v. Fed. Hous. Fin. Agency*, 876 F.3d 220 (6th Cir. 2017); *Perry Capital*, 864 F.3d at 598.

[68] Because we find that the Shareholders' statutory claims are barred by § 4617(f), we need not resolve whether HERA's succession provision, 12 U.S.C. § 4617(b)(2)(A)(i) independently prevents the Shareholders from asserting their statutory claims.

[69] 12 U.S.C. § 4617(f).

[70] *See Roberts*, 889 F.3d at 402-06; *Robinson*, 876 F.3d at 227-32; *Perry Capital LLC*, 864 F.3d at 606-15.

[71] *See Roberts*, 889 F.3d at 406-08; *Robinson*, 876 F.3d at 228-29; *Perry Capital LLC*, 864 F.3d at 615-16.

jurisdiction to consider a substantial constitutional claim.[72] Ordinarily, courts have a "duty . . . to construe the statute in order to save it from constitutional infirmities" and should be cautious of "overstat[ing] the matter" when describing the power and independence of the Director.[73] Before we examine the FHFA's structure, we must determine whether the Shareholders have standing to bring their claim.

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[72] *See Garner v. U.S. Dep't of Labor*, 221 F.3d 822, 825 (5th Cir. 2000).

[73] *Morrison v. Olson*, 487 U.S. 654, 682 (1988); *see also INS v. Chadha*, 462 U.S. 919, 944 (1983). The Shareholders dispute that the presumption of constitutionality applies in separation-of-powers cases. Justice Scalia noted in his *Morrison* dissent that "harmonious functioning of the system demands that we ordinarily give some deference . . . to the actions of the political branches." 487 U.S. at 704 (Scalia, J., dissenting). But "where the issue pertains to separation of powers, and the political branches are . . . in disagreement, neither can be presumed correct." *Id.* at 704-05; *see also Freytag v. C.I.R.*, 501 U.S. 868, 879-80 (1991) (declining to defer to executive branch interpretation of statute alleged to violate the Appointments Clause because the "structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic"). Indeed, "the separation of powers does not depend on the views of individual Presidents . . . nor on whether the encroached-upon branch approves the encroachment." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010) (internal quotation marks and citations omitted). Because this case disputes the Constitution's allocation of governing power, we do not defer to one branch's interpretation that would permit it to encroach on another branch's constitutional authority.

1. Standing

Federal courts are confined to adjudicating actual "cases" and "controversies."[74] That "requirement is satisfied only where a plaintiff has standing."[75] "Standing is a question of law that we review de novo."[76] At its "irreducible constitutional minimum," standing requires plaintiffs "to demonstrate: they have suffered an 'injury in fact'; the injury is 'fairly traceable' to the defendant's actions; and the injury will 'likely . . . be redressed by a favorable decision.'"[77] The party invoking federal jurisdiction bears the burden of establishing these elements.[78] And a plaintiff must demonstrate standing for each claim asserted.[79]

Standing for separation-of-powers claims is subject to a more relaxed inquiry: "Party 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."[80] Under this standard, "a party is not required to show that he has received less favorable treatment

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[74] U.S. CONST. art. III, § 2, cl. 1.

[75] *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273 (2008).

[76] *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319 (5th Cir. 2002).

[77] *Pub. Citizen, Inc. v. Bomer*, 274 F.3d 212, 217 (5th Cir. 2001) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

[78] *Lujan*, 504 U.S. at 561.

[79] *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008).

[80] *Buckley v. Valeo*, 424 U.S. 1, 117 (1976) (citations omitted).

than he would have if the agency were lawfully constituted."[81] In essence, the prophylactic, structural nature of the separation of powers justifies permitting claims beyond those where a "specific harm . . . can be identified."[82]

The FHFA argues that the Shareholders lack standing to assert their separation-of-powers claim because the Shareholders' claimed injury[83] is not traceable to the removal provision, nor would it be redressed if the restriction were held unconstitutional.

a. Injury-in-fact

Generally, a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[84] The shareholder standing rule "prohibits shareholders from initiating actions to enforce the rights of [a] corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgment."[85] "[S]hareholder[s] with a direct, personal interest in a cause of action," however, may

[81] *Comm. for Monetary Reform v. Bd. of Governors of Fed. Reserve Sys.*, 766 F.2d 538, 543 (D.C. Cir. 1985) (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 533 (1962) (plurality opinion)).

[82] *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995).

[83] The Agencies do not contest the Shareholders' injury-in-fact. Nevertheless, the court "must—where necessary—raise" standing issues sua sponte. *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 301 F.3d 329, 331-32 (5th Cir. 2002).

[84] *Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

[85] *Id.*

"bring suit even if the corporation's rights are also implicated."[86]

The Shareholders assert that the unconstitutionally structured FHFA caused them direct economic injury—"[m]inority shareholders were directly and uniquely harmed by the expropriation of their rights" because this case "concern[s] the transfer of *all* minority shareholder economic rights to a single, majority shareholder."

We agree. Divesting the Shareholders' property rights caused a direct injury.[87] In *Bowsher v. Synar*, for example, a statute required the President to issue an "order mandating the spending reductions specified by the Comptroller General."[88] The statute automatically suspended scheduled cost-of-living increases to National Treasury Employees Union members.[89] The Union filed suit alleging that the statute violated the separation of powers.[90] The Court found the Union had standing because it would "sustain injury by not receiving a scheduled increase in benefits."[91] The statutory deprivation of benefits was sufficient to injure Union members directly.[92]

Here, the transfer of the Shareholders' economic rights to Treasury by an allegedly unlawfully constituted agency resembles the statutory deprivation of

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[86] *Id.* at 336-37.

[87] *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714 (1986).

[88] *Id.* at 718.

[89] *Id.* at 719.

[90] *Id.* at 720.

[91] *Id.* at 721.

[92] *See id.* at 718-19.

benefits to the Union members in *Bowsher*. The Shareholders are directly and uniquely affected by the net worth sweep.

b. Causation

Next, standing requires "a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant."[93] Whether an injury is traceable to a defendant's conduct depends on "the causal connection between the assertedly unlawful conduct and the alleged injury."[94] The injury cannot be "the result of the independent action of some third party not before the court."[95]

Because the FHFA was unconstitutionally insulated from executive control, the Shareholders argue that its actions are presumptively unconstitutional and thus void. In *Landry v. FDIC*, the D.C. Circuit noted that separation-of-powers matters justify a relaxed causation inquiry because "it will often be difficult or impossible for someone subject to a wrongly designed scheme to show that the design—the structure—played a causal role in his loss."[96] We endorse that inquiry here.

The FHFA argues that the Shareholders' harm is not traceable to the removal restriction for two reasons.

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[93] *Lujan*, 504 U.S. at 560 (cleaned up).

[94] *Allen v. Wright*, 48 U.S. 737, 753 n.19, 757 (1984), *abrogated in part on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

[95] *Lujan*, 504 U.S. at 560 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-41 (1976)).

[96] *Landry v. FDIC*, 204 F.3d 1125, 1130-31 (D.C. Cir. 2000); *see also Buckley*, 424 U.S. at 117.

First, the Third Amendment was the decision of an acting director whose designation was not subject to the for-cause removal restriction. Second, the FHFA does not exercise "executive" power; instead, the FHFA "steps into the shoes" of the GSEs—private financial institutions —when it acts as conservator. Neither argument is persuasive.

Section 4512(f) specifies when an acting Director may serve the FHFA in the Director's place.[97] The FHFA argues that because § 4512(f) does not specify a fixed term nor restrict the President's removal authority, the acting Director is not subject to the for-cause removal restriction. But if the acting Director could be removed at will, the FHFA would be an *executive* agency—not an independent agency. There is no indication that Congress sought to revoke the FHFA's status as an independent agency when it is led by an acting, rather than appointed, Director.[98] So an acting Director, like an appointed one, is covered by the removal restriction.[99]

Second, the FHFA argues that it does not exercise executive functions that Article II vests in the Executive Branch. Under HERA, the FHFA as conservator succeeds to "all rights, titles, powers, and privileges" of the GSEs.[100] Courts interpret this provision as evincing

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[97] "In the event of the death, resignation, sickness, or absence of the Director, the President shall designate [one of the Deputy Directors] to serve as acting Director until the return of the Director, or the appointment of a successor." 12 U.S.C. § 4512(f).

[98] *See Wiener v. United States*, 357 U.S. 349, 353 (1958).

[99] *See* 12 U.S.C. § 4512(b)(2).

[100] *Id.* § 4617(b)(2)(A)(i).

Congress's intent for the FHFA to step into the shoes of the GSEs; although the FHFA is a federal agency, as conservator it "shed[s] its government character and also becom[es] a private party."[101] And the GSEs are undoubtedly private entities.[102]

When an agency acts as conservator, we have held that it does not exercise governmental functions. In *United States v. Beszborn*, the Government filed indictments against various defendants for their role in scheming to defraud financial institutions.[103] Earlier, however, the Resolution Trust Corporation ("RTC") participated in a civil action seeking punitive damages against the defendants as conservator to a financial institution based on the same conduct leading to criminal charges.[104] Our circuit assessed whether the government's prosecution following the RTC's role in the civil trial violated the Double Jeopardy Clause.[105] The court noted the "uniqueness" of the RTC's role as receiver: It was represented by private attorneys, and proceeds from successful actions benefited the creditors and stockholders of the institution it represented rather than the Treasury.[106] Thus, the court found that by acting as receiver, "the RTC stands as a private, non-

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[101] *Meridian Invs., Inc. v. Fed. Home Loan Mortg. Corp.*, 855 F.3d 573, 579 (4th Cir. 2017); *see also O'Melveney & Myers v. FDIC*, 512 U.S. 79, 86-87 (1994) (interpreting the nearly identical provision 12 U.S.C. § 1821(d)(2)(A)(i)); *Perry Capital*, 864 F.3d at 622; *Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017).

[102] *See* 12 U.S.C. §§ 1452(a), 1723(b).

[103] 21 F.3d 62, 64-65 (5th Cir. 1994).

[104] *Id.* at 67.

[105] *Id.*

[106] *Id.* at 68.

governmental entity, and is not the Government for purpose of the Double Jeopardy Clause."[107]

In *Beszborn*, however, it was "the *conduct or actions* of the Government which the Double Jeopardy Clause seeks to limit."[108] The court reasoned that "[t]he rationale behind the protection of the Double Jeopardy Clause rests upon the doctrine that the Government or the sovereign with all of its power should not be allowed to make repeated attempts to convict an individual for an alleged offense."[109] As a result, whether or not the agency was acting as a receiver or regulator decided the issue of whether it violated constitutional protections. We emphasized that "for the Double Jeopardy Clause to have any application, there must be *actions by a sovereign*, which place the individual twice in jeopardy."[110] The separation of powers, however, rests on an entirely different foundation than the Double Jeopardy Clause.

Once again, the Supreme Court has emphasized the nature of the separation-of-powers principle as a "prophylactic device" and structural safeguard rather than a remedy available only when a specific harm is identified.[111] Whether the FHFA's specific conduct or actions were governmental in nature is not relevant—the structure of the agency is. In *Free Enterprise Fund*, for example, the Court considered the causation prong of standing in the context of a separation-of-powers

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[107] *Id.*

[108] *Id.* at 67 (emphasis added).

[109] *Id.*

[110] *Id.* (emphasis added).

[111] *See Plaut*, 514 U.S. at 239.

claim.[112] Like the Agencies in the instant case, the Public Company Accounting Oversight Board ("PCAOB") argued that petitioners lacked standing because their injuries were not fairly traceable to an invalid appointment.[113] The Court rejected this argument, finding that "standing does not require precise proof of what the PCAOB's policies might have been" had the agency's structure met constitutional requirements.[114]

Thus, to establish standing, the Shareholders are not required to show what the FHFA may have done had it been constitutionally structured.[115] Beyond its powers as conservator, the FHFA enjoys broad regulatory power over the GSEs.[116] And that regulatory power will continue to cast a shadow over the Shareholders' interests even after this case is resolved. As regulator, the FHFA has the ongoing potential to make decisions that affect the Shareholders' economic rights. We are satisfied that the Shareholders' injury is fairly traceable to the FHFA's unconstitutional structure.

c. Redressability

Redressability examines "the causal connection between the alleged injury and the judicial relief requested."[117] "The point has always been the same: whether a plaintiff *personally* would benefit in a tangible way from the court's intervention."[118] "[I]t must be

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[112] *See Free Enter. Fund*, 561 U.S. at 477.

[113] *Id.* at 512 n.12.

[114] *Id.*

[115] *See id.*

[116] 12 U.S.C. § 4511 *et seq.*

[117] *Allen*, 468 U.S. at 753 n.19.

[118] *Sprint Commc'ns Co.*, 554 U.S. at 300 (cleaned up).

likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[119]

Treasury argues that there is no basis to set aside the Third Amendment, and thus ruling on FHFA's constitutionality would result in an impermissible advisory opinion.[120] In essence, Treasury argues severing the removal restriction would be the appropriate remedy for the Shareholders' claim, which would not resolve the Shareholders' injury.

We disagree. The Shareholders allege an *ongoing* injury—being subjected to enforcement or regulation by an unconstitutionally constituted body. This is consistent with standing in separation-of-powers cases. In *Free Enterprise*, for example, the Court concluded that the petitioners were "entitled to declaratory relief sufficient to ensure that the reporting requirements and auditing standards to which they are subject will be enforced only by a constitutional agency accountable to the Executive."[121] Striking the removal provision was meaningful because a plaintiff was registered with the PCAOB and subject to its continuing jurisdiction, regulation, and investigation.[122] Declaratory relief addressing the constitutional issue stopped the ongoing injury from persisting. Petitioners thus had a tangible interest in ensuring that the PCAOB met constitutional requirements[123] —just like the Shareholders here.

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[119] *Lujan*, 504 U.S. at 561 (cleaned up).

[120] *See Bayou Liberty Ass'n v. U.S. Army Corps of Eng'rs*, 217 F.3d 393, 397-98 (5th Cir. 2000).

[121] *Free Enter. Fund*, 561 U.S. at 513.

[122] *See* 561 U.S. at 487-88, 513.

[123] *Id.*

The relationship between the FHFA and the Shareholders is sufficiently close to subject the Shareholders to FHFA oversight. In exercising its power as conservator, the FHFA has stepped into the shoes of the directors and managers charged with making decisions that directly affect the Shareholders' interests. As a result, the Shareholders' injury stems from the continued harm caused by the FHFA's ongoing conservatorship without executive oversight.

The relatively sparse case law seems to support this conclusion: The Supreme Court's most authoritative statement on Article III standing of shareholders and the prudential doctrine of shareholder standing came in *Franchise Tax Board of California v. Alcan Aluminium Ltd.*[124] There, a wholly-owned subsidiary was taxed by the state of California. The subsidiary's parent companies, rather than the subsidiary itself, sued for relief. The Supreme Court concluded that the parent companies clearly had standing.[125] But the "more difficult issue [was] whether respondents [could] meet the prudential requirements of . . . the so-called shareholder standing rule."[126] Although the Court left that issue unresolved, it left bread crumbs that resulted in courts using the direct-derivative action dichotomy for the

[124] 493 U.S. at 335.

[125] *Id.* at 336 ("If [taxes against the subsidiary] are higher than the law of the land allows, that method threatens to cause actual financial injury to [the parent companies] by illegally reducing the return on their investments in [the subsidiary] and by lowering the value of their stockholdings.").

[126] *Id.*

shareholder standing rule.[127] Consistent with this approach, the Shareholders here assert direct, personal interest in their cause of action[128]—their security interests are subject to the FHFA's continuing jurisdiction, regulation, and control.

Because the Article III standard is subject to a more relaxed inquiry than the shareholder standing rule, we conclude that the Shareholders have Article III standing to seek declaratory relief. The FHFA as conservator and regulator has extensive authority and responsibility that impacts the Shareholders' rights. Vacatur of the net worth sweep alone would not fully resolve the Shareholders' constitutional injury—it fails to remedy the ongoing separation-of-powers violation.

We are satisfied that the Shareholders have standing to bring their constitutional claim.

2. The FHFA is Unconstitutionally Structured

Our Constitution divides the powers and responsibilities of governing across three co-equal branches. Each branch may exercise only the powers explicitly enumerated in the Constitution—executives execute, legislators legislate, and judges judge. This structural division of

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[127] *Id.* (stating that there is an exception to the shareholder standing rule for "a shareholder with a direct, personal interest in a cause of action to bring suit even if the corporation's rights are also implicated").

[128] We recognize that, while not a test for Article III standing, the shareholder standing rule is an exception to the prudential doctrine that could prevent the Shareholders' claims for want of standing.

power aims to ensure no single branch becomes too powerful.[129] The Framers were not tinkerers; they upended things. The Revolution produced a revolutionary design. "Ambition must be made to counteract ambition."[130] The Constitution's unique architecture is "the central guarantee of a just government"[131] and essential to protecting individual liberty.[132]

Yet when one branch tries to impair the power of another, this upsets the co-equality of the branches and degrades the Constitution's deliberate separation of powers. Accordingly, the Supreme Court "ha[s] not

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[129] *See* THE FEDERALIST NO. 47 (James Madison) ("The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.").

[130] THE FEDERALIST NO. 51 (James Madison).

[131] *Freytag*, 501 U.S. at 870.

[132] *See Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (explaining that our system of separated powers aims "to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty"); *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (citations omitted) ("This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."); *Morrison*, 487 U.S. at 697 (Scalia, J., dissenting) ("The Framers . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government."); *id.* ("Without a secure structure of separated powers, our Bill of Rights would be worthless."); *Bowsher*, 478 U.S. at 722 ("[C]hecks and balances [are] the foundation of a structure of government that would protect liberty."); *id.* at 730 ("The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.").

hesitated to strike down provisions of law that *either* accrete to a single Branch powers more appropriately diffused among separate Branches *or* that undermine the authority and independence of one or another coordinate Branch."[133]

Here, the Shareholders assert the FHFA, as currently structured, undermines the separation of powers; they claim that the Executive Branch cannot adequately control the agency. Before evaluating the merits of the Shareholders' challenge, we must discuss the powers and obligations of the two branches implicated in this case.

Incidental to the exercise of its enumerated powers, Congress may establish independent agencies as "necessary and proper."[134] Over the past century, Congress has established dozens of independent agencies responsible for performing executive, regulatory, and quasi-judicial functions.[135] These independent agencies "wield[] vast power and touch[] almost every aspect of daily life."[136]

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[133] *Mistretta*, 488 U.S. at 381 (emphasis added).

[134] *See Free Enter. Fund*, 561 U.S. at 515 (Breyer, J., dissenting) (citations omitted).

[135] *See PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 170 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

[136] *Free Enter. Fund*, 561 U.S. at 499; *see PHH Corp.*, 881 F.3d at 170 (Kavanaugh, J., dissenting) ("Ever since the 1935 *Humphrey's Executor* decision, independent agencies have played a significant role in the U.S. Government. The independent agencies possess extraordinary authority over vast swaths of American economic and social life—from securities to antitrust to telecommunications to labor to energy. The list goes on.").

Congress often structures agencies to be independent from the Executive Branch in hopes that a measure of political insulation will enable the agencies to pursue policy objectives that (hopefully) yield long-term benefits.[137] To do so, Congress selects from a "menu of options"[138] in order "to structure the agency to be more or less insulated from presidential control."[139]

The quintessential independence-promoting mechanism is restricting the Executive Branch's ability to remove agency leaders at will. The Supreme Court in 1935 explained the rationale this way: "[O]ne who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will."[140] As a result, Congress will often permit the President to remove agency leadership only "for cause." And the Supreme Court has approved this design: "Congress can, under certain cir-

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[137] *See, e.g.*, *PHH Corp.*, 881 F.3d at 78 ("Congress has historically given a modicum of independence to financial regulators like the Federal Reserve, the FTC, and the Office of the Comptroller of the Currency. That independence shields the nation's economy from manipulation or self-dealing by political incumbents and enables such agencies to pursue the general public interest in the nation's longer-term economic stability and success, even where doing so might require action that is politically unpopular in the short term.").

[138] *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 825 (2013).

[139] *See* Datla & Revesz, *supra* note 138, at 825.

[140] *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935).

cumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause."[141]

Beyond the removal restriction, Congress may impose other independence-promoting features.[142] For example, Congress may:

- Empower a single director or a body of co-equal leaders to manage the agency;
- Establish fixed terms of service for agency leadership;
- Mandate the agency be composed of a bipartisan leadership team;
- Exempt the agency from the standard appropriations process;
- Require the Senate to formally approve agency leadership nominations;
- Establish a formal oversight board that monitors and manages the independent agency's activities; and
- Grant the agency unilateral litigation authority, untethered from the Department of Justice.[143]

Sometimes, Congress imposes multiple independence-promoting mechanisms. Ultimately, "an agency's practical degree of independence from presidential influence

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[141] *Free Enter. Fund*, 561 U.S. at 483 (citations omitted).

[142] *See* Datla & Revesz, *supra* note 138, at 826-27 (recognizing agencies "fall along a continuum" ranging "from most insulated to least insulated from presidential control").

[143] *See generally id.*

depends" on the combined effect of these (sometimes mutually reinforcing) structural features.[144]

While "[t]he Supreme Court has long recognized that, as deployed to shield certain agencies, a degree of independence is fully consonant with the Constitution,"[145] a vast "field of doubt" remains regarding how much Congress can insulate an independent agency from Executive Branch influence.[146] In other words: "where, in all this, is the role for oversight by an elected President?"[147]

The President's oversight role originates in Article II. The Constitution vests the "executive Power" in the President and obligates him to "take Care that the Laws be faithfully executed."[148] Independent agencies are staffed by subordinate executive officers,[149] so the President bears the ultimate responsibility for overseeing those officials.[150] Accordingly, "[s]ince 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing

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[144] *Id.* at 824.

[145] *PHH Corp.*, 881 F.3d at 78.

[146] *Humphrey's Ex'r*, 295 U.S. at 632.

[147] *Free Enter. Fund*, 561 U.S. at 499; *id.* ("The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws.").

[148] U.S. CONST. art. II § 1, cl. 1; *id.* § 3.

[149] *See Free Enter. Fund*, 561 U.S. at 483.

[150] *See id.*; *id.* at 492 ("It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman's famous phrase.").

them from office, if necessary."[151] The President cannot shirk this oversight obligation: "Abdication of responsibility is not part of the constitutional design."[152]

If an independent agency is *too* insulated from Executive Branch oversight, the separation of powers suffers. First, excessive insulation impairs the President's ability to fulfill his Article II oversight obligations.[153] By limiting his ability to oversee subordinates, Congress weakens the President's ability to fulfill his "constitutionally assigned duties, and thus undermines . . . the balance of constitutionally prescribed power among the branches."[154]

Second, excessive insulation allows Congress to accumulate power for itself. As the Supreme Court recognized, excessively insulating an independent agency from Executive Branch influence "provides a blueprint

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[151] *Id.* at 483 (citations omitted).

[152] *Clinton*, 524 U.S. at 452 (1998) (Kennedy, J., concurring).

[153] *Cf. Free Enter. Fund*, 561 U.S. at 498 ("By granting the [Public Company Accounting Oversight] Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts. The Act's restrictions are incompatible with the Constitution's separation of powers.").

[154] Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 501 (1991) (footnote omitted); *see Free Enter. Fund*, 561 U.S. at 500 ("'Even when a branch does not arrogate power to itself,' . . . it must not 'impair another in the performance of its constitutional duties.'" (quoting *Loving v. United States*, 517 U.S. 748, 757 (1996) (footnote omitted))).

for extensive expansion of the legislative power."[155] Congress can expand its powers through its "plenary control over the salary, duties, and even existence of executive offices."[156] And without meaningful tools to oversee the agency, the President cannot counteract Congress's ambition.[157]

For these reasons, agencies may be independent, but they may not be isolated. Surveying the Supreme Court's removal-power cases, a unifying principle emerges: The outer limit of Congress's ability to insulate independent agencies from executive oversight is the President's Article II obligation to ensure that the nation's laws are faithfully executed. In other words, Article II's Take Care Clause must impose a hard limit on what is "necessary and proper" under Article I.[158] Otherwise, Congress could insulate an agency to the

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[155] *Free Enter. Fund*, 561 U.S. at 500 (2010) (quoting *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 277 (1991)).

[156] *Id.*

[157] *See id.* ("Only Presidential oversight can counter its influence."); *id.* at 501 (citing THE FEDERALIST No. 51 (James Madison)).

[158] Congress may establish independent agencies as "necessary and proper" in order to exercise its enumerated powers. But whatever Congress finds "necessary and proper" must be consistent with Constitution's "letter and spirit." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 537 (2012) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819)); *id.* at 559 ("As our jurisprudence under the Necessary and Proper Clause has developed, we have been very deferential. . . . But we have also carried out our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution."); *see Free Enter. Fund*, 561 U.S. at 516 (Breyer, J., dissenting) ("The Necessary and Proper Clause does not grant Congress power to free *all* Executive Branch officials from dismissal at the will of the President.").

point where the President could not adequately oversee the agency's activities, impairing the President's ability to fulfill his Article II obligations.[159] This excessive insulation upsets the separation of powers both by allowing Congress to weaken the President's performance of his constitutionally mandated duties *and* by allowing Congress to accumulate power for itself. Therefore, Congress cannot enshroud an agency in layers of independence-promoting insulation to the point at which the President cannot adequately control the agency's behavior.[160]

To determine when insulating an independent agency from Executive Branch control goes too far, we must review the Supreme Court's leading removal-power cases.

***a.* Free Enterprise Fund**

The Supreme Court in *Free Enterprise Fund* evaluated whether Public Company Accounting Oversight Board ("PCAOB") members were excessively insulated from Executive Branch control.

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[159] *Free Enter. Fund*, 561 U.S. at 496 (finding that when the President could not hold agency officials accountable for their conduct, "his ability to execute the laws . . . [was] impaired" in violation of Article II); *see Humphrey's Ex'r*, 295 U.S. at 629. ("The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question.").

[160] *Free Enter. Fund*, 561 U.S. at 508 (holding that Congress cannot "deprive the President of adequate control over the [Public Company Accounting Oversight] Board, which is the regulator of first resort and the primary law enforcement authority for a vital sector of our economy").

The PCAOB was a "nonprofit corporation" with "expansive powers to govern" foreign and domestic accounting firms that audit public companies to ensure compliance with our nation's securities laws.[161] Congress charged the SEC with the responsibility of overseeing the PCAOB.[162] Yet, Congress also "substantially insulated" PCAOB members "from the Commission's control."[163] PCAOB members could not be removed "except for good cause," and the Securities and Exchange Commissioners decided "whether good cause exist[ed]."[164] The President had virtually no oversight over the good-cause determination made by the SEC Commissioners; the President "was powerless to intervene—unless that determination [was] so unreasonable as to constitute inefficiency, neglect of duty, or malfeasance in office."[165] Thus, to the Court, none of those Commissioners were "subject to the President's direct control."[166]

The Court concluded that excessively insulating the PCAOB members through two layers of for-cause removal protection unconstitutionally impaired the President's ability to fulfill his Article II responsibility. Congress "withdr[ew] from the President any decision on whether . . . good cause exists" and "vested" that decision in SEC Commissioners.[167] This meant that the PCAOB was "not accountable to the President," and

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[161] *Id.* at 484-85.

[162] *Id.* at 485.

[163] *Id.*

[164] *Id.* at 496.

[165] *Id.* (cleaned up).

[166] *Id.*

[167] *Id.*

the President was "not responsible for the Board."[168] This arrangement was unconstitutional because:

> [n]either the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, ha[d] full control over the Board. The President [was] stripped of the power our precedents have preserved, and *his ability to execute the laws—by holding his subordinates accountable for their conduct—[was] impaired.*[169]

We draw three important lessons from *Free Enterprise*.

First, Congress may not "shelter the bureaucracy" to the point where executive officers are "immune from Presidential oversight."[170] We must not forget the Court's fear that, absent effective oversight tools, the Chief Executive could lose control over the Executive Branch.[171]

Second, to maintain "adequate control"[172] over his subordinates, the President must retain sticks that he can use to demand accountability—including the power

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[168] *Id.*

[169] *Id.* at 496 (emphasis added).

[170] *Id.* at 497.

[171] *Id.* at 499 ("The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may *slip from the Executive's control*, and thus from that of the people." (emphasis added)).

[172] *Id.* at 508 (holding that Congress cannot "deprive the President of adequate control over the Board, which is the regulator of first resort and the primary law enforcement authority for a vital sector of our economy").

to remove.[173] As the *Free Enterprise* Court made clear, Congress cannot transform the President into a "cajoler-in-chief" who can only offer carrots.[174]

Third, we must look at the aggregate effect of the insulating mechanisms to determine whether an agency is excessively insulated. The Court in *Free Enterprise* explicitly recognized that "the language providing for good-cause removal" "working together" with "a number of statutory provisions" "produce[d] a constitutional violation."[175] Indeed, all nine Justices adopted this analytical approach.[176]

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[173] *See id.* at 483-84; *id.* at 499.

[174] *Id.* at 501-02; *id.* ("The President . . . is not limited, as in Harry Truman's lament, to 'persuad[ing]' his unelected subordinates 'to do what they ought to do without persuasion.'" (alterations in original)); *id.* at 502 ("Congress cannot reduce the Chief Magistrate to a cajoler-in-chief.").

[175] *See id.* at 509.

[176] Justice Breyer—dissenting and joined by Justices Stevens, Ginsburg and Sotomayor—followed roughly the same analytical framework. The dissent recognized that the removal restriction's constitutionality must be decided "in light of the provision's practical functioning in context," *id.* at 523 (Breyer, J., dissenting), because "[i]n practical terms no 'for cause' provision can, in isolation, define the *full measure* of executive power," *id.* at 524 (emphasis added). Congress's agency-design decisions—such as the agency's "scope of power" and funding—"affect the President's power to get something done." *See id.* Thus, the dissent posed the central question as: "To what extent [] is the . . . 'for cause' [removal] provision likely, as a practical matter, to limit the President's exercise of executive authority?" *Id.* The dissent concluded that, even with the removal restriction, the President—through his "constitutionally sufficient" control over the SEC—could adequately control the PCAOB. *Id.* at 528-30. In other words, after evaluating the cumulative effect of the

b. Morrison

Morrison involved the constitutionality of the Ethics in Government Act ("EGA"), which permitted "the appointment of an 'independent counsel' to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws."[177] The EGA conferred upon the independent counsel protection from at-will removal by the Executive Branch.[178]

The independent counsel was an "inferior officer"[179] within the Executive Branch, who was "subject to good-cause removal by a higher Executive Branch official" (i.e., the Attorney General).[180] The counsel had no "authority to formulate policy for the Government or the Executive Branch, nor . . . [authority to exercise] any administrative duties outside of those necessary to operate her office."[181] The counsel could "only act within the scope of the jurisdiction that ha[d] been granted by

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insulating mechanisms, the dissent concluded the President could still adequately control the PCAOB.

[177] *Morrison*, 487 U.S. at 660 (footnote omitted).

[178] *Id.* at 663; *id.* at 686 (recognizing that the Attorney General may remove the independent counsel for good cause, after following a statutorily-prescribed process).

[179] The Court reached this conclusion when evaluating the claim that the EGA violated Article II's Appointments Clause. We do not find it necessary to recite the Court's reasoning. We note, however, that this conclusion influenced the Court's subsequent analysis of the separation-of-powers challenge.

[180] *Id.* at 671, 686.

[181] *Id.* at 671-72.

the Special Division[182] pursuant to a request by the Attorney General."[183] The Attorney General—a principal executive officer who is removable at will by the President —exercised substantial oversight over the authority and actions of the independent counsel.

Although the EGA provided the independent counsel protection from at-will removal, the Court found this removal restriction did not "sufficiently deprive[] the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws."[184] The Court recognized that the separation of powers aims to ensure "Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II."[185] But it concluded that the removal restriction did not "impede the President's ability to perform his constitutional duty."[186] This is because the EGA provided the Executive Branch various other tools to supervise and control the independent counsel.[187] For example:

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[182] The Special Division was "a special court . . . created by the Act 'for the purpose of appointing independent counsels.'" *Id.* at 661.

[183] *Id.* at 672.

[184] *Id.* at 693.

[185] *Id.* at 689.

[186] *Id.* at 691.

[187] *Id.* at 695-96 ("It is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity. . . . Nonetheless, the Act does give the Attorney General several means of supervising

- The independent counsel may be appointed only following a "specific request by the Attorney General, and the Attorney General's decision not to request appointment if he finds 'no reasonable grounds to believe that further investigation is warranted' is committed to his unreviewable discretion."[188] This gave "the Executive a degree of control over the power to initiate an investigation by the independent counsel."[189]
- The independent counsel's jurisdiction was "defined with reference to the facts submitted by the Attorney General."[190]
- "[O]nce a counsel [was] appointed, the Act require[d] that the counsel abide by Justice Department policy unless it [was] not 'possible' to do so."[191]

Considering the combined effect of the EGA's provisions, the Court concluded that "[n]otwithstanding the fact that the counsel [was] *to some degree* 'independent' and free from executive supervision . . . [those] features of the Act g[a]ve the Executive Branch *sufficient control* over the independent counsel to ensure that the President [was] able to perform his constitutionally assigned duties."[192] Congress, in effect, compensated for the removal restriction by providing the Executive

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or controlling the prosecutorial powers that may be wielded by an independent counsel.").

[188] *Id.* at 696.

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] *Id.* at 696 (emphasis added).

Branch other effective tools to monitor and control the independent counsel. Thus, the *Morrison* Court held, the independent counsel was not excessively insulated from presidential control, so there was no separation-of-powers violation.[193]

* * *

The overarching imperative to prevent an agency from being unconstitutionally insulated from Executive Branch oversight explains why an at-will removal limit survived in *Morrison* but died in *Free Enterprise*. Restricting at-will removal of PCAOB Members in *Free Enterprise*—in combination with the other mechanisms that insulated the PCAOB from executive oversight—went too far.[194] But in *Morrison*, the Executive retained tools to meaningfully oversee the independent counsel, despite the removal restriction. After considering the combined effect of the provisions governing the independent counsel, the *Morrison* Court concluded that Congress had not excessively insulated the independent counsel from the Executive Branch.[195]

Congress cannot isolate an independent agency from meaningful executive oversight. Otherwise, the President could not fulfill his Article II responsibility to ensure the faithful execution of the nation's laws, thus undermining the separation of powers.

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[193] *See id.* at 697.

[194] *Free Enter. Fund*, 561 U.S. at 509 ("It is true that the language providing for good-cause removal is only one of a number of statutory provisions that, *working together*, produce a constitutional violation.") (emphasis added).

[195] *See Morrison*, 487 U.S. at 696.

c. The FHFA

We hold that Congress insulated the FHFA to the point where the Executive Branch cannot control the FHFA or hold it accountable.[196] We reach this conclusion after assessing the combined effect of the: (1) for-cause removal restriction; (2) single-Director leadership structure; (3) lack of a bipartisan leadership composition requirement; (4) funding stream outside the normal appropriations process; and (5) Federal Housing Finance Oversight Board's purely advisory oversight role.

i. The for-cause removal restriction

The President may remove the FHFA Director only "for cause." Limiting the President to only "for cause" removal dulls an important tool[197] for supervising the FHFA because the agency is protected from Executive

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[196] Admittedly, measuring the degree of insulation is difficult—especially when each insulating feature, standing alone, may pass constitutional muster. Nevertheless, we must remain faithful to the Supreme Court's guidance and engage in a fact-specific inquiry to decide whether the various insulating provisions, "working together, produce a constitutional violation." *See Free Enter. Fund*, 561 U.S. at 509.

[197] Query whether a policy disagreement constitutes cause to remove. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEXAS L. REV. 15, 27 (2010) (footnote omitted) ("Though the issue has not been decided by the Supreme Court, most commentators agree that it is not good cause for removal if an agency performs a lawful regulatory agency action that the President disagrees with as a matter of policy.").

influence and oversight.[198] Although the power to remove "for cause" may be a dull oversight tool,[199] limiting the President to "for cause" removal is not sufficient

[198] *See* Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 488 (2008) (finding that when "[p]residents cannot fire independent-agency heads on policy grounds . . . [they] have been constrained in their efforts to direct independent-agency policy making."); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 611 (2010) ("[A] President who cannot remove the personnel of the agency for policy disagreements lacks a key method to impose administration views."); *see also* Datla & Revesz, *supra* note 138, at 787 (footnote omitted) ("The ability to remove an agency head at will is an enforcement tool that helps the President ensure that the agency follows his policy preferences."); Barkow, *supra* note 197, at 28 ("Empirical studies on when Congress opts for good-cause provisions support the view that this design feature seems largely aimed at stopping presidential pressure [on independent agencies]."); *id.* at 30 ("A removal restriction undoubtedly gives an agency head greater confidence to challenge presidential pressure.").

[199] Indeed, the contours of "for cause" removal are uncertain. "No recent President has attempted to remove the head of an independent agency for cause. . . . " Datla & Revesz, *supra* note 138, at 788; *id.* at 787-89 (theorizing that the uncertainty regarding what constitutes "for cause" removal and the potential political costs of litigating the issue discourage Presidents from firing agency officials for cause).

Also, statutory provisions governing how to *replace* the FHFA Director may blunt the effectiveness of "for cause" removal. If the Director is absent, a Deputy Director (chosen by the recently removed former Director) is designated by the President to serve as the FHFA's acting Director. *See* 12 U.S.C. § 4512. This former Deputy serves as acting Director until "the appointment of a successor" following a formal appointment proceeding. Even if a President removes the Director "for cause," the President must designate an acting Director from the ranks of Deputy Directors whom the recently removed Director selected. And the President cannot install to trigger a separation-of-powers violation.[200] Cognizant of this restriction, we consider whether this and other independence-promoting mechanisms—"working together"[201]—excessively insulate the FHFA, violating the separation of powers.

ii. Single-Director agency leadership

The FHFA's single-Director structure further insulates the Agency from presidential influence and oversight.

Traditionally, independent agencies are governed by multi-member bodies.[202] Early examples of agencies whose directors were protected from at-will removal—such as the Interstate Commerce Commission and the Federal Trade Commission—were "multi-member bodies: They were designed as nonpartisan expert agencies that could neutrally and impartially issue rules, initiate law enforcement actions, and conduct or review administrative adjudications."[203]

The distinction affects the President's ability to monitor independent agencies. In multi-member agencies

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the Director of his choice until the Senate approves his replacement. These speedbumps to appointing a replacement Director render for-cause removal an impotent oversight mechanism.

[200] *See Free Enter. Fund*, 561 U.S. at 483 (citations omitted).

[201] *See id.* at 509.

[202] *See generally PHH Corp.*, 881 F.3d at 177-79 (Kavanaugh, J., dissenting) (discussing the nation's "deeply rooted tradition—namely, that independent agencies are headed by multiple commissioners—[that] has been widely recognized by leading judges, congressional committees, and academics who have studied the issue").

[203] *See id.* at 169; *id.* at 173 ("Until this point in U.S. history, independent agencies exercising substantial executive authority have all been multi-member commissions or boards.").

whose leaders are protected from at-will removal, the President can still influence the agency through the power "to designate the chairs of the agencies and to remove chairs at will from the chair position."[204] By designating a chair, a new President can "quickly" exert supervisory oversight.[205]

The FHFA has no chair. "[A] President may be stuck for years with a [FHFA] Director who was appointed by the prior President and who vehemently opposes the current President's agenda."[206] This "dramatic and meaningful difference vividly illustrates that the . . . single-Director structure diminishes Presidential power more than traditional multi-member independent agencies do."[207] Thus, the FHFA's single-Director leadership structure insulates the agency from presidential oversight.

iii. Lack of bipartisan balance

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[204] *See id.* at 166; *see* Datla & Revesz, *supra* note 138, at 796-97 (summarizing the chairperson's ability to influence agency direction and recognizing "it is clear that the ability to appoint the head of an independent agency allows the President to retain some control over that agency's activities"); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 590 (1984) (explaining that the President can influence an independent agency's priorities and policymaking by designating a chairperson); *id.* at 590 n.68 ("The personal, political loyalty of the chairman assures the President a substantial impact on agency administration, and consequent influence on policy.").

[205] Barkow, *supra* note 197, at 38-39.

[206] *See PHH Corp.*, 881 F.3d at 167 (Kavanaugh, J., dissenting).

[207] *Id.*

Another factor is whether the independent agency has a statutorily mandated requirement of bipartisan leadership.

A bipartisan leadership structure gives the President allies: "[C]ommon sense and existing scholarship point to the increasing identity of interests between the President and independent-agency commissioners from the president's party."[208] Even when the President inherits an agency led by the opposing party, he often can secure a majority of the leadership on the governing board within the first two years of his term.[209] And "[o]nce the President has a majority of members of his or her party, the commissions fall in line with the President's priorities and positions."[210] Thus, bipartisan balance requirements bolster presidential involvement.

The FHFA, however, lacks this requirement. "Its single Director is from a single party—presumably the party of the President who appoints him."[211] Given the Director's fixed five-year term, the opposing party may

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[208] Devins & Lewis, *supra* note 198, at 491 (footnote omitted); *see also id.* ("[S]ystematic studies of both commissioner voting and the nomination process support our claim that, in this era of party polarization, independent-agency heads are especially likely to support the priorities of the political party they represent.").

[209] *See* Barkow, *supra* note 197, at 38 (citations omitted) (finding that recent Presidents have managed to obtain a partisan majority on multi-member independent agencies in an average of twenty months (a historically slow rate)).

[210] Barkow, *supra* note 197, at 38; Devins & Lewis, *supra* note 198, at 498 (concluding "there is good reason to think that independent agencies will adhere to presidential preferences once a majority of commissioners are from the President's party").

[211] *See PHH Corp.*, 881 F.3d at 148 (Henderson, J., dissenting).

dominate the Agency for the duration of the President's term.

Plus, bipartisan leadership requirements enhance Executive Branch oversight. Party members on an agency's governing board are "likely to . . . dissent if the agency goes too far in one direction,"[212] which serves as a "fire alarm" that alerts the President about controversial agency actions.[213] But, at the FHFA, no one is there to sound the alarm.

iv. Abnormal agency funding

An agency's funding stream bears on presidential influence.[214] If the agency is subject to the normal appropriations process, the President can veto a spending bill containing appropriations for the agency.[215] Also, the President submits an annual budget to Congress, which he uses "to influence the policies of independent agencies."[216]

By placing an agency outside the normal appropriations process, the President loses "leverage" over the

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[212] *See* Barkow, *supra* note 197, at 41.

[213] *See id.*

[214] *See PHH Corp.*, 881 F.3d at 146-47 (Henderson, J., dissenting) (citation omitted); *see also* Barkow, *supra* note 197, at 43 ("To be sure, the power of the purse is one of the key ways in which democratic accountability is served." (footnote omitted)).

[215] *See PHH Corp.*, 881 F.3d at 147 (Henderson, J., dissenting) (citation omitted).

[216] *Id.* (citation omitted).

agency's activities.[217] As Justice Breyer's *Free Enterprise* dissent recognized, "who controls the agency's budget requests and funding" affects the "full measure of executive power" to oversee an agency; an agency's funding stream "affect[s] the President's ability to get something done."[218]

The FHFA stands outside the budget[219]—in stark contrast to "*nearly all* other administrative agencies"[220] —and is therefore immune from presidential control.

v. No formal control over agency activities

No statutory provision provides for formal Executive Branch control over the FHFA's activities. The closest thing is the statutorily created Federal Housing Finance Oversight Board (the "Board").[221] Two of the Board's four members are Cabinet officials who are beholden to the President: the Secretary of the Treasury and the Secretary of Housing and Urban Development. But the Board may not "exercise any executive authority, and the Director may not delegate to the Board any of the functions, powers, or duties of the Director."[222] The Board exercises purely advisory functions; it cannot

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[217] *See id.* at 147; Barkow, *supra* note 197, at 44 ("With independent funding, the agency is insulated from . . . the President." (footnote omitted)).

[218] *Free Enter. Fund*, 561 U.S. at 524 (Breyer, J., dissenting).

[219] 12 U.S.C. § 4516(f)(2); *see* HENRY B. HOGUE ET AL., CONG. RESEARCH SERV., R43391, INDEPENDENCE OF FEDERAL FINANCIAL REGULATORS: STRUCTURE, FUNDING, AND OTHER ISSUES 27 (2017).

[220] *Cf. PHH Corp.*, 881 F.3d at 146 (Henderson, J., dissenting) (citations omitted) (emphasis added).

[221] 12 U.S.C. § 4513a(a).

[222] *Id.* § 4513a(b).

require the FHFA or Director to do anything—beyond ordering "a special meeting of the Board."[223] Thus, Cabinet officials—through the Board—can do nothing more than *cajole* the FHFA into acting.

This lack of formal involvement contrasts with situations where courts have upheld the insulation of independent agencies: *PHH* (the Consumer Financial Protection Bureau) and *Morrison* (independent counsel).

With respect to the Consumer Financial Protection Bureau ("CFPB"), the President, through the Financial Stability Oversight Council ("FSOC"), can influence the CFPB's activities.[224] The Council is comprised of ten voting members.[225] The Treasury Secretary is the Council's Chairperson.[226] The other voting members are heads of various independent agencies, including the SEC, Commodity Futures Trading Commission, CFPB, and FHFA.[227] "Significantly, a supermajority of persons on the Council are designated by the President."[228]

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[223] *Id.* § 4513a(d)(2).

[224] *See id.* § 5321.

[225] *Id.* § 5321(b)(1).

[226] *Id.* § 5321(b)(1)(A).

[227] *Id.* § 5321(b)(1). The President, with the advice and consent of the Senate, also appoints a voting "independent member . . . having insurance expertise" to the FSOC who serves a six-year term. *Id.* § 5321(b)(1)(J), (c)(1).

[228] *PHH Corp.*, 881 F.3d at 120 (Wilkins, J., concurring); *see id.* at 120 n.3 (Wilkins, J., concurring) (explaining that "the chairpersons of five independent agencies serve on the Council, each of whom the President has the opportunity to appoint either at the outset or near the beginning of the administration" and "[o]nly four members of the FSOC have terms longer than four years and are thus potentially not appointed by a one-term President").

The FSOC holds veto-power over the CFPB's policies.[229] Specifically, the FSOC may "set aside a final regulation prescribed by the [CFPB], or any provision thereof, if the Council decides . . . the regulation or provision would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk."[230] "Any member of the Council can file a petition to stay or revoke a rule, which can be granted with a two-thirds majority vote."[231] This veto is a "powerful" oversight mechanism.[232] Thus, despite the CFPB's independent status, the Executive Branch retains an emergency brake to hold the CFPB accountable.[233]

With respect to the independent counsel in *Morrison*, the EGA established formal mechanisms for the Attorney General to oversee the independent counsel. And these mechanisms, in part, persuaded the Court to uphold the removal restriction.

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[229] *See PHH Corp.*, 881 F.3d at 98; *id.* at 120-21 (Wilkins, J., concurring) (finding these "additional statutory requirements on CFPB action make[] the CFPB Director more accountable to the President").

[230] *Id.* § 5513(a).

[231] *PHH Corp.*, 881 F.3d at 120 (Wilkins, J., concurring) (citing 12 U.S.C. § 5513).

[232] *Id.*

[233] Some question whether the FSOC is a "meaningful substitute check" on the CFPB's actions. *See id.* at 159-60 (Henderson, J., dissenting) ("The fact that anyone mentions the Council's narrow veto as a check is instead a testament to the CFPB's unaccountable policymaking power."). This magnifies the concern here: The FHFA lacks *any* oversight body.

In sum, there are no formal mechanisms by which the Executive Branch can control how the FHFA exercises authority. The only formal oversight body is the Federal Housing Finance Oversight Board—a *purely advisory* body that cannot impose its will on the FHFA. Although the Treasury Secretary is a member of the Board, she cannot pump the brakes on the FHFA's actions.

d. There are no similarly insulated agencies.

The FHFA defends its constitutionality by asserting that it follows in a long line of independent agencies that courts have found to be constitutional—namely, the Federal Trade Commission, the Office of the Independent Counsel, and the Consumer Financial Protection Bureau. We see things differently. The FHFA is sui generis, and its unique constellation of insulating features offends the Constitution's separation of powers.

i. The FTC in Humphrey's Executor

The FTC is an independent agency whose leaders are protected from at-will removal. The Supreme Court approved this arrangement 80-plus years ago in *Humphrey's Executor*—which the FHFA takes as validation.

But the Court has since clarified that *Humphrey's Executor* did not grant Congress blanket authority to create independent agencies whose leaders are protected from at-will removal.[234] The *Humphrey's Executor* Court established two demarcations regarding the

[234] *See Free Enter. Fund*, 561 U.S. at 483 (reading *Humphrey's Executor* to mean that "Congress can, *under certain circumstances*, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only

President's oversight power: The President has "unrestrictable power to remove purely executive officers," and Congress may limit the President's power to remove commissioners of an independent agency that is "wholly disconnected from the executive department."[235] Between those poles lies a "field of doubt."[236]

The *Humphrey's Executor* Court's description of the FTC instructs how we tend the field. First, the Court described the FTC as "an administrative body created by Congress to carry into effect legislative policies" that "act[ed] in part quasi legislatively and in part quasi judicially."[237] The Court emphasized that the FTC "cannot in any proper sense be characterized as an arm or an eye of the executive."[238] And "any executive function" it does exercise—"as distinguished from executive power in the constitutional sense"[239]—is "in the discharge and effectuation of its quasi legislative or quasi judicial powers, or as an agency of the legislative or judicial departments of the government."[240] Thus, central to the Court's decision was its perception that the FTC did not exercise executive power.

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for good cause." (emphasis added)); *see also PHH Corp.*, 881 F.3d at 186 (Kavanaugh, J., dissenting) (interpreting *Humphrey*'s *Executor* as limited to approving removal limitations for independent agencies with multi-member leadership structures).

[235] *Humphrey's Ex'r*, 295 U.S. at 630.

[236] *Id.* at 632.

[237] *Id.* at 628; *see id.* at 624 (finding the FTC's duties were "neither political nor executive, but predominantly quasi judicial and quasi legislative.").

[238] *Id.* at 628.

[239] *Id.*

[240] *Id.* (footnote omitted).

This discussion highlights how the FTC differs from the FHFA. The FHFA—unlike the FTC[241]—exercises executive functions. For example, the FHFA can enforce rules that it creates through cease-and-desist orders and monetary civil penalties.[242] Thus, the FHFA can easily "be characterized as an arm or eye of the executive."[243]

Also, the FHFA lacks formal nonpartisanship requirements. The President appoints the Director, and the Director then appoints three deputies. Most likely, the agency's approach to exercising its broad discretion will slant toward the views of the President's party.[244] The FTC, on the other hand, is bipartisan.[245] The FTC is also structured to allow the President to choose a chairperson,[246] which allows the Executive Branch to

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[241] The *Morrison* Court acknowledged, however, that the *Humphrey's Executor* Court may have misperceived the FTC's authority: "[I]t is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." *Morrison*, 487 U.S. at 690 n.28 (citations omitted). The Court has not, however, formally abrogated the *Humphrey's Executor* holding.

[242] *See* 12 U.S.C. §§ 4585, 4636.

[243] *See Humphrey's Ex'r*, 295 U.S. at 628. Decades later, the *Morrison* Court deemphasized the focus on the agency's function in favor of an approach that focused on "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light." *Morrison*, 487 U.S. at 691.

[244] *See PHH Corp.*, 881 F.3d at 144-48 (Henderson, J., dissenting).

[245] *See Humphrey's Ex'r*, 295 U.S. at 628. *Compare* 15 U.S.C. § 41 (FTC) *with* 12 U.S.C. § 4512 (FHFA).

[246] 15 U.S.C. § 41.

wield considerable influence over the agency's priorities and actions.[247]

One final distinction: The FTC is subject to the traditional appropriations process.[248] "Accordingly, the FTC must go to the Congress every year with a detailed budget request explaining its expenditure of public money,"[249] which allows the President to monitor and shape the agency's activities.[250]

Humphrey's Executor, therefore, is inapposite. By structuring the FTC to preserve Executive Branch influence, Congress mitigated the impact of limiting the President's removal power. Congress did not stifle the President's ability to directly impact the agency. As a result, the President could fulfill his Article II responsibility, and the FTC survived constitutional challenge. The FHFA is a different beast.

ii. The independent counsel in Morrison

The Executive Branch could exercise far greater control over the independent counsel as compared with the FHFA.[251] Indeed, the EGA gave the Executive Branch control over when and how the independent counsel performed its prosecutorial functions; this control was "suf-

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[247] *See supra* notes 202-213 and accompanying text.

[248] U.S.C. § 42. *See generally PHH Corp.*, 881 F.3d at 146 (Henderson, J., dissenting).

[249] *PHH Corp.*, 881 F.3d at 146 (Henderson, J., dissenting).

[250] *See supra* notes 214-220 and accompanying text.

[251] *See supra* notes 177-193 and accompanying text; *see also Morrison*, 487 U.S. at 696; *PHH Corp.*, 881 F.3d at 176 (Kavanaugh, J., dissenting).

ficient" to allow the President to fulfill his Article II responsibilities.[252] No principal Executive Branch official can exert comparable influence over the FHFA.

The FHFA Director also does not resemble the independent counsel. The independent counsel "exercised only executive power, not rulemaking or adjudicative power" and "had only a limited jurisdiction for particular defined criminal investigations."[253] Because the FHFA Director can *write and enforce* laws—as opposed to just enforcing existing laws—the FHFA Director "poses a more permanent threat to the President's faithful execution of the laws."[254]

iii. The CFPB in PHH Corporation

The D.C. Circuit recently evaluated the constitutionality of the structure of the Consumer Financial Protection Bureau, an independent agency that exercises executive, legislative, and adjudicatory functions. Congress structurally insulated the CFPB from Executive Branch oversight; this insulation included a restriction on the President's ability to remove the CFPB's director at will.[255] Ultimately, the en banc court found the agency's structure constitutional.[256]

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[252] *Morrison*, 487 U.S. at 696.

[253] *PHH Corp.*, 881 F.3d at 176 (Kavanaugh, J., dissenting).

[254] *Cf. id.* at 152-53 (Henderson, J., dissenting) (comparing the CFPB Director to the independent counsel).

[255] *Id.* at 78 (recognizing "[t]he Director may be fired only for 'inefficiency, neglect of duty, or malfeasance in office'" (quoting 12 U.S.C. § 5491(c)(3)).

[256] We compliment our colleagues for their numerous incisive, detailed opinions, from which we have drawn extensively.

The D.C. Circuit found that "[t]he [Supreme] Court has consistently upheld ordinary for-cause removal restrictions like the one at issue here, while invalidating only provisions that either give Congress some role in the removal decision or otherwise make it abnormally difficult for the President to oversee an executive officer."[257] Following that framing, the court approved "Congress's application of a modest removal restriction to the CFPB, a financial regulator akin to the independent FTC in *Humphrey's Executor* and the independent SEC in *Free Enterprise Fund*, with a sole head like the office of independent counsel in *Morrison*."[258]

The D.C. Circuit explained its conclusion as follows. First, the CFPB's structure was consistent with historical practice with regard to independent, financial regulatory agencies.[259] Second, "Congress validly decided that the CFPB needed a measure of independence and chose a constitutionally acceptable means to protect it,"[260] including budgetary independence.[261] Third, an agency led by a single director is likely as responsive to the Executive Branch as an agency with a multi-member leadership structure.[262] Finally, the D.C. Circuit disa-

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[257] *Id.* at 85.

[258] *Id.* at 85. The D.C. Circuit also described the removal restrictions at-issue as "wholly ordinary" and "mild." *Id.* at 78.

[259] *Id.* at 91 ("Financial regulation, in particular, has long been thought to be well served by a degree of independence.").

[260] *Id.* at 92-93.

[261] *Id.* at 93.

[262] *Id.* ("[T]here is no reason to assume an agency headed by an individual will be less responsive to presidential supervision than one headed by a group.").

greed with Judge Kavanaugh's dissenting position; according to the majority, the CFPB's novel structure was, standing alone, not constitutionally problematic,[263] nor did the CFPB lose under a freestanding "liberty" inquiry.[264] Ultimately, "[n]o relevant consideration g[ave] [the court] reason to doubt the constitutionality of the independent CFPB's single-member structure. Congress made constitutionally permissible institutional design choices for the CFPB with which courts should hesitate to interfere."[265]

We are mindful of our sister court's analysis regarding the FHFA's constitutionality. But salient distinctions between the agencies compel a contrary conclusion.

First, the agencies are structured differently. The Executive Branch can directly control the CFPB's actions through the FSOC—a feature the *PHH* majority found highly relevant.[266] The FHFA, on the other hand, has no formal oversight beyond the purely advisory Federal Housing Finance Oversight Board.

Second, the Shareholders here challenge not only the removal-power limitation or the FHFA's single-head structure. Instead, they challenge the FHFA's unconstitutional insulation from Executive Branch oversight —the *cumulative* effect of Congress's agency-design

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[263] *See id.* at 102-05.

[264] *See id.* at 105-06.

[265] *Id.* at 110. The D.C. Circuit seemed disturbed that PHH's position "call[ed] into question the structure of a host of independent agencies that make up the fabric of the administrative state." *Id.* at 93.

[266] *Id.* at 98.

decisions. Indeed, as the D.C. Circuit recognized, "for two unproblematic structural features to become problematic in combination, they would have to affect the same constitutional concern and amplify each other in a constitutionally relevant way."[267] That is precisely the case here: The structural insulation of the FHFA Director—who may be appointed by a former President, who cannot be replaced at-will, and who is insulated from Executive Branch oversight—interferes with the President's ability to fulfill his duties under the Constitution.

* * *

Article I cannot cannibalize Article II. Congress has broad discretion to establish independent agencies, but Congress cannot go so far as to impair the President's ability to fulfill his Article II obligations. The independent agencies Congress may establish may not be excessively insulated from Executive Branch oversight—even if insulation is normatively desirable.[268] Article II is an outer limit on what is "necessary and proper."

In order to achieve a "workable government,"[269] the FHFA asks to us trust that *Congress* can adequately

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[267] *Id.* at 96; *see id.* at 85 (recognizing that the Supreme Court has invalidated statutory provisions that "make it abnormally difficult for the President to oversee an executive officer"); *id.* at 79 (framing its task as follows: "The ultimate purpose of our constitutional inquiry is to determine *whether the means of independence, as deployed at the agency in question, impedes* the President's ability under Article II of the Constitution to take Care that the Laws be faithfully executed" (cleaned up and emphasis added)).

[268] *See Free Enter. Fund*, 561 U.S. at 499.

[269] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses

monitor the FHFA, altering the agency's budget or authority if necessary. But this highlights the separation-of-powers concern: The FHFA performs *executive* functions, but the agency's operations are subject primarily (if not exclusively) to *Congress's* will, divorced from Executive control. The Executive Branch should not—and, constitutionally, cannot—delegate to Congress the responsibility to ensure the faithful execution of the nation's laws.[270] And, even if Congress could fix the FHFA's unconstitutionality in the future, we must fulfill our own constitutional obligation here and now.[271]

We conclude that the FHFA's structure violates Article II. Congress encased the FHFA in so many layers of insulation—by limiting the President's power to remove and replace the FHFA's leadership, exempting the Agency's funding from the normal appropriations process, and establishing no formal mechanism for the Executive Branch to control the Agency's activities

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power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.").

[270] *See Clinton*, 524 U.S. at 451-52 (Kennedy, J., concurring) ("Abdication of responsibility is not part of the constitutional design."); *see also Free Enter. Fund*, 561 U.S. at 497 ("The President can always choose to restrain himself in his dealings with subordinates. He cannot, however, . . . escape responsibility for his choices by pretending that they are not his own.").

[271] *See Free Enter. Fund*, 561 U.S. at 510 (recognizing that while "Congress of course remains free to" re-structure an agency, the Court cannot shirk its responsibility to remedy constitutional violations in cases before it); *PHH Corp.*, 881 F.3d at 158 (Henderson, J., dissenting) ("At all events, an otherwise invalid agency is no less invalid merely because the Congress can fix it at some undetermined point in the future.").

—that the end "result is a[n] [Agency] that is not accountable to the President."[272] The President has been "stripped of the power [the Supreme Court's] precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—[has been] impaired."[273] In sum, while Congress may create an independent agency as a necessary and proper means to implement its enumerated powers, Congress may not insulate that agency from meaningful Executive Branch oversight.[274]

3. Relief Available for Separation-of-Powers Violations

Having concluded that the FHFA structure violates Article II, we must now determine what to do about it. When fashioning relief for constitutional violations, courts "try to limit the solution to the problem, severing any problematic portions while leaving the remainder

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[272] *Free Enter. Fund*, 561 U.S. at 496.

[273] *Id.*

[274] We do not question Congress's authority to establish independent agencies, nor do we decide the validity of any agency other than the FHFA. Governing through independent agencies may be normatively desirable. It may not be. That is neither here nor there: Our sole task is to decide whether the FHFA is constitutionally structured. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). We found, after an in-depth examination, that the FHFA is excessively insulated from Executive Branch influence and is, therefore, structured in violation of the Constitution. We leave for another day the question of whether other agencies suffer from similar constitutional infirmities.

And, of course, our opinion does not abrogate the *Morrison* Court's holding regarding the constitutionality of an independent agency tasked with investigating high-ranking Executive Branch officials.

intact."[275] When a removal limitation crosses constitutional lines, courts routinely declare the limitation inoperative, prospectively correcting the error.[276] Severability is appropriate so long as the remaining statute remains "fully operative as a law with the tenure restrictions excised"[277] and nothing in the text or historical context of the statute makes it "evident" that Congress would have preferred no law at all to excising the restriction.[278] Indeed, there is a presumption that "the objectionable provision can be excised."[279] In doing so, courts routinely "accord[] validity to past acts of unconstitutionally structured governmental agencies."[280]

We conclude that severing the removal restriction from HERA is the proper remedy in the instant case. As a result, we leave the remainder of HERA undisturbed. The removal restriction itself has little effect on the remainder of HERA. In fact, HERA remains operative as a law without the restriction; its remaining provisions are capable of functioning independently from the removal restriction.[281] Given the exigent context in

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[275] *Free Enter. Fund*, 561 U.S. at 508-09 (quotation marks and citation omitted).

[276] *See id.* at 508; *PHH Corp.*, 881 F.3d at 160-61 (Kavanaugh, J., dissenting); *John Doe Co. v. Consumer Fin. Prot. Bureau*, 849 F.3d 1129, 1133 (D.C. Cir. 2017).

[277] *Free Enter. Fund*, 561 U.S. at 509.

[278] *Id.*

[279] *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987).

[280] *John Doe Co.*, 849 F.3d at 1133 (citing *Buckley*, 424 U.S. at 142; *Citizens for Abatement of Aircraft Noise, Inc. v. Metropolitan Wash. Airports Auth.*, 917 F.2d 48, 57 (D.C. Cir. 1990), *aff'd*, 501 U.S. 252 (1991)); *see also Free Enter. Fund*, 51 U.S. at 508-09.

[281] *Free Enter. Fund*, 561 U.S. at 509.

which the law was passed, it is unlikely that the entirety of HERA depended on a removal restriction. And though HERA contains no severability clause,[282] "there is nothing in the statute's text or historical context that makes it 'evident' that Congress, faced with the limitations imposed by the Constitution, would have preferred no [FHFA] at all" to one with a Director "removable at will" by the President.[283]

The appropriate remedy for the constitutional infirmity is to strike the language providing for good-cause removal from 12 U.S.C. § 4512(b)(2), restoring Executive Branch oversight to the FHFA. It is true here, as it was in *Free Enterprise Fund*, that the removal restriction is just one of several provisions that cumulatively offend the separation of powers. To be sure, we could "blue-pencil" other edits to HERA, but, as the Supreme Court advises, "such editorial freedom . . . belongs to the Legislature, not the Judiciary."[284] We leave intact the remainder of HERA and the FHFA's past actions—including the Third Amendment. In striking the offending provision from HERA, the FHFA survives as a properly supervised executive agency.

III. CONCLUSION

We AFFIRM the district court's order granting the Agencies' motions to dismiss the Shareholders' APA claims because such claims are barred by 12 U.S.C. § 4617(f).

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[282] *See Alaska Airlines*, 480 U.S. at 686.

[283] *Free Enter. Fund*, 561 U.S. at 509.

[284] *Id.* at 509-10.

We REVERSE the district court's order granting the Agencies' motion for summary judgment regarding the Shareholders' claim that the FHFA is unconstitutionally structured in violation of Article II and the Constitution's separation of powers, and we REMAND to the district court with instructions to enter judgment declaring the "for cause" limitation on removal of the FHFA's Director found in 12 U.S.C. § 4512(b)(2) violates the Constitution's separation-of-powers principles.

CARL E. STEWART, Chief Judge, dissenting in part:

The constitutional issue presented by the Shareholders —whether the FHFA's structure impermissibly inhibits the President's ability to oversee and remove the Director consistent with his Article II obligation to "take care that the laws are faithfully executed"—does not lend itself to a clear-cut answer. As the panel majority's opinion states, Congress may mix and match a number of "features of independence" when crafting an independent agency's internal structure, subject of course to constitutional limitations set both within the Constitution's text and by Supreme Court precedent. These features include: placing formal constraints on the President's removal power through the use of "for-cause" removal restrictions, establishing a multimember leadership structure, subjecting agency heads to fixed terms of service, mandating that an agency be composed of a bipartisan leadership team, exempting the agency from the standard appropriations process, and granting the agency unilateral litigation authority. *See* P.C. Opn. at pg. 28; *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd*, 561 U.S. 477, 588 app. D (2010) (Breyer, J., dissenting). And Congress has used these features in several different combinations. Importantly, neither the presence nor absence of any given feature is dispositive of the agency's viability under Articles I and II and separation-of-powers principles.

The Supreme Court's Article II removal precedent, although sparse, has only rejected Congress's attempts to fashion independent agencies on two occasions. The first was in *Myers v. United States*, 272 U.S. 52, 60 (1926), in which Congress attempted to simultaneously limit the

President's removal power and increase its own authority over the agency by conditioning the President's removal power on the Senate's advice and consent. This form of appropriation and aggrandizement was deemed violative of the Constitution's separation of powers. The second was in *Free Enterprise Fund*, which presented an "extreme variation on the traditional good-cause removal standard" by doubly insulating members of Public Company Accounting Oversight Board with two layers of for-cause removal protection. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 89 (D.C. Cir. 2018) (en banc). These cases and others within the Supreme Court's body of Presidential removal power precedent establish, as the panel majority explains, that Congress's use and construction of independent agencies is subject to constitutional limitations, the outer boundary of which is the President's domestic executive authority under Article II.

Notwithstanding my agreement with this fundamental principle of law, I conclude that the FHFA's structure does not reach that boundary and therefore does not impinge on the President's oversight and removal authority. My reasoning substantially mirrors that of the D.C. Circuit's en banc majority opinion in *PHH Corporation*, which concluded that the CFPB's similar structure does not exceed constitutional constraints on the agency's makeup. Thus, and for reasons expressed by the en banc majority in *PHH Corporation*, I respectfully dissent from the panel majority opinion's conclusion that the FHFA's structure unconstitutionally restricts the President's removal power under Article II.

I elaborate to briefly address and distinguish a feature of the CFPB's structure that is absent from the

FHFA. As the majority opinion notes, when Congress created the CFPB, it also created the Financial Stability Oversight Council ("FSOC"), 12 U.S.C. § 5321, which is composed of several members of the Executive Branch and independent agency heads chosen by the President who have substantial stay and veto authority over any rule promulgated by the Director that the FSOC believes might "put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk." 12 U.S.C. § 5513. No such "mandatory oversight" committee, with stay and veto power, exists under HERA's provisions creating the FHFA. Rather, HERA created the Federal Housing Finance Oversight Board ("FHFOB"), 12 U.S.C. § 4513a(a). Two Executive Branch officials—the Treasury Secretary and the Secretary of Housing and Urban Development—are members of the FHFOB, *see id.* § 4513(c). However, unlike the FSOC, the Board may not "exercise any executive authority" and may not be delegated "any functions, powers, or duties of the Director." *Id.* § 4513a(b). The FHFOB's involvement in the FHFA Director's execution of his statutory mandate is limited to "advis[ing] the Director with respect to overall strategies and policies in carrying out" his duties. *Id.* § 4513a(a). The panel majority opinion highlights the advisory status of the FHFOB as further removing the FHFA from Presidential oversight.

The mandatory-versus-advisory oversight distinction, although important, does not meaningfully alter the constitutional analysis in this case. Notably, the FHFA is not the only single-leader independent agency subject to the "mere advice" of an advisory board. The Social Security Act created the Social Security Advisory

Board ("SSAB") which is statutorily required to "advise" the Social Security Commissioner "on policies related to" the availability of benefits to Social Security beneficiaries. 42 U.S.C. § 903(b). The SSAB's functions are largely limited to "making recommendations" with respect to several aspects of the Administration's duties, *see id.* § 903(b), and the SSAB is not statutorily authorized to exercise veto power over the Commissioner's decisions.

Further, even without mandatory oversight authority, the FHFOB wields some sway over the FHFA Director's exercise of his statutory power. The Director is required to meet with the FHFOB at least once every three months and must at the very least subject himself to their advice. *See* 12 U.S.C. § 4513a(a), (d)(1). And once every year, the FHFOB must testify before Congress regarding, *inter alia*, the "operations, resources, and performance of the [FHFA]" and "such other matters relating to the [FHFA] and its fulfillment of its mission," *id.* § 4513a(e)(5), (6). At these Congressional hearings, the FHFOB may either testify in support of the Director's leadership or testify that the Director has derogated from his duties under HERA, thereby providing grounds for the President to exercise his "prerogative to consider whether any excesses amount to cause for removal." *PHH Corp.*, 881 F.3d at 106. Although giving the FHFOB a more active role in the promulgation of policy decisions would more explicitly submit the Director to Executive Branch *control*, when it comes to independent agencies, control in the sense encouraged by the panel majority opinion is not required by the Constitution. An advisory board both preserves permissible agency independence and exposes the FHFA Director to policy perspectives held by Executive Branch officials immediately answerable to the President and, thereby, the President, thus achieving the oversight and accountability necessary to satisfy Article II.

Neither the for-cause removal restriction nor the single-leader feature of the FHFA's structure place the agency outside the Presidents purview in violation of the Constitution or the Supreme Court's removal jurisprudence. Nor does the absence of a mandatory oversight board in this case unduly inhibit the President's ability to remove the Director or oversee the goings-on of the FHFA. For the foregoing reasons, I respectfully dissent.

WILLETT, Circuit Judge, dissenting in part:

Desperate times breed desperate measures. Exhibit A is the Housing and Economic Recovery Act of 2008 ("HERA"), enacted after the United States housing bubble burst and triggered a massive mortgage-security and general-credit crisis. Nobody disputes that Congress created the Federal Housing Finance Authority ("FHFA") amid a dire financial calamity. The situation, both domestic and international, was grim and worsening quickly:

- housing market—melting down
- national economy—circling the drain
- global financial system—teetering on collapse

The FHFA was cast as a silver bullet, a super-agency endowed with far-reaching regulatory authority to stanch the bleeding and to restore liquidity to the U.S. housing and financial markets.

But contrary to how other federal courts have so far ruled on this issue (including this court's opinion today), Congress did not vest the FHFA with unbounded, unreviewable power. The FHFA—like any agency—is restrained by the four corners of its enabling statute: "An agency literally has no power to act . . . unless and until Congress confers power upon it."[1] Every agency requires a defined statutory basis for its actions. Absent a valid delegation of authority, an agency's actions are dubious at best, and contrary to bedrock constitutional principles at worst. Exigency does not jus-

[1] *New York v. FERC*, 535 U.S. 1, 18 (2002).

tify conferring nigh-unchecked power on an agency insulated from judicial review. Expedience does not license omnipotence.

This case concerns whether the net worth sweep falls within the scope of the FHFA's statutory authority as conservator. To answer the question before us, we need only look to HERA's plain text. And it is our duty to ensure that the FHFA operates squarely within the bounds of its statutory authority.

Regrettably, the majority opinion does otherwise. The upshot is a lucrative limbo: Mortgage-finance giants Fannie Mae and Freddie Mac are forever trapped in a zombie-like trance as wards of the state, bled of their profits quarter after quarter in perpetuity. In rejecting the Shareholders' statutory claims, the majority opinion embraces the views of our sister circuits, adopting "the same well-reasoned basis common to those courts' opinions."[2] But what the majority opinion finds convincing, I find confounding.

With respect I dissent.

I

In essence, the judicial consensus is that HERA's anti-injunction provision bars the Shareholders claims because (1) the text of HERA does not require the FHFA as conservator to "preserve and conserve" the

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[2] Maj. Op. at 15.

assets of these colossal government-sponsored enterprises ("GSEs");[3] and (2) regardless, the net worth sweep is consistent with the FHFA's statutory authority.[4]

Respectfully, this reading, while popular, flouts HERA's plain text, which should be the North Star of our analysis. HERA tells us two important things. First, the anti-injunction provision bars only claims that would "restrain or affect" the FHFA's statutory powers *as conservator* (not the case here).[5] Second, the FHFA does not have unfettered discretion to dispose of the GSEs' assets and property at will so long as it dons the conservator cowl.

By enacting the net worth sweep in the Third Amendment, the FHFA exceeded the scope of its statutory authority as conservator. HERA makes clear that the FHFA may operate *either* as conservator *or* receiver at

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[3] *Roberts v. Fed. Hous. Fin. Agency*, 889 F.3d 397, 403-04 (7th Cir. 2018); *Robinson v. Fed. Hous. Fin. Agency*, 876 F.3d 220, 232 (6th Cir. 2017); *Perry Capital L.L.C. v. Mnuchin*, 864 F.3d 591, 607-09 (D.C. Cir. 2017).

[4] *Roberts*, 889 F.3d at 404 (characterizing the Shareholders' claims as "whether the Agency made a poor business judgment"); *Robinson*, 876 F.3d at 231; *Perry Capital*, 864 F.3d at 607 ("FHFA's execution of the Third Amendment falls squarely within its statutory authority to operate the Companies, to reorganize their affairs, and to take such action as may be appropriate to carry on their business." (cleaned up)).

[5] All courts agree: HERA's anti-injunction provision does not apply when a plaintiff "properly alleges that 'FHFA acted beyond the scope of its conservator power.'" *Robinson*, 876 F.3d at 228 (quoting *Cty. of Sonoma v. Fed. Hous. Fin. Agency*, 710 F.3d 987, 992 (9th Cir. 2013)); *see also Roberts*, 889 F.3d at 402; *Perry Capital*, 864 F.3d 591, 605; *accord id.* at 638, 641 (Brown, J., dissenting in part). The Shareholders have made this showing.

any given time. The statute then provides a list of role-specific duties. As conservator, the FHFA must "preserve and conserve the assets and property" of the GSEs.[6] This statutory command is mandatory, not discretionary. Stripping the GSEs of their cash reserves by depriving them of their net worth—*in perpetuity*—is antithetical to this "preserve and conserve" requirement. This permanent pillaging of capital violates the FHFA's obligation as conservator to "put the [GSEs] in a sound and solvent condition."[7] The sweep siphons the GSEs' net worth quarter after quarter—all but guaranteeing that they will draw on Treasury's funding commitment, increasing its liquidation preference. This action is fundamentally incompatible with the FHFA's statutory mandate as conservator. Indeed, Congress specifically permits the FHFA to perform this action *as receiver*, yet the FHFA seeks to evade the carefully crafted statutory scheme by proposing an impermissibly broad, and unnecessarily encroaching, view of its powers as conservator. This overstep cannot sidestep judicial review.

According to the majority opinion, however, there is essentially *no* limit to the FHFA's conservatorship authority, and courts are powerless to intervene so long as the FHFA operates under the guise of "conservator." The majority opinion's conception of conservatorship is foreign to this (or any) court. Adopting this exotic approach betrays the letter and the spirit of limitations provided by HERA, and ultimately allows the FHFA to

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[6] 12 U.S.C. § 4617(b)(2)(D)(ii).

[7] *Id.* § 4617(b)(2)(D)(i).

raze our established principles governing administrative entities.

I cannot endorse such a willy-nilly delegation of authority to an administrative entity impervious to meaningful judicial review. The FHFA's professed power is something special—so spacious it's specious. In terms of unfettered clout, the FHFA has no rival across the federal agency landscape. But unfettered must never be unfretted. Agencies must always operate within the carefully crafted statutory schemes that govern their existence. And while the FHFA's averred authority as conservator is audacious, it is not limitless.

I cannot join the majority opinion's conclusion that the Shareholder's statutory claims are barred by HERA's anti-injunction provision.

II

Agencies require statutory authorization for their actions. The full extent of FHFA's authority as conservator is thus found within HERA's text.[8] As we recently made clear, "the text is the alpha and the omega of the interpretive process."[9] So I begin with the language Congress actually used.

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[8] *See City of Arlington, Tex. v. FCC*, 569 U.S. 290, 317 (2013) (Roberts, C.J., dissenting) (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).

[9] *United States v. Maturino*, 887 F.3d 716, 723 (5th Cir. 2018); *see also New York*, 535 U.S. at 18 ("[W]e must interpret the statute to determine whether Congress has given [the agency] the power to act as it has.").

Congress created the FHFA to supervise and regulate the GSEs and Federal Home Loan banks.[10] HERA granted the FHFA's director discretionary authority to place the GSEs in conservatorship. The statute authorizes the FHFA to "be appointed conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity."[11] When serving as conservator or receiver, the FHFA enjoys an array of general powers enumerated in § 4617(b)(2). Once appointed as either conservator or receiver, the FHFA succeeds to the "rights, titles, powers, and privileges of the [GSE], and of any stockholder, officer, or director . . . with respect to the [GSE] and the assets of the [GSE]."[12] And the FHFA may assume the assets, business operations, and functions of the GSE, collect money due to the GSE, and "preserve and conserve the assets and property" of the GSE.[13] Finally, HERA permits the FHFA to exercise any function of any stockholder, director or officer of the GSE.[14]

These general powers, however, must be read in concert with the more specific powers enumerated for conservators and receivers, respectively. Acts of Congress should be read cohesively, contextually, and comprehensively, not "as a series of unrelated and isolated provisions."[15] Under our precedent, "it is a 'cardinal rule that a statute is to be read as a whole,' in order not

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[10] 12 U.S.C. § 4511.

[11] *Id.* § 4617(a)(2) (emphasis added).

[12] *Id.* § 4617(b)(2)(A).

[13] *Id.* § 4617(b)(2)(B).

[14] *Id.* § 4617(b)(2)(C).

[15] *In re Burnett*, 635 F.3d 169, 172 (5th Cir. 2011) (quoting *Soliman v. Gonzales*, 419 F.3d 276, 282 (4th Cir. 2005)).

to render portions of [a statute] inconsistent or devoid of meaning."[16] The majority opinion's focus on general powers ignores HERA's specific provisions governing how the FHFA is to behave.

Reading the statute holistically, it is clear that HERA outlines two distinct roles—conservator and receiver—that come with distinct powers. And when the FHFA acts as conservator, HERA imposes mandatory duties on the FHFA to "preserve and conserve" the GSEs' assets and property.

A

Crucial to the issue before us today is that HERA distinguishes between the role of conservator and the role of receiver. The FHFA Director may designate the agency as *either* conservator *or* receiver, but once the FHFA is appointed as one or the other, its powers depend on the role. And HERA prescribes and proscribes those powers.

HERA explicitly provides that the FHFA may "be appointed as conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity."[17] The statute uses the disjunctive "or," denoting that the FHFA may not act as both conservator *and* receiver simultaneously.[18] Indeed, the text further makes clear that these roles are mutually

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[16] *Id.* (quoting *Zayler v. Dep't of Agric. (In re Supreme Beef Processors, Inc.)*, 468 F.3d 248, 253 (5th Cir. 2006)).

[17] 12 U.S.C. § 4617(a)(2).

[18] In ordinary use, the term "or" "is almost always disjunctive, that is, the words it connects are to be given separate meanings." *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (quoting *United States v. Woods,* 134 S. Ct. 557, 567 (2013)).

exclusive—appointing the FHFA as receiver "immediately terminate[s] any conservatorship established for the GSE."[19] The roles are distinctive, not cumulative.

So are the powers attaching to each role. Section 4617(b)(2)(D) specifies the FHFA's powers as conservator. The FHFA may take any action "necessary to put the [GSE] in a sound and solvent condition" and "appropriate to carry on the business of the [GSE] and preserve and conserve the [GSE's] assets and property."[20] By contrast, § 4617(b)(2)(E), (f) enumerates powers reserved to the FHFA as receiver—which include liquidating the GSE and organizing a "successor enterprise" to operate the GSE.[21] Elsewhere, HERA emphasizes the contrasting nature of these powers. In operating the GSEs, the statute permits the FHFA to "perform all functions of the [GSE] in the name of the [GSE] which are *consistent with the appointment* as conservator or receiver."[22] This language echoes later in the statute. Under the incidental powers provision, the FHFA is empowered only to "exercise all powers and authorities specifically granted to conservators or receivers, *respectively*, under this section. . . . "[23] This use of "respectively" further severs the role of "conservator" from that of "receiver." HERA thus outlines a distinct vision for the FHFA's role as conservator and its role as receiver.

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[19] 12 U.S.C. § 4617(a)(4)(D).

[20] *Id.* § 4617(b)(2)(D).

[21] *See id.* § 4617(b)(2)(E), (F).

[22] *Id.* § 4617(b)(2)(B)(iii) (emphasis added).

[23] *Id.* (emphasis added).

This distinction is not a mere procedural formality. When the FHFA acts as receiver, HERA imposes specific statutory requirements to protect the various rights and interests of creditors and investors.[24] These procedures exist to ensure that receivers "fairly adjudicate claims against failed institutions."[25] Liquidation is exclusively reserved for the FHFA when it acts as receiver.[26] In fact, liquidation is mandatory, leaving no hope to "rehabilitate" a GSE in receivership.[27] On the other hand, when the FHFA acts as conservator, it may take any action "necessary to put the [GSE] in a sound and solvent condition" and "appropriate to carry on the business of the [GSE] and preserve and conserve the [GSE's] assets and property."[28] These explicit grants of power to the FHFA when it acts as conservator or receiver define the nature of authority in each role. In this light, the FHFA-as-conservator does not have authority to "wind[] up" the GSEs. That is inherently, textually, and exclusively the function of a receiver.

This plain-language interpretation of the FHFA's conservatorship powers follows our interpretation of near-identical language in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). Congress essentially cut-and-pasted the FHFA's powers and functions as conservator, including

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[24] *See id.* § 4617(b)(3)-(9), (c).

[25] *Whatley v. Resolution Tr. Corp.*, 32 F.3d 905, 909-10 (5th Cir. 1994).

[26] *See* 12 U.S.C. § 4617(b)(2)(E), (F), (b)(3); 12 C.F.R. § 1237.3(b).

[27] *See* 12 U.S.C. § 4617(b)(2)(E) ("In any case in which the [FHFA] is acting as receiver, the [FHFA] *shall* place the [GSE] in liquidation." (emphasis added)).

[28] *Id.* § 4617(b)(2)(D).

the anti-injunction provision, from FIRREA.[29] And it is a treasured canon of statutory interpretation that when "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law."[30] Thus, our interpretation of FIRREA must inform our interpretation of HERA.

FIRREA empowers the Federal Deposit Insurance Corporation ("FDIC") to act as conservator or receiver.[31] FIRREA also breaks down the powers and functions of the FDIC when it acts as conservator or receiver. Once appointed, the FDIC "succeed[s] to . . . all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director . . . with respect to the institution and the assets of the institution."[32] FIRREA also permits the FDIC to fully assume the assets, business operations, and functions of the institution, to collect money due to the institution, and to "preserve and conserve the assets and property" of the institution.[33] Finally, the FDIC may also exercise any function by any stockholder, director or officer of the institution.[34]

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[29] *Compare id.* § 1821(d)(2)(D) (FIRREA) *with id.* § 4617(b)(2)(D) (HERA).

[30] *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85-86 (2006).

[31] 12 U.S.C. § 1821(c)(1).

[32] *Compare id.* § 1821(d)(2)(A)(i) *with id.* § 4617(b)(2)(A)(i).

[33] *Compare id.* § 1821(d)(2)(B) *with id.* § 4617(b)(2)(B).

[34] *Compare id.* § 1821(d)(2)(C) *with id.* § 4617(b)(2)(C).

This should sound familiar. Much of FIRREA's text and structure mirrors that of HERA. As under HERA, the conservator and receiver roles under FIRREA share common powers and functions, but they are plainly distinct. Among its general powers in operating the regulated entity, the FDIC may "perform all functions of the institution in the name of the institution which are *consistent with the appointment* as conservator or receiver."[35] And, like HERA, FIRREA enumerates specific, unique powers held by conservators[36] and by receivers.[37] FIRREA authorizes conservators to take "such action as may be . . . necessary to put the insured depository institution in a sound and solvent condition; and . . . appropriate to carry on the business of the institution and preserve and conserve [its] assets."[38] In particular, it notes the conservator's "fiduciary duty to minimize the institution's losses,"[39] whereas receivers "place the insured depository institution in liquidation and proceed to realize upon the assets of the institution."[40] Though the conservator and receiver roles in FIRREA overlap in some respects, the duties reflect different interests and distinct powers.[41] Under FIRREA, the FDIC holds distinct roles when it acts as

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[35] *Id.* § 1821(d)(2)(B)(iii) (emphasis added).

[36] *Id.* § 1821(d)(2)(D).

[37] *Id.* § 1821(d)(2)(E)-(F).

[38] *Id.* § 1821(d)(2)(D).

[39] *Id.* § 1831f(d)(3).

[40] *Id.* § 1821(d)(2)(E).

[41] *See McAllister v. Resolution Tr. Corp.*, 201 F.3d 570, 579 (5th Cir. 2000); *Resolution Tr. Corp. v. CedarMinn Bldg. Ltd. P'ship*, 956 F.2d 1446, 1451-52, 1454 (8th Cir. 1992).

conservator or receiver with clearly delineated statutory bounds between the two roles.

We should read HERA consistently with our previous interpretation of FIRREA. Congress "can be presumed to have had knowledge of the interpretation given to the incorporated law."[42] So under HERA's nearly identical language, the FHFA as conservator exercises plainly distinct powers from the FHFA as receiver.

Nevertheless, the FHFA seeks to make bright lines blurry. First, it argues that "winding up is different from liquidation," so a conservator may take steps akin to winding up so long as they fall short of liquidation. Alternatively the FHFA argues that "HERA's plain text authorizes FHFA as 'conservator *or* receiver' to be appointed 'for the purpose of reorganizing, rehabilitating, *or winding up* the affairs'" of the GSEs. As a result, the FHFA can "wind up" the GSEs as either conservator or receiver. This argument convinced the D.C. Circuit, which rejected the idea that there is "a rigid boundary" between the FHFA's conservator and receiver roles.[43]

To be sure, both as a general matter and as a textual matter, conservators and receivers share some common functions under HERA. For example, the FHFA, acting as either conservator *or* receiver, may "transfer or

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[42] *See Yates v. United States*, 135 S. Ct. 1074, 1093 (2015) (Kagan, J., dissenting) (noting that only the most compelling evidence will persuade the Court that Congress intended identical terms used in similar contexts to bear different meanings); *Morissette v. United States*, 342 U.S. 246, 263 (1952).

[43] *Perry Capital*, 864 F.3d at 610.

sell any asset or liability" of the GSEs, "without any approval, assignment, or consent."[44] In fact, many powers granted to the FHFA are available to it in either role.[45]

Winding up the GSEs is not one of those powers. Reading HERA this way would be absurd: It would render the carefully crafted, mandatory, receiver-specific, wind-up procedures irrelevant.[46] There are no corresponding procedures for winding up the GSEs *during conservatorship*.[47] This silence is unsurprising. As conservator, the FHFA must "preserve and conserve" the GSEs' assets. In fact, the powers and functions unique to the FHFA as receiver—winding up and liquidating a GSE—are *antithetical* to the duties of the FHFA as conservator—rehabilitating a GSE and operating it as a going concern, preserving its assets.[48] If the FHFA wished to wind up the GSEs, it must first be designated as receiver.

This conclusion does not deny the FHFA discretion to exercise its lawful powers as conservator; it simply enforces it. The FHFA may not exercise powers re-

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[44] 12 U.S.C. § 4617(b)(2)(G).

[45] *See, e.g.*, *id.* § 4617(b)(2)(G) (power to transfer or sell assets or liability of GSE in default); *id.* § 4617(b)(2)(H) (power to pay certain obligations of GSE); *id.* § 4617(b)(2)(I) (power to issue subpoenas); *id.* § 4617(b)(2)(J) (incidental powers necessary for the FHFA to execute its authority as conservator or receiver); *id.* § 4617(d)(1) (power to repudiate contracts or leases).

[46] *See id.* § 4617(b)(3)-(9), (c) (describing how to resolve claims against the GSEs during liquidation).

[47] *See id.* § 4617(b)(2)(D).

[48] *Id.* § 4617(a)(2), (b)(2)(D)-(E).

served for receivers when it is designated as a conservator. HERA specifies discrete conduct that the FHFA may exercise in pursuit of its goals in either role.

All this boils down to the fact that the FHFA cannot hide behind the conservator label to insulate it from meaningful judicial review. The FHFA placed the GSEs into conservatorship. In making that designation, the FHFA is limited to its authority as a conservator under HERA.

B

Next, we must outline the contours of the FHFA's conservatorship authority. Understanding how HERA defines the FHFA's conservatorship role is essential to determining whether the FHFA exceeded its statutory authority.

HERA enumerates specific powers for the FHFA when it acts as conservator. The FHFA "may . . . take such action as may be . . . necessary to put the regulated entity in a sound and solvent condition; and . . . appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity."[49]

These powers accord with the traditional understanding of the role of conservators at common law.[50]

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[49] *Id.* § 4617(b)(2)(D).

[50] "It is a settled principle of interpretation that, absent other indication, 'Congress intends to incorporate the well-settled meaning of the common-law terms it uses.'" *United States v. Castleman*, 134 S. Ct. 1405, 1410 (2014) (quoting *Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013)). And "absence of contrary direction may be taken as satisfaction with widely accepted definitions."

A conservator is "the modern equivalent of the common-law *guardian*" and a "managing conservator" is "[a] person appointed by a court to manage the estate or affairs of someone who is legally incapable of doing so."[51] And conservators had specific fiduciary duties: They were appointed to protect the legal interests of those unable to protect themselves.[52] According to the Congressional Research Service, "[a] conservator is appointed to operate the institution, conserve its resources, and restore it to viability."[53] Traditionally at common law, conservators thus owed certain obligations to their wards—power must be exercised for their benefit.

This common-law understanding forms the foundation on which Congress built FIRREA and later, HERA, authorizing agencies to serve as conservators for an entity by "preserv[ing] and conserv[ing]" its assets and operating it in a "sound and solvent" manner.[54] As explained above, we have interpreted FIRREA to

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Morissette, 342 U.S. at 263. Congress's use of the word "conservator" in HERA and FIRREA incorporates the tradition of fiduciary conservatorships at common law. *See, e.g.*, *Perry Capital*, 864 F.3d at 641 (Brown, J., dissenting in part) (construing FHFA conservatorship authority in light of common-law principles); *Matter of Still*, 963 F.2d 75, 77 (5th Cir. 1992) (construing FDIC receivership authority in light of common-law understandings).

[51] *Conservator*, BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis in original).

[52] *See, e.g.*, Unif. Prob. Code § 5-418.

[53] DAVID H. CARPENTER & M. MAUREEN MURPHY, CONG. RES. SERV., FINANCIAL INSTITUTION INSOLVENCY: FEDERAL AUTHORITY OVER FANNIE MAE, FREDDIE MAC, AND DEPOSITORY INSTITUTIONS 5 (2008), https://digital.library.unt.edu/ark:/67531/metadc795484/m1/1/high_res_d/RL34657_2008Sep 10.pdf.

[54] *See* 12 U.S.C. § 1821(d)(2)(D); *id.* § 4617(b)(2)(D).

"state[] explicitly that a conservator only has the power to take actions necessary to restore a financially troubled institution to solvency."[55] We are in good company—the Fourth, Eighth, Ninth, Eleventh, and D.C. Circuits have articulated similar views.[56] And the FDIC's own policy statements reflect its view that the conservatorship role imposes a duty to achieve "sufficient tangible capitalization" that reasonably assures "the future viability of the institution."[57] Importantly, a conservator must "minimize the institution's losses" and ensure "the future viability of the institution,"

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[55] *McAllister*, 201 F.3d at 579.

[56] *See, e.g.*, *James Madison Ltd. By Hecht v. Ludwig*, 82 F.3d 1085, 1090 (D.C. Cir. 1996) ("The principal difference between a conservator and receiver is that a conservator may operate and dispose of a bank as a going concern, while a receiver has the power to liquidate and wind up the affairs of an institution."); *Elmco Props., Inc. v. Second Nat'l Fed. Sav. Ass'n*, 94 F.3d 914, 922 (4th Cir. 1996) ("[A] conservator's function is to restore the bank's solvency and preserve its assets."); *Del E. Webb McQueen Dev. Corp. v. Resolution Tr. Corp.*, 69 F.3d 355, 361 (9th Cir. 1995) ("The [Resolution Trust Corporation ("RTC")], as conservator, operates an institution with the hope that it might someday be rehabilitated. The RTC, as receiver, liquidates an institution and distributes its proceeds to creditors according to the priority rules set out in the regulations."); *Resolution Tr. Corp. v. United Tr. Fund, Inc.*, 57 F.3d 1025, 1033 (11th Cir. 1995) ("The conservator's mission is to conserve assets which often involves continuing an ongoing business. The receiver's mission is to shut a business down and sell off its assets."); *CedarMinn*, 956 F.2d at 1453 (noting that a conservator's "mission[]" is "to take action necessary to restore the failed [financial institution] to a solvent position and to carry on the business of the institution and preserve and conserve the assets and property of the institution" (quoting 12 U.S.C. § 1821(d)(2)(D)).

[57] Statement of Policy on Assistance to Operating Insured Depository Institutions, 57 Fed. Reg. 60203, 60205 (Dec. 18, 1992).

whereas a receiver liquidates and realizes upon the assets of the institution.

Before this litigation, the FHFA itself agreed with this understanding of its authority as conservator. The FHFA acknowledged publicly that "[t]he purpose of conservatorship is to preserve and conserve each company's assets and property and to put the companies in a sound and solvent condition."[58] The FHFA has repeatedly emphasized that HERA "required" it to restore the GSEs to soundness and to "preserve and conserve" the GSEs' assets.[59] And its own regulations highlight that "the essential function of a conservator is to preserve and conserve the institution's assets," and "[a] conservator's goal is to continue the operations of a regulated entity, rehabilitate it[,] and return it to a safe,

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[58] Fed. Hous. Fin. Agency, Report to Congress: 2009, at i (May 25, 2010), https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/2009_AnnualReportToCongress_508.pdf (acknowledging "[t]he purpose of conservatorship is to preserve and conserve each company's assets and property and to put the companies in a sound and solvent condition").

[59] *See* Fannie Mae and Freddie Mac Loan Purchase Limits: Request for Public Input on Implementation Issues, 78 Fed. Reg. 77450, 77451 (Dec. 23, 2013) (describing the authority to "preserve and conserve" the GSEs' assets as "FHFA's conservator *obligation*" (emphasis added)); 2012-2014 Enterprise Housing Goals, 77 Fed. Reg. 67535, 67549 (Nov. 13, 2012) ("FHFA's *duties* as conservator *require* the conservation and preservation of the [GSEs'] assets." (emphasis added)); Conservatorship and Receivership, 76 Fed. Reg. 35724, 35726 (June 20, 2011) (describing FHFA's authority under § 4617(b)(2)(D) as its "*statutory mission* to restore soundness and solvency to insolvent regulated entities and to preserve and conserve their assets and property" (emphasis added)).

sound[,] and solvent condition."[60] Neither winding up nor liquidating an entity, whether synonymous or not, are consistent with this mission.

Now, however, the FHFA no longer thinks a conservator must conserve. The FHFA argues that HERA's conservatorship powers "bear no resemblance to the type of conservatorship measures that a private common-law conservator would be able to undertake," and Congress empowered the FHFA to act in its own best interests under the "incidental powers" provision. In essence, the FHFA contends that the incidental powers provision represents a clear, contrary intention by Congress to displace the common-law interpretation of "conservator."

Other circuits have found this argument persuasive. They believe Congress explicitly delegated authority that exceeds the customary meaning of conservator, so the FHFA complied with its general statutory mandate in adopting the net worth sweep.[61] First, they conclude that the FHFA is not a traditional conservator because "Congress granted FHFA a broad array of discretionary authority"—by framing HERA in terms of permissive authority, Congress intended the FHFA to exercise

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[60] Conservatorship and Receivership, 76 Fed. Reg. 35724, 257327, 35730 (June 20, 2011).

[61] *See, e.g.*, *Robinson*, 876 F.3d at 229-30 (finding that the statute is framed in terms of discretionary authority and that express powers conflict with traditional notions of conservatorships); *Perry Capital*, 864 F.3d at 613 ("Congress made clear in the Recovery Act that the FHFA is not your grandparents' conservator.").

its discretion and it is not required to pursue binding duties under § 4617(b)(2)(D) when it acts as conservator.[62] Second, they find that the FHFA is not a traditional conservator because express powers granted by HERA's incidental powers permit the FHFA to take its own interests into account when performing its duties as conservator, conflicting with the customary meaning of conservatorships.[63]

There is a textual hook in finding that Congress granted the FHFA discretionary authority. HERA provides that the FHFA "may . . . take such action as may be . . . necessary to put the regulated entity in a sound and solvent condition; and . . . appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity."[64] Typically, "may" implies discretion.[65] I do not doubt that "may means may" or that

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[62] *Robinson*, 876 F.3d at 229-30; *see also Roberts*, 889 F.3d at 403 ("[S]ection 4617(b)(2)(D) does not *require* the Agency to do anything. It uses the permissive 'may,' rather than the mandatory 'shall' or 'must,' to introduce the Agency's power as conservator to 'preserve and conserve' Freddie's and Fannie's assets and to restore their solvency."); *Perry Capital*, 864 F.3d at 607 ("The statute is thus framed in terms of expansive grants of permissive, discretionary authority for FHFA to exercise as the 'Agency determines is in the best interests of the regulated entity or the Agency.'" (quoting 12 U.S.C. § 4617(b)(2)(J))).

[63] *Robinson*, 876 F.3d at 230; *Perry Capital*, 864 F.3d at 613.

[64] 12 U.S.C. § 4617(b)(2)(D) (emphasis added).

[65] *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016).

"'may is, of course, 'permissive rather than obligatory.'"[66] But courts seeking a forthright interpretation should not myopically focus on "may" at the expense of reading HERA as a cohesive, contextual whole. In divining statutory meaning, courts must never divorce text from context.[67]

Once again, "[a]n agency literally has no power to act . . . unless and until Congress confers power upon it."[68] Here, "may" *enables* the FHFA to act—the FHFA *may* take any action as conservator that is either (1) "necessary to put the [GSE] in a sound and solvent condition" or (2) "appropriate to carry on the business of the [GSE] *and* preserve and conserve" GSE assets and property.[69] Logically, the FHFA may *not* take an action that is inconsistent with this express list of powers.[70] Any other reading would render the FHFA's enumeration of specific conservator powers meaning-

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[66] *Perry Capital*, 864 F.3d at 607 (quoting *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 608 (D.C. Cir. 2016); *Baptist Mem'l Hosp. v. Sebelius*, 603 F.3d 57, 63 (D.C. Cir. 2010)).

[67] *See, e.g.*, *Torres v. Lynch*, 136 S. Ct. 1619, 1626 (2016) (explaining that courts must "interpret the relevant words [of a statute] not in a vacuum, but with reference to the statutory context" (quoting *Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014))).

[68] *New York*, 535 U.S. at 18.

[69] 12 U.S.C. § 4617(b)(2)(D) (emphasis added).

[70] Under the negative implication interpretive canon, *expressio unius est exclusio alterius*, the specification of one thing implies the exclusion of the other. Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012); *see also Texas v. United States*, 809 F.3d 134, 182 (5th Cir. 2015) (noting the utility of *expressio unius* for interpreting statutes in the administrative law field).

less. Section 4617(b)(2)(D), though framed permissively, thus circumscribes the FHFA's powers as conservator—any action it takes must be consistent with its mission to "preserve and conserve" the GSEs' assets.

Nor does HERA's incidental powers provision give the FHFA carte blanche to ignore its statutory mandate as conservator. Under its incidental powers, the FHFA may "exercise all powers and authorities specifically granted to conservators or receivers, respectively, under this section, and such incidental powers as shall be necessary" to carry them out.[71] And the FHFA may "take any action authorized by this section, which the [FHFA] determines is in the best interests of the [GSE] or the [FHFA]."[72] According to the Shareholders, and at least two other circuits, this provision includes a broad grant of permissive authority for the FHFA to do whatever it pleases based on its own self-interest.[73]

I doubt that Congress "in fashioning this intricate . . . machinery, would [] hang one of the main gears on the tail pipe."[74] Interpreting the incidental powers provision to include such sweeping authority would treat the incidental powers as ends unto themselves, swallowing the remainder of HERA's statutory text.

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[71] 12 U.S.C. § 4617(b)(2)(J)(i).

[72] *Id.* § 4617(b)(2)(J)(ii).

[73] *See Robinson*, 876 F.3d at 232 (finding that the Third Amendment could be a valid use of the FHFA's incidental power as conservator); *Perry Capital*, 864 F.3d at 607-08 (noting that the incidental powers provision permits the FHFA to take any action which it determines is in its best interests).

[74] *Brannan v. Stark*, 342 U.S. 451, 463 (1952).

The incidental powers provision is not a freestanding source of authority to act. Instead, the provision is confined to "any action *authorized by this section*."[75] In essence, "incidental" powers must be "incidental" to *something*.

To support this reading, we need look no further than a dictionary; "incidental" means "[s]ubordinate to something of greater importance; having a minor role."[76] It is inconceivable that FHFA could exercise such freewheeling authority under its "incidental" powers—wholly untethered from its specific powers as conservator or receiver.

And this broad reading ignores provisions granting the FHFA specific powers and functions as either conservator or receiver. The incidental powers provision references these powers and functions when it authorizes the FHFA to "exercise all powers and authorities specifically granted *to conservators or receivers, respectively*."[77] Logically, any exercise of the FHFA's incidental powers must be in service of a power specifically provided by HERA.[78] It is only with reference to these

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[75] 12 U.S.C. § 4617(b)(2)(J)(ii) (emphasis added).

[76] *Incidental*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[77] 12 U.S.C. § 4617(b)(2)(J)(i) (emphasis added).

[78] In some respects, the Court's analysis of the Necessary and Proper Clause, Article I's "incidental powers" provision, is instructive. *Cf. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 560 (2012) (noting that "cases upholding laws under [the Necessary and Proper] Clause involved exercises of authority derivative of, and in service to, a granted power"); *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819) (noting that the general authority to pass laws "necessary and proper" to executing its powers are determined by the powers granted under the Constitution).

specific powers that we may discern the scope of the FHFA's authority over the GSEs.[79]

Regardless, permitting the FHFA to act in its own best interests does not come close to providing the type of explicit instruction required to suggest that Congress displaced the common-law attributes of conservatorships.[80] The FHFA possesses significant regulatory authority with the potential for reverberations throughout the United States economy. Given the importance of the FHFA's role and the potential disruption to financial markets, the incidental powers provision is insufficient to negate the assumption that the settled common-law meaning of conservator applies.[81] Instead, the provision merely permits the FHFA to engage in self-dealing transactions, an act otherwise inconsistent with the conservator role.[82]

The FHFA's topsy-turvy take on the notion of conservators upends our traditional understanding of fidu-

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[79] *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (noting that it is a well-known canon of statutory construction that a specific provision of a statute governs the general, avoiding "the superfluity of a specific provision that is swallowed by the general one, 'violat[ing] the cardinal rule that, if possible, effect shall be given to every clause and part of a statute'" (quoting *D. Ginsburg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932))).

[80] *Cf. Morissette*, 342 U.S. at 263.

[81] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.").

[82] *See Perry Capital*, 864 F.3d at 643 (Brown, J., dissenting in part).

ciary conservatorships, and I cannot endorse it. "Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations."[83] Conservator is one such term. We have consistently honed the meaning of conservator at common law and subsequently under FIRREA. This court should decline to follow FHFA through the looking glass to a world where conservators need not conserve.

Without the statutory command to "preserve and conserve" the GSEs' assets and property, the FHFA is left without any intelligible principle to guide its discretion as conservator. The FHFA is essentially permitted to take *any action*—unmoored from any statutory guidance—so long as it could plausibly defend its action as "reorganizing" the GSEs. This broad reading effectively eviscerates the carefully crafted statutory authority granted to the FHFA, permitting it to abandon its conservatorship mission.

In sum, the FHFA "is not empowered to jettison every duty a conservator owes its ward, and it is certainly not entitled to disregard the statute's own clearly defined limits on conservator power."[84] The FHFA cannot act contrary to HERA's conservator powers; any such action would not be "incidental" to its statutorily enumerated authority. Thus, the FHFA may act in its

[83] *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (citations omitted); *see also Lorillard*, 434 U.S. at 580-81 (noting that where "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law").

[84] *Perry Capital*, 864 F.3d at 643 (Brown, J., dissenting in part).

own interests as conservator, but its actions must otherwise be consistent with its statutory authority to "preserve and conserve" the GSEs' assets and operate the GSEs in a "sound and solvent" manner.

III

Because the FHFA was appointed as conservator—not as receiver—we must consider whether the net worth sweep was consistent with "the duties, purpose, and actions of a prudent conservator."[85] The key question is whether the net worth sweep was designed to "preserve and conserve" the GSEs' assets and rehabilitate the GSEs by putting them in "sound and solvent condition."[86]

The FHFA's conservatorship began on a relatively optimistic note. Fannie and Freddie were publicly placed into conservatorship on September 6, 2008, after failed attempts to recapitalize the GSEs. At the time, the FHFA Director was concerned about the GSEs' ability to "operate safely and soundly," and he explained the conservatorship as "a statutory process designed to stabilize a troubled institution with the objective of returning the entities to normal business operations."[87] In pursuit of its conservatorship goals, the FHFA enlisted Treasury to provide cash infusions that preserved

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[85] *Leon Cty. v. Fed. Hous. Fin. Agency*, 700 F.3d 1273, 1278 (11th Cir. 2012).

[86] 12 U.S.C. § 4617(b)(2)(D).

[87] Statement of FHFA Director James B. Lockhart at News Conference Announcing Conservatorship of Fannie Mae and Freddie Mac, FHFA (Sept. 7, 2008), https://www.fhfa.gov/Media/PublicAffairs/pages/statement-of-fhfa-director-james-b--lockhart-at-news-conference-annnouncing-conservatorship-of-fannie-mae-and-freddiemac.aspx.

the value of Fannie's and Freddie's assets, enhanced their ability to function in the housing market, and mitigated the systemic risk that contributed to an unstable market.[88] Per the PSPA, Treasury purchased $1 billion of senior preferred stock in each GSE from the FHFA in exchange for access to capital. Treasury also had a right to a 10% dividend and periodic commitment fee to compensate it for any capital provided to the GSEs. Treasury believed it had a "responsibility to both avert and ultimately address the systemic risk" of GSE debt and to "eliminate any mandatory triggering of receivership."[89] This is consistent with its role as conservator—fixing short-term deficits and returning entities to functioning market participants is the essence of conservatorships.

But everything changed under the Third Amendment. The net worth sweep fundamentally altered the PSPA between the FHFA and Treasury, replacing the fixed-rate 10% dividend with the right to sweep the GSEs' entire quarterly net worth after accounting for a $3 billion capital reserve buffer that would gradually fall to zero. Far from ensuring ongoing access to capital, the net worth sweep denied the GSEs access to approximately $130 billion in profit that was instead turned

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[88] *See* Questions and Answers on Conservatorship, FHFA (Sept. 7, 2008), https://www.fhfa.gov/Media/PublicAffairs/Pages/Fact-Sheet-Questions-and-Answers-on-Conservatorship.aspx.

[89] Fact Sheet: Treasury Senior Preferred Stock Purchase Agreement, U.S. Treasury Dep't (Sept. 7, 2008), https://www.treasury.gov/press-center/press-releases/Documents/pspa_factsheet_090708%20hp1128.pdf.

over to Treasury.[90] In essence, the sweep siphoned nearly all of the GSEs' net worth between 2012 and the present day directly to a sole shareholder: Treasury. It is undisputed that Treasury has collected over $200 billion under the net worth sweep—well exceeding the $187.5 billion it loaned to the GSEs.[91] Treasury has now recovered far more than it invested in the companies between 2008 and 2012 under the PSPAs. Yet the GSEs remain on the hook for the $187.5 billion obtained from Treasury before the Third Amendment. Under the Third Amendment, Treasury has the right to retain the GSEs' net worth in perpetuity.

Indeed, the Agencies abandoned their original optimism for a more ominous outlook for the GSEs. Both Treasury and the FHFA thought the Third Amendment aimed to wind up the GSEs—in other words, the GSEs would not return to operating capacity. Treasury announced that the Third Amendment would "expedite the wind down of Fannie Mae and Freddie Mac" and ensure that the GSEs "will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form."[92] The FHFA Acting Director also noted that there "seems to be broad consensus that Fannie Mae and Freddie Mac will not return to their previous corporate forms," that the "preferred

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[90] *See* FHFA, Table 2: Dividends on Enterprise Draws from Treasury, https://www.fhfa.gov/DataTools/Downloads/Documents/Market-Data/Table_2.pdf.

[91] *Id.*

[92] Press Release, Dep't of Treasury, *Treasury Department Announces Further Steps to Expedite Wind Down of Fannie Mae and Freddie Mac* (Aug. 17, 2012), https://www.treasury.gov/press-center/press-releases/Pages/tg1684.aspx.

course of action is to wind down the [GSEs]," and that the Third Amendment "reinforce[d] the notion that the [GSEs] will not be building capital as a potential step to regaining their former corporate status."[93] Once again, in a report to Congress, the FHFA explained that it was "prioritizing [its] actions to move the housing industry to a new state, one without Fannie Mae and Freddie Mac."[94] Treasury and the FHFA did not attempt to hide their intentions, or, if they did, they weren't very good at it. Instead, they proclaimed loudly and proudly that they wanted to transfer wealth from the Shareholders to Treasury in an effort to wind up Fannie's and Freddie's affairs.

But to wind up the GSEs' affairs, the FHFA needed to follow HERA's carefully crafted procedures. The FHFA could be designated as receiver for the GSEs and put them on the path to liquidation. But that is not the path that the FHFA chose—the FHFA was designated as *conservator*. By evading the receivership label, the FHFA could unilaterally bleed the GSEs' assets for its own use. The Shareholders were essentially denied their property rights in GSE assets. Even worse, the FHFA evaded any judicial oversight to ensure compliance with HERA's receivership procedures.

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[93] Edward J. DeMarco, Acting Director, FHFA, Statement Before the U.S. Sen. Comm. on Banking, Hous., & Urban Affairs (Apr. 18, 2013), https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-Edward-J-DeMarco-Acting-Director-FHFA-Before-the-US-Senate-Committee-on-Banking-Housing-and-Urban-Affa359.aspx.

[94] FHFA, Report to Congress 2012, at 13 (June 13, 2013), https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/2012_ AnnualReportToCongress_508.pdf.

The Sixth, Seventh, and D.C. Circuits determined that the Third Amendment falls squarely within the FHFA's authority operate the GSEs, carry on business, transfer or sell assets, and do so in the GSEs' or its own best interests.[95] These courts characterize the Shareholders' complaint as attacking the "necessity or financial wisdom" of the net worth sweep, reasoning that "Congress could not have been clearer about leaving those hard operational calls to FHFA's managerial judgment."[96]

Admittedly, judges are not experts at Byzantine financial dealings or long-term market strategy. But interpreting statutes is squarely in the judicial wheelhouse. The FHFA may not hide behind the label of conservator to insulate itself from meaningful judicial review. Instead, we must apply wellsettled principles underlying conservatorships to determine if the FHFA's actions were within its statutory authority. Simply put, HERA requires the FHFA as conservator to act in a certain way, and the net worth sweep is inconsistent with those requirements. Draining the GSEs' entire net worth in perpetuity makes rehabilitation—a core function of conservatorships—impossible. The net worth sweep was thus inconsistent with what a conservator may do, under HERA or otherwise.

That the GSEs have returned to profitability is of no matter. This case concerns whether a discrete action

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[95] *Robinson*, 876 F.3d at 231 (citing 12 U.S.C. § 4617(b)(2)); *Roberts*, 889 F.3d at 404; *Perry Capital*, 864 F.3d at 607.

[96] *Robinson*, 876 F.3d at 231 (quoting *Perry Capital*, 864 F.3d at 607); *Roberts*, 889 F.3d at 404 (quoting *Perry Capital*, 864 F.3d at 607).

by the FHFA falls within its statutory conservatorship authority. The net worth sweep strips the GSEs of their capital reserves, and it is thus antithetical to the FHFA's statutory command that it "preserve and conserve the assets and property" of the GSEs.[97] Yet the net worth sweep persists—and it persists indefinitely.

This violates the FHFA's principal duty as conservator to "put the [GSEs] in a sound and solvent condition."[98] One of the FHFA's regulatory duties over the GSEs is "to ensure that [the GSEs] operate[] in a safe and sound manner, including maintenance of adequate capital."[99] And FHFA regulations suggest that allowing this transfer of capital to Treasury, thereby depleting the conservatorship assets, is incompatible with its "statutory charge to work to restore a regulated entity in conservatorship to a sound and solvent condition."[100] Without capital reserves, the net worth sweep left the GSEs extremely vulnerable to market fluctuations and risked further reliance on Treasury's funding commitment. This risk increased each year as the reserve cap decreased, supporting the position that the net worth sweep is inconsistent with the statutory command to take actions "necessary to put the regulated entity in a sound and solvent condition.[101] The FHFA Director said

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[97] 12 U.S.C. § 4617(b)(2)(D)(ii).

[98] *Id.* § 4617(b)(2)(D)(i).

[99] *Id.* § 4513(a)(1)(B).

[100] Conservatorship and Receivership, 76 Fed. Reg. 35724, 35727 (June 20, 2011).

[101] 12 U.S.C. § 4617(b)(2)(D)(i).

it best: Allowing the GSEs to operate without a reserve buffer is "irresponsible."[102]

To be sure, the GSEs are now permitted to retain a $3 billion capital reserve amount under the net worth sweep.[103] But removing the GSEs' entire net worth beyond that reserve cap still risks increasing Treasury's liquidation preference. In fact, the GSEs have incurred additional debt in order to pay Treasury under the net worth sweep. Ordering the GSEs to further weaken their financial position in this manner is inconsistent with the FHFA's statutory authority.

Congress carefully delineated the FHFA's powers as conservator. And courts have a responsibility to ensure that the FHFA does not exceed those powers. By holding otherwise, the majority opinion forecloses any recourse the Shareholders have to ensure that their property rights are protected by HERA's mandatory procedures.

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In a legal system governed by the Rule of Law, investors rely on predictable, well-settled principles of conservatorships and receiverships and the consistent

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[102] Melvin L. Watt, Director, FHFA, Statement Before the U.S. House of Representatives Comm. on Fin. Servs. (Oct. 3, 2017), https://www.fhfa.gov/Media/PublicAffairs/pages/statement-of-melvin-l--watt,-director,-fhfa,before-the-u-s--house-of-representatives-committee-on-financial-services.aspx.

[103] Melvin L. Watt, Director, FHFA, Statement on Capital Reserve for Fannie Mae and Freddie Mac (Dec. 21, 2017), https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-from-FHFA-Director-Melvin-L-Watt-on-Capital-Reserve-for-Fannie-Mae-and-Freddie-Mac.aspx.

interpretation of these terms by courts. HERA established the FHFA in order to stabilize and restore confidence in the United States housing market. In drafting the statute, Congress built HERA on the foundation of FIRREA, importing the accompanying predictable, deep-dyed common-law principles of conservatorships. Importantly, when the FHFA acts as conservator, Congress requires it to "preserve and conserve" the property and assets of the GSEs.

The FHFA abandoned this duty as conservator when it enacted the net worth sweep, thus barring the GSEs from earning and maintaining a profit. In essence, the FHFA began to wind up the GSEs and place them into liquidation—a power reserved for its role as receiver.[104] But the FHFA had not been designated as receiver, and it disregarded the receiver-specific statutory protections afforded to the GSEs and their investors.

Nothing in the statute prevents the FHFA from being designated and acting as a receiver. Perhaps all this litigation could have been avoided had the FHFA done so. But the FHFA has made its statutory bed, and now it must lie in it. If the FHFA wishes to wind up the GSEs, it must comply with the statutory procedures designating itself as receiver and terminating the conservatorship first. Having failed to do just that, the FHFA exceeded its statutory authority.

HERA neither bars review of the Shareholders' APA claim nor authorizes the FHFA as conservator to bleed the GSEs profits in perpetuity. Because the majority opinion holds otherwise, I respectfully dissent.

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[104] *See* 12 U.S.C. § 4617(a)(4)(D), (b)(2)(E), (b)(3), (c).

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-16-3113

PATRICK J. COLLINS, ET AL., PLAINTIFFS

v.

FEDERAL HOUSING FINANCE AGENCY, ET AL., DEFENDANTS

[Filed: May 22, 2017]

MEMORANDUM AND ORDER

Plaintiffs Patrick J. Collins, Marcus J. Liotta and William M. Hitchcock are shareholders in the Federal National Mortgage Association ("Fannie Mae") and/or the Federal Home Loan Mortgage Corporation ("Freddie Mac"). Plaintiffs complain that actions by the Federal Housing Finance Agency ("FHFA") and the United States Department of Treasury ("Treasury") adversely affected the value of Plaintiffs' shares. The case is now before the Court on the Motion to Dismiss [Doc. # 23] filed by Defendants FHFA and its Director Melvin L. Watt. Also pending is the Motion to Dismiss [Doc. # 25] filed by Treasury and its Secretary Steven Mnuchin,[1]

[1] In February 2017, Mnuchin became Secretary of Treasury, replacing Jacob Lew, the named Defendant. As a result, Mnuchin

the Motion for Summary Judgment on Constitutional Claim [Doc. # 33] filed by Plaintiffs, and the Cross-Motion for Summary Judgment on Constitutional Claim [Doc. # 35] filed by the FHFA and Watt.[2] The Court has reviewed the full record and the applicable legal authorities. Based on that review, the Court **grants** Defendants' Motions and **denies** Plaintiffs' Motion.

I. BACKGROUND

The historical background of this dispute is set forth fully in the well-reasoned decision of the United States Court of Appeals for the District of Columbia in *Perry Capital, LLC v. Mnuchin*, 948 F.3d 1072 (D.C. Cir. 2017). The Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") became major players in the United States housing market. By 2008, they controlled combined mortgage portfolios valued at $5 trillion, nearly half of the United States mortgage market.

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was automatically substituted as Defendant in this lawsuit. *See* FED. R. CIV. P. 25(d); *McCardell v. U.S. Dept. of Hous. and Urban Dev.*, 794 F.3d 510, 515 n.19 (5th Cir. 2015).

[2] The FHFA and Watt filed a Memorandum [Doc. # 24] in support of their Motion to Dismiss, Treasury and Mnuchin filed a Memorandum [Doc. # 26] in support of their Motion to Dismiss, Plaintiffs filed a combined Memorandum [Doc. # 32] in opposition to Defendants' Motions to Dismiss and in support of their Motion for Summary Judgment, the FHFA and Watt filed a Reply [Doc. # 37] in support of their Motion to Dismiss, Treasury and Mnuchin filed a Reply [Doc. # 38] in support of their Motion to Dismiss, Plaintiffs filed a combined Reply [Doc. # 41], the FHFA and Watt filed a Reply [Doc. # 49] in support of their Motion for Summary Judgment on Constitutional Claim, Plaintiffs filed a Sur-Reply [Doc. # 45], and Defendants filed a Response [Doc. # 48] to Plaintiffs' Sur-Reply.

In 2008, the United States housing market suffered a severe decline. Fannie Mae and Freddie Mac suffered a precipitous drop in the value of their mortgage portfolios. As a result, Congress enacted the Housing and Economic Recovery Act ("HERA"), which established FHFA. HERA classified Fannie Mae and Freddie Mac as "regulated entities" subject to the direct supervision of FHFA. *See* 12 U.S.C. § 4511(b)(1). Fannie Mae and Freddie Mac were subject also to the general regulatory authority of FHFA's Director. *See* 12 U.S.C. § 4511(b)(1), (2). HERA charged FHFA's Director with overseeing the prudential operations of Fannie Mae and Freddie Mac, and ensuring that they operated in a safe and sound manner, consistent with the public interest. *See* 12 U.S.C. § 4513(a)(1)(A), (B)(i), (B)(v).

HERA also authorized the FHFA Director to appoint FHFA as either conservator or receiver for Fannie Mae and Freddie Mac, "for the purpose of reorganizing, rehabilitating, or winding up the[ir] affairs." 12 U.S.C. § 4617(a)(2). HERA grants to FHFA as conservator broad authority and discretion over the operation of Fannie Mae and Freddie Mac. For example, upon appointment as conservator of a regulated entity, FHFA immediately succeeds to "all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." 12 U.S.C. § 4617(b)(2)(A). Additionally, FHFA is authorized to "take over the assets of and operate the regulated entity," and to "preserve and conserve the assets and property of the regulated entity." 12 U.S.C. § 4617(b)(2)(B)(i), (iv).

HERA also grants to FHFA expansive general powers, authorizing FHFA to, *inter alia*, "take such action as may be . . . necessary to put the regulated entity in a sound and solvent condition" and "appropriate to carry on the business of the regulated entity and preserve and conserve [its] assets and property[.]" 12 U.S.C. § 4617(b)(2), (2)(D). FHFA is also authorized, in its discretion, to "transfer or sell any asset or liability of the regulated entity in default . . . without any approval, assignment, or consent." 12 U.S.C. § 4617(b)(2)(G). Additionally, FHFA is authorized to "disaffirm or repudiate [certain] contract[s] or lease[s]." 12 U.S.C. § 4617(d)(1). HERA, to enable the FHFA Director to protect the "public interest," granted to FHFA as conservator the authority to exercise its statutory authority and any necessary "incidental powers" in the manner that FHFA "determines is in the best interests of the regulated entity or the Agency." 12 U.S.C. § 4617(b)(2)(J).

Separately, HERA granted Treasury temporary authority to "purchase any obligations and other securities issued by" Fannie Mae and Freddie Mac. 12 U.S.C. §§ 1455(l)(1)(A), 1719. This enabled Treasury to buy large numbers of Fannie Mae and Freddie Mac shares, and thereby infuse the companies with capital to ensure their continued liquidity and stability. HERA conditioned such purchases of stock on Treasury's specific determination that the terms of the purchase would "protect the taxpayer." 12 U.S.C. § 1719(g)(1)(B)(iii). A sunset provision terminated Treasury's authority to purchase shares after December 31, 2009. 12 U.S.C. § 1719(g)(4). Thereafter, Treasury was authorized only "to hold, exercise any rights received in connection with, or sell, any obligations or securities purchased." 12 U.S.C. § 1719(g)(2)(D).

Importantly for the pending lawsuit, HERA sharply limits judicial review of FHFA's conservatorship activities, directing that "no court may take any action to restrain ***or affect*** the exercise of powers or functions of the Agency as a conservator." 12 U.S.C. § 4617(f) (emphasis added).

On September 6, 2008, FHFA's Director placed both Fannie Mae and Freddie Mac into conservatorship. The next day, Treasury entered into Preferred Stock Purchase Agreements ("PSPAs") with Fannie Mae and Freddie Mac, under which Treasury committed to invest billions of dollars in the two companies to keep them from defaulting. In exchange for Treasury's capital infusion, Treasury received one million senior preferred shares in each company. Those shares entitled Treasury to: (i) a $1 billion senior liquidation preference—a priority right above all other shareholders, whether preferred or otherwise, to receive distributions from assets if the entities were dissolved; (ii) a dollar-for-dollar increase in that liquidation preference each time Fannie Mae and Freddie Mac drew upon Treasury's funding commitment; (iii) quarterly dividends that the companies could either pay at a rate of 10% of Treasury's liquidation preference or a commitment to increase the liquidation preference by 12%; (iv) warrants allowing Treasury to purchase up to 79.9% of Fannie Mae's and Freddie Mac's common stock; and (v) the possibility of periodic commitment fees over and above any dividends. The PSPAs also included a covenant that Fannie Mae and Freddie Mac could not "declare or pay any dividend (preferred or otherwise) or make any other distribution (by reduction of capital or otherwise), whether in cash, property, securities or a combination thereof" without Treasury's advance consent (unless the dividend or distribution was for Treasury's Senior Preferred Stock or warrants).

The PSPAs initially capped Treasury's commitment to invest capital at $100 billion per company. When it appeared that Fannie Mae and Freddie Mac would require even greater capital infusions by Treasury, FHFA and Treasury adopted the First Amendment to the PSPAs in May 2009, under which Treasury agreed to double the funding commitment to $200 billion for each company. Seven months later, in a Second Amendment to the PSPAs, FHFA and Treasury again agreed to raise the cap, this time to an adjustable figure determined in part by the amount of Fannie Mae's and Freddie Mac's quarterly cumulative losses between 2010 and 2012. As of June 30, 2012, Fannie Mae and Freddie Mac together had drawn $187.5 billion from Treasury's funding commitment.

Through the first quarter of 2012, Fannie Mae and Freddie Mac repeatedly struggled to generate enough capital to pay the 10% dividend they owed to Treasury under the amended PSPAs. As a result, FHFA and Treasury adopted the Third Amendment to the PSPAs on August 17, 2012. The Third Amendment to the PSPAs replaced the previous quarterly 10% dividend formula with a requirement that Fannie Mae and Freddie Mac pay as dividends only the amount, if any, by which their net worth for the quarter exceeded a capital buffer of $3 billion, with that buffer decreasing annually down to zero by 2018. Stated differently, the Third Amendment requires Fannie Mae and Freddie Mac to pay to Treasury quarterly dividends equal to their excess net worth. Under the new dividend formula in the Third Amendment, Fannie Mae and Freddie Mac would no longer incur additional debt in order to make their quarterly dividend payments, but they would no longer accrue capital during good quarters. Under the Third Amendment, Fannie Mae and Freddie Mac together paid Treasury $130 billion in dividends in 2013, and another $40 billion in 2014. In 2015, however, Fannie Mae's and Freddie Mac's quarterly net worth was much lower, such that Fannie Mae paid Treasury $10.3 billion and Freddie Mac paid Treasury $5.5 billion. By comparison, without the Third Amendment, Fannie Mae and Freddie Mac together would have been required to pay Treasury $19 billion in 2015. If they had been unable to make the 2015 payments, the companies would have been required to draw on Treasury's commitment of funds and thereby increase Treasury's liquidation preference. In the first quarter of 2016, Fannie Mae paid Treasury $2.9 billion and Freddie Mac paid Treasury no dividend at all.

Plaintiffs in this case are shareholders in Fannie Mae and/or Freddie Mac. They filed this lawsuit in October 2016. Counts 1-3 of the Complaint [Doc. # 1] seek relief under the Administrative Procedure Act ("APA"). Count 4 challenges the provision in HERA that requires cause for removal of the FHFA Director ("Removal Provision"), arguing that it is an unconstitutional violation of the separation of powers. Plaintiffs seek a declaratory judgment that the Third Amendment violated HERA, that Treasury acted arbitrarily and capriciously by executing the Third Amendment, and that FHFA's structure violates the separation of powers. Plaintiffs also seek an injunction requiring a "return" to Fannie Mae and Freddie Mac of all dividend payments made pursuant to the Third Amendment, and enjoining the FHFA from applying the Third Amendment in the future. Plaintiffs ask this Court to vacate and set aside the Third Amendment.

Defendants moved to dismiss Counts 1-3 based on the limit on judicial review set forth in 12 U.S.C. § 4617(f). Both sides moved for summary judgment on Count 4, the constitutional challenge. The pending motions have been exhaustively briefed and are now ripe for decision.

II. APA CLAIMS

A. Count 1 - FHFA

Plaintiffs allege in Count 1 that the FHFA exceeded its statutory authority by adopting the Third Amendment. Specifically, Plaintiffs allege that the FHFA acted in contravention of its statutory duty to rehabilitate Fannie Mae and Freddie Mac and its duty to preserve and conserve Fannie Mae's and Freddie Mac's assets. Plaintiffs allege also that the FHFA exceeded its statutory authority by acting to benefit taxpayers. Defendants seek dismissal of this claim as precluded by the limitation on judicial review set forth in § 4617(f).

This issue was addressed in *Perry Capital*, and this Court finds the District of Columbia Circuit's reasoning to be persuasive. As noted in *Perry Capital*, the "plain statutory text [of § 4617(f)] draws a sharp line in the sand against litigative interference—through judicial injunctions, declaratory judgments, or other equitable relief—with FHFA's statutorily permitted actions as conservator or receiver." *Perry Capital*, 848 F.3d at 1087. As explained by the District of Columbia Circuit, "adoption of the Third Amendment falls within FHFA's statutory conservatorship powers." *Id.* This is true because HERA "endows FHFA with extraordinarily broad flexibility to carry out its role as conservator." *Id.* "Entirely absent from [HERA's] text is any mandate, command, or directive to build up capital for the financial benefit of [Fannie Mae's and Freddie Mac's] stockholders." *Id.* at 1088. To avoid the limitation of § 4617(f), Plaintiffs' burden "is to show that FHFA's actions were frolicking outside of statutory limits as a matter of law." *Id.* at 1093. For the reasons set forth in *Perry Capital*, the arguments asserted by Plaintiffs here—the same arguments asserted by the plaintiffs in *Perry Capital*—fail to demonstrate that the FHFA's conduct was outside the scope of its broad statutory authority as conservator. Therefore, Plaintiffs' APA claim against the FHFA is barred by § 4617(f).

B. Counts 2 and 3 - Treasury

Plaintiffs allege that Treasury's conduct in connection with the Third Amendment exceeded its statutory authority under HERA and was arbitrary and capricious. As explained by the District of Columbia Circuit in *Perry Capital*, these claims are barred by § 4617(f). *See Perry Capital*, 848 F.3d at 1096-97. "Section 4617(f) also forecloses judicial relief that would 'affect' the exercise of FHFA's 'powers or functions' as conservator or receiver." *Id.* at 1096. Here, "the effect of any injunction or declaratory judgment aimed at Treasury's adoption of the Third Amendment would have just as direct and immediate an effect as if the injunction operated directly on FHFA." *Id.* "Accordingly, Section

4617(f)'s prohibition on relief that 'affect[s] FHFA applies here because the requested injunction's operation would have exactly the same force and effect as enjoining FHFA directly." *Id.* Therefore, § 4617(f) bars Counts 2 and 3 of Plaintiffs' Complaint.

III. <u>CONSTITUTIONAL CLAIMS</u>

The FHFA is governed by a Director who can be removed only for cause. *See* 12 U.S.C. § 4512(b)(2) ("The Director shall be appointed for a term of 5 years, unless removed before the end of such term for cause by the President"). Plaintiffs argue that this structure violates the constitutional separation of powers. Plaintiffs argue that, as a result, the FHFA is unconstitutional and the Third Amendment is invalid as entered into by an unconstitutional entity. The Court concludes that the for-cause removal provision for the FHFA's Director does not violate the United States Constitution.

Article II of the United States Constitution charges the President to "take Care that the Laws be faithfully executed." U.S. CONST. Art. II, § 3. The Constitution specifically defines the President's appointment power:

> He shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. Art. II, § 2, cl. 2.

The Constitution, however, "is conspicuously silent" regarding the President's removal authority. *See Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc.*, __ F.3d __, 2015 WL 1013508, *7 (S.D. Ind. Mar. 6, 2015) (appeal dismissed). Nonetheless, the United States Supreme Court has held that "some degree of discretion in removing executive officers is inherent in the President's powers and must be protected from excessive legislative encroachment." *Id.* First, in *Myers v. United States*, 272 U.S. 52 (1926), the Supreme Court held that Congress was prohibited from unduly limiting the President's removal power.

In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Supreme Court held that the President's removal power was not absolute with respect to removal of officers of federal agencies that are not "purely executive" but that, instead, engage in activities that are quasi-judicial, quasi-legislative, or otherwise not exclusively the execution and enforcement of the laws enacted by Congress. *See* 295 U.S. at 627-29.

Later, in *Morrison v. Olson*, 487 U.S. 654 (1988), the Supreme Court held that the Attorney General's appointment of an "independent counsel" did not unconstitutionally violate the President's appointment and removal powers. *See Morrison*, 487 U.S. at 691-92. The Supreme Court noted that the President retained some control over the independent counsel through his control over the Attorney General, the President's at-will appointee. *See id.* at 692.

Most recently, in 2010, the Supreme Court noted that it previously held that "Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010) (citing *Humphrey's Executor*). At issue in *Free Enterprise* was a "for cause" requirement for the removal of commissioners of the Public Company Accounting Oversight Board, an entity under the Securities and Exchange Commission whose own commissioners could be removed only for cause. The Supreme Court held that this "second level of tenure protection changes the nature of the President's review." *Id.* at 496. The Supreme Court held this structure providing two levels of "for cause" removal protection to be unconstitutional. *See id.* at 498.

Viewed in light of this Supreme Court rubric, the structure of the FHFA does not violate the Constitution. As noted in *Morrison*, "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty." *Morrison*, 487 U.S. at 691. A "for cause" requirement for removal has been approved by the Supreme Court where, as here, the agency's mission is not "purely executive." *See Humphrey's Executor*, 295 U.S. at 619, 632; *see also Consumer Fin. Prot. Bureau v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1087-88 (C.D. Cal. 2014); *Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc.*, 2015 WL 1013508 at *9. Indeed, the challenged Third Amendment was adopted by the FHFA in its capacity as conservator of Fannie Mae and Freddie Mac, not as an executive enforcing the laws of the United States.

Plaintiffs in their Motion for Summary Judgment on Constitutional Claim rely primarily on *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016), which held that the Consumer Financial Protection Bureau was unconstitutionally governed by a single Director removable only for cause. The District of Columbia Circuit has granted rehearing *en banc* and has vacated the panel's opinion on which Plaintiffs rely. Moreover, the panel's decision was based on the view that the single-Director structure of the CFPB was "novel" and that the independent counsel statute upheld in *Morrison* was a mistake. In addition to the CFPB and the FHFA at issue in this case, the Social Security Administration's Commissioner is a single agency head who is removable only for cause. *See* 42 U.S.C. § 902(a). Whether the independent counsel statute was wise or a mistake, it was upheld as constitutional by the Supreme Court in *Morrison*. As a result, the Court finds the reasoning of the panel decision in *PHH Corp.* to be unpersuasive even if it had not been vacated.

Plaintiffs argue that the single director structure is a "second layer" that renders the structure of the FHFA unconstitutional under *Free Enterprise*. The existence of a single director is not, however, a "second level of tenure protection" that is prohibited by *Free Enterprise*. Indeed, the existence of a single director rather than a board or commission offers no "tenure protection" at all. Additionally, the Supreme Court did not limit its decision in *Humphrey's Executor* to a multimember board rather than a single director, holding simply that a "for cause" removal provision for agencies that are not "purely executive" was not an unconstitutional violation of the separation of powers. The

FHFA's removal provision, when viewed in light of the agency's overall structure and purpose, does not impede the President's ability to perform his constitutional duty to take care that the laws are faithfully executed. As a result, Plaintiffs' Motion for Summary Judgment on this constitutionality issue is denied and Defendants' Motion for Summary Judgment on this issue is granted.

IV. CONCLUSION AND ORDER

Based on the foregoing, particularly the District of Columbia Circuit's well-reasoned decision in *Perry Capital*, the Court grants Defendants' Motions to Dismiss the APA claims as precluded by § 4617(f). Additionally, the Court concludes that the removal for cause provision applicable to the FHFA Director is not unconstitutional. Accordingly, it is hereby

ORDERED that the Motion to Dismiss [Doc. # 23] filed by Defendants Federal Housing Finance Agency and Melvin L. Watt is **GRANTED**; the Motion to Dismiss [Doc. # 25] filed by the United States Department of Treasury ("Treasury") and Steven Mnuchin is **GRANTED**; Plaintiffs' Motion for Summary Judgment on Constitutional Claim [Doc. # 33] is **DENIED**; and the Cross-Motion for Summary Judgment on Constitutional Claim [Doc. # 35] filed by the FHFA and Watt is **GRANTED**.

The Court will issue a separate final order.

SIGNED at Houston, Texas, this 22nd day of **May, 2017**.

/s/ NANCY F. ATLAS
NANCY F. ATLAS
SENIOR UNITED STATES DISTRICT JUDGE