No. 19-563

In the Supreme Court of the United States

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

Petitioners

v.

PATRICK J. COLLINS, ET AL.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* BRYNDON FISHER, BRUCE REID, AND ERICK SHIPMON IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

Bryndon Fisher and Bruce Reid are each shareholders in both Fannie Mae and Freddie Mac, and Erick Shipmon is a shareholder in Fannie Mae. *Amici* are plaintiffs in actions pending in the United States Court of Federal Claims (Case Nos. 13-608C, 14-152C) in which, as shareholders, they assert derivative claims on behalf of Fannie Mae and Freddie Mac against the United States for (i) an unlawful taking without just compensation in violation of the Fifth Amendment of the U.S. Constitution; (ii) an illegal exaction in violation of the Fifth Amendment of the U.S. Constitution; and (iii) breach of fiduciary duty. The injury upon which *amici*'s claims are based is the harm to Fannie Mae and Freddie Mac (the "GSEs") caused by the Third Amendment.

Amici are the only shareholders with claims pending in the Court of Federal Claims who have consistently and exclusively asserted derivative claims on behalf of Fannie Mae and Freddie Mac in connection with the harm caused by the Third Amendment.

This case is of particular interest to *amici* because the questions presented may have a direct and potentially dispositive impact on *amici*'s pending claims against the United States. Specifically, one question now before the Court is whether the

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[1] No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae* and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

"succession clause" of the Housing and Economic Recovery Act of 2008 ("HERA"), 12 U.S.C. § 4617(b)(2)(A), precludes shareholders of Fannie Mae and Freddie Mac from challenging the Third Amendment. If the Court decides that derivative claims relating to the Third Amendment are barred by the succession clause, then *amici*'s pending claims would likely be barred as well.

Moreover, this case raises important constitutional questions, including the circumstances in which Congress may, by statute, deny injured parties any judicial forum for a constitutional claim. The resolution of this important issue will have a direct impact on *amici*'s constitutional claims pending in the Court of Federal Claims.

SUMMARY OF THE ARGUMENT

One question before the Court is whether the "succession clause" of the Housing and Economic Recovery Act of 2008 ("HERA"), 12 U.S.C. § 4617(b)(2)(A), precludes shareholders of Fannie Mae and Freddie Mac from challenging the Third Amendment. In order for the Court to reach this question, however, it would first have to reverse the court of appeals' holding that the shareholders' claims relating to the Third Amendment are direct. On this threshold question of whether shareholder claims relating to the Third Amendment are direct or derivative, the *amici* and the Government agree: given the nature of the claims asserted, the injury upon which the shareholders' claims are based, and the available remedies, the claims are derivative.

From there, the *amici* and the Government diverge. The Government argues that HERA's succession clause displaces established corporate law under which shareholders may pursue a derivative action when those in control of the corporation face a manifest conflict of interest in deciding whether to bring suit. HERA's text and history, however, reveals no Congressional intent to displace longstanding corporate law permitting shareholders to bring derivative suits when the parties in control of a corporation face a conflict of interest. To the contrary, the origin of the succession clause reflects Congress's intent to preserve such shareholder rights under those circumstances.

Specifically, Congress copied HERA's succession clause from the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), which courts have consistently construed to permit derivative actions during a conservatorship or receivership of a bank where the conservator or receiver faces a manifest conflict of interest that prevents the conservator or receiver from objectively determining whether to bring suit. Rather than draft HERA to diverge from this established, existing law, Congress adopted the precise operative terms from FIRREA, thereby adopting existing law that construed those operative terms.

Moreover, the Government's construction of HERA would raise serious constitutional issues. If the succession clause were construed to bar all derivative suits on behalf of Fannie Mae and Freddie Mac, including *amici*'s takings and illegal exaction claims pending in the Court of Federal Claims, it would deny shareholders any remedy for the

Government's unconstitutional actions. The court of appeals recognized this problem with respect to the shareholders' claim that the structure of the FHFA violates Article II, §§ 1 and 3 of the Constitution. On that issue, the court of appeals correctly held that HERA's succession clause could not bar such a constitutional claim.

Finally, this Court has never directly decided whether Congress may completely foreclose all judicial remedies for a constitutional claim. Lower courts and commentators agree that Congress cannot constitutionally do so. And, at a minimum, there would have to be a "heightened showing" that Congress specifically intended to "deny any judicial forum for a colorable constitutional claim." App., 55a–56a (quotations omitted). The Government has not, and could not have, made such a showing here.

ARGUMENT

A. The Shareholder Claims Are Derivative.

Although the questions presented in this case do not include whether the shareholders' claims are direct or derivative, the Court would have to find that the claims are derivative to determine whether HERA's succession clause bars them. The Government argues that the court of appeals erred in determining that certain shareholders' claims are direct. Pet. 21. On this question, *amici* agree with the Government.

The court of appeals sidestepped established law that resolves whether claims are derivative or direct, focusing instead on the APA's broad grant of stand-

ing for parties who are "adversely affected or aggrieved by agency action." This holding, which conflicts with the holdings of multiple other circuit courts addressing the same issue, is incorrect.

1. The Injury Alleged in this Case.

The court of appeals held that shareholders' standing derived from 5 U.S.C. § 702, which permits a person "adversely affected or aggrieved by agency action" to obtain judicial review. The only "adverse effect" the court of appeals identified, on which it based its decision that the shareholders' claims are direct, was that shareholders "were excluded from the GSEs' profits." Pet. App. 29a.

The reference to being "excluded from the GSE's profits" refers to the effect of the Third Amendment, which required the GSEs to hand over to Treasury their positive net worth each quarter, minus a small capital cushion. Put another way, the property the Government seized through the Third Amendment is simply the GSEs' rights to their future earnings.

Although the court of appeals characterized the injury as an "exclus[ion] from the GSEs' profits," the terms of the Third Amendment directed the GSEs to turn over their entire net worth to the Government at the end of each quarter. The transactions at issue are between the GSEs and the Government. No money or other property has been taken directly from the shareholders. No harm has been inflicted on shareholders that is distinct from the property and money taken from the GSEs.

2. The Applicable Law on Resolving Whether a Claim Is Direct or Derivative.

Where a shareholder's claims arise under federal law (as with shareholders' APA claims here), federal law governs whether the claims are direct or derivative. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 (1991) ("[A]ny common law rule necessary to effectuate a private cause of action … is necessarily federal in character."); *see also* Wright & Miller et al., Fed. Prac. & Proc. § 1821 ("[I]n suits in which the rights being sued upon stem from federal law, federal law will control the issue whether the action is derivative.").

Under federal law, however, there is a "presumption that state law should be incorporated into federal common law" unless doing so in a particular context "would frustrate specific objectives of the federal programs." *Kamen*, 500 U.S. at 98. This presumption "is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Id.* "Corporation law is one such area." *Id.*; *see also Burks v. Lasker*, 441 U.S. 471, 478 (1979) ("Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute.").

In any event, in resolving whether a claim is direct or derivative, federal law aligns with Delaware law. *Franchise Tax Bd. of Cal. v. Alcan Aluminum, Ltd.*, 493 U.S. 331, 336–37 (1990) (holding that only "shareholder[s] with a direct, personal interest in a

cause of action," rather than "injuries [that] are entirely derivative of their ownership interests" in a corporation, can bring actions directly").[2]

The leading Delaware decision as to whether claims are direct or derivative is *Tooley v. Donaldson Lufkin & Jenrett, Inc.*, 845 A.2d 1031 (Del. 2004). There, the Delaware Supreme Court held that the two core questions relevant to distinguishing between direct and derivative claims are "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)." *Id.* at 1033.

With respect to the first prong of *Tooley*—who suffered the alleged harm, "claims of corporate overpayment are treated as causing harm solely to the corporation, and thus, are regarded as derivative." *Gentile v. Rosette*, 906 A.2d 91, 99 (Del. 2006); *J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 818 (Del. Ch. 2005) (claim for corporate overpayment is derivative). Both shareholders and the company may be harmed by a single transaction, but the relevant question in determining if a shareholder has a direct claim is whether "an injury is suffered by the shareholder that is not dependent on a prior injury to the corporation." *Agostino v. Hicks*, 845 A.2d 1110,

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[2] Shareholders' claims concerning Fannie Mae and Freddie Mac are governed by Delaware and Virginia law, respectively, because their corporate charters so designate. *Roberts v. Fed. Hous. Fin. Agency*, 889 F.3d 397, 408–09 (7th Cir. 2018).

1122 (Del. Ch. 2004); *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1260 (Del. 2016) (relevant question is whether the stockholder "can prevail without showing an injury to the corporation") (quoting *Tooley*, 845 A.2d at 1039).

Of course, shareholders are, in some sense, always adversely affected by corporate overpayments, as overpayments reduce the value of shareholders' interest in the company. But, such "dilution in value of the corporation's stock … is merely the unavoidable result … of the reduction in value of the entire corporate entity." *Gentile*, 906 A.2d at 99. Such a harm, although real, is derivative.

The *Tooley* framework governs whether the claims here are direct or derivative.[3]

3. The Claims Here Are Derivative.

The court of appeals' analysis began, correctly, by holding, consistent with *Tooley*, that "[t]o decide whether" the shareholders' claims are derivative, "we begin with the cause of action." App., 27a.

The court of appeals then pointed to the APA's language affording a remedy to "[a] person suffering legal wrong … or adversely affected or aggrieved by agency action." *Id.* (quoting 5 U.S.C. § 702). The court reasoned that because shareholders suffered an "injury in fact" and are "within the zone of interests"

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[3] The law of Virginia, the state in which Freddie Mac is incorporated, is consistent with *Tooley*. *See Simmons v. Miller*, 544 S.E.2d 666, 674 (Va. 2001).

of the APA, that therefore, their claim "is a direct claim." *Id.* 28a–29a. The court of appeals did not mention, let alone apply, the *Tooley* framework to resolve whether the APA claims are direct or derivative.

The court of appeals erred by failing to recognize that the mere fact that a shareholder meets the basic requirements for alleging an "injury in fact" does not resolve whether the shareholder's claim is direct or derivative. Delaware law affords standing to shareholders to bring derivative lawsuits in part because a shareholder's "status as a shareholder provides an interest and incentive to obtain legal redress for the benefit of the corporation." *Alabama By-Products Corp. v. Ede & Co. ex. Rel. Shearso*, 657 A.2d 254, 265 (Del. 1995). The equitable standing rule for derivative actions "recognize[s] the truth that the stockholders are *ultimately* the only beneficiaries; that their rights are really, though indirectly, protected by remedies given to the corporation …." *Schoon v. Smith*, 953 A.2d 196, 201 n.10 (Del. 2008) (quotation omitted; emphasis in original).

Hence, all shareholders who assert derivative claims meet the minimum requirement of "injury in fact"; that is the injury that confers them standing to sue derivatively. However, that shareholders suffer, indirectly at least, some minimal "injury in fact" whenever the corporation suffers an injury cannot mean that shareholders always have a direct claim whenever their interests are negatively affected. Were that the case, derivative claims could always be converted to direct claims. *Tooley* and other abundant authority confirm that a shareholder

showing an injury-in-fact, in the abstract, isn't enough to establish a direct claim; the shareholder must show an injury that is *distinct from the injury to the company*, or that a contract or statute specifically affords a remedy to the shareholder, *to the exclusion of the company*. The APA, however, confers no right or cause of action specifically on shareholders. Instead, it merely states a general injury-in-fact requirement. That is not the same as a statute that, by its terms, confers a remedy specifically upon shareholders. *Cf. Citigroup Inc. v. AHW Inv. P'ship,* 140 A.3d 1125, 1140 (Del. 2016).

In short, because there is no express statutory provision in the APA affording shareholders the right to challenge actions that primarily affect the corporation, *Tooley* provides the relevant framework for resolving whether the shareholders' APA claims are direct or derivative.

Turning to the first prong of *Tooley,* the injury shareholders allege is that through the Third Amendment, the GSEs' profits were diverted permanently to the Government. The property the Government took through the Third Amendment was, specifically, the GSEs' future net earnings. The Third Amendment no doubt indirectly adversely affected Fannie's and Freddie's shareholders, but such effects were the "unavoidable result" of the reduction in value to the GSEs that occurred as a result of the Government taking all of the GSEs' future net profits. The injury occurred to the GSEs, which are the entities that paid the money over to the Government as required by the Third Amendment. Had the GSEs not been required by the Third Amendment to pay all their net profits to the

Government, the shareholders would not have been injured. Because the shareholders' injuries are dependent upon the prior injury to the GSEs, their claims are derivative.

With respect to the second prong of *Tooley*—who would receive the benefit of any recovery—the recovery here would flow to the GSEs since the GSEs are the entities which paid the net worth sweep to the Government.

Two courts of appeal have held, contrary to the court of appeals here, that the shareholders' claims predicated on the Third Amendment are derivative.

The Seventh Circuit in *Roberts* observed that shareholders' complaint was that "the net worth dividend illegally dissipated corporate assets by transferring them to the Treasury," which is a "classic derivative claim[]." 889 F.3d at 409. The essential harm described in *Roberts* is the same as here: the Third Amendment unlawfully transferred the GSEs' assets to the Government.

The D.C. Circuit reached a similar conclusion with respect to shareholders' claim for breach of fiduciary duty. *Perry Capital LLC ex rel. Inv. Funds v. Mnuchin*, 864 F.3d 591, 626–27 (D.C. Cir. 2017). That court, applying *Tooley*, emphasized the remedies the shareholders sought, including rescission of the Third Amendment and a declaration that the Third Amendment was not in the best interests of the GSEs was relief that would accrue directly to the GSEs, not their shareholders. *Id.*

The decisions of the Seventh and D.C. Circuits were correct and applied the proper analytical framework. The court of appeals' decision below is in error.

B. HERA's Succession Clause Does Not Bar Shareholder Derivative Claims Where FHFA Faces a Manifest Conflict of Interest.

Proceeding from the premise that the shareholders' claims are derivative—a proposition with which *amici* agree—the Government argues those derivative claims are barred by the "succession clause" of HERA, 12 U.S.C. § 4617(b)(2)(A)(i). The Government argues that this clause abrogates background principles of corporate law and categorically precludes all derivative suits on behalf of Fannie and Freddie regardless of how serious a conflict of interest the FHFA faces in deciding whether to bring suit. The Government is wrong.

1. The Structure of HERA Reflects that Derivative Suits Are Permitted Where FHFA Faces a Manifest Conflict of Interest.

When Congress enacted HERA, it did not write on a blank slate. Instead, HERA borrows directly from a substantively identical provision of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA").

FIRREA provides that the FDIC:

> *shall, as conservator or receiver, and by operation of law, succeed to … all rights, titles, pow-*

> *ers, and privileges* of the insured depository institution, and *of any stockholder*, member, accountholder, depositor, officer, or director of such institution *with respect to* the institution and *the assets of* the institution.

12 U.S.C. § 1821(d)(2)(A)(i) (emphasis added).

HERA's succession clause provides that FHFA:

> *shall, as conservator or receiver, and by operation of law, … succeed to … all rights, titles, powers, and privileges of* the regulated entity, and of *any stockholder*, officer, or director of such regulated entity with *respect to* the regulated entity and *the assets of* the regulated entity.

12 U.S.C. § 4617(b)(2)(A)(i) (emphasis added).

HERA's succession clause is substantively identical to FIRREA's succession clause. A few words are changed to identify the parties to whom the clause applies—HERA, for example, refers to the "regulated entity" (i.e., Fannie Mae and Freddie Mac), while FIRREA referred to an "insured depository institution." But, as reflected in the emphasized statutory provisions quoted above, the *substance* of the succession clause in the two statutes is identical, word-for-word.

Critically, at the time Congress enacted HERA, FIRREA's succession clause did *not* displace existing corporate law pursuant to which shareholders may maintain derivative suits where the company's

managers or directors face a manifest conflict of interest.

The leading case is a landmark Federal Circuit decision, *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1282–84 (Fed. Cir. 1999). There, a bank shareholder alleged the FDIC had breached contracts with the bank and committed unconstitutional takings by raising bank capital requirements during receivership beyond the levels to which the FDIC had previously agreed. The Court of Federal Claims held that FIRREA's succession clause precluded shareholders from maintaining any derivative claims. *Id.* at 1294. The Federal Circuit reversed, holding that where the FDIC faces a manifest conflict of interest in deciding whether to sue, shareholders may maintain a derivative suit notwithstanding FIRREA's succession clause. The court explained:

> We agree with the Court of Federal Claims that, as a general proposition, the FDIC's statutory receivership authority includes the right to control the prosecution of legal claims on behalf of the insured depository institution now in its receivership. However, the very object of the derivative suit mechanism is to permit shareholders to file suit on behalf of a corporation when the managers or directors of the corporation, perhaps due to a conflict of interest, are unable or unwilling to do so, despite it being in the best interests of the corporation.

Id. at 1295. The Federal Circuit found that such a manifest conflict of interest existed because "FDIC

was asked to decide on behalf of the depository institution in receivership whether it should sue the federal government based upon a breach of contract, which, if proven, was caused by the FDIC itself." *Id.*

First Hartford reflects established law under FIRREA. The Ninth Circuit reached the same conclusion prior to the enactment of HERA in *Delta Savings Bank v. United States*, 265 F.3d 1017, 1022–24 (9th Cir. 2001) (permitting derivative suit notwithstanding FIRREA succession clause given "significant and manifest" conflict of interest FDIC faced in bringing lawsuit "against one of its closely-related, sister agencies") *In re Fed. Home Loan Mtg. Corp. Deriv. Litig.*, 643 F. Supp. 2d 790, 797–98 (E.D. Va. 2009) (recognizing conflict of interest exception but finding no conflict); *Branch v. FDIC*, 825 F. Supp. 384, 404–05 (D. Mass. 1993) (FIRREA "does not alter the settled rule that shareholders of failed national banks may assert derivative claims").

Although some courts have recognized that FIRREA's succession clause transfers to the FDIC the right to bring derivative claims *in general*,[4] no court has rejected *First Hartford's* holding that FIRREA preserved corporate law that permits shareholders to pursue derivative claims where the

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[4] *See*, *e.g.*, *Pareto v. FDIC*, 139 F.3d 696, 700–01 (9th Cir. 1998) (holding FIRREA's succession clause precludes derivative suits in general but declining to consider "what claims … interested parties may have against the FDIC should it commit some wrongdoing" because "[t]hat issue [was] not before [the court]").

entity managing the company (be it a board of directors, conservator, receiver, or someone else) faces a conflict of interest.

Congress copied the succession clause from FIRREA into HERA, and with it, adopted the established jurisprudence that the succession clause does not preclude derivative lawsuits in the event of a manifest conflict of interest. Had Congress intended to displace equitable principles underlying derivative claims and categorically preclude all derivative claims regardless of any conflict of interest, it could have done so in HERA. Congress chose not to. Congress's decision to borrow FIRREA's succession clause word-for-word is powerful evidence that Congress intended for HERA to be construed consistent with the established judicial construction of FIRREA. *Merrill Lynch Pierce Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006) ("[W]hen judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates … the intent to incorporate its … judicial interpretations as well.") (internal quotations omitted).[5]

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[5] The Government argues (Gov. Br. 32) that "Congress's failure to overturn an intermediate court's erroneous interpretation of a statute does not demonstrate that Congress meant to ratify that error." The case upon which it relies for this argument, however, concerned an amendment to an existing statute, not Congress's decision to copy provisions from one statute to another. *See Cent. Bank, N.A. v. First Interstate Bank, N.A.,* 511 U.S.

2. HERA's Structure and Other Provisions Confirm that the Succession Clause Does Not Present an Absolute Bar to All Shareholder Claims.

Even aside from statutory context, the Government's construction of HERA's succession clause—leaving shareholders with zero rights—is untenable in light of the structure of HERA, as well as its other provisions. Multiple provisions of HERA confirm that § 4617(b)(2)(A) cannot categorically extinguish "all" shareholders' rights. For example, HERA expressly provides that stockholders retain important economic rights, including rights to future distributions and to participate in a statutory claims process regarding the GSEs' residual assets. *See* 12 U.S.C. § 4617(b)(2)(K)(i); 12 U.S.C. § 4617(c)(1). If HERA transferred "all" stockholder "rights, titles, powers and privileges" to FHFA without exception

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164, 186 (1994). Moreover, the Government's argument that *First Hartford* and *Delta Savings* did not establish a "settled meaning" of FIRREA again is not supported by the case upon which the Government relies, *Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553 (2017). In *Lightfoot*, the prior decisions construing statutory language "did not speak to" the interpretive question or contained only "brief, ambiguous statements" concerning the statute. *Id.* at 563–64. In contrast, here, *First Hartford* and *Delta Savings* addressed head-on the precise language that Congress copied from FIRREA to HERA. There is ample basis to infer Congress intended the two states to be construed consistently.

(which it did not), then the stockholders' rights to residual assets would accrue to FHFA, and there would have been no need to include stockholders in any claims process. *See Branch*, 825 F. Supp. at 404–05 (analyzing similar terms of FIRREA to hold that "despite its strong language, [the succession clause of FIRREA] does not transfer all incidents of stock ownership").

Similarly, HERA expressly provides that during conservatorship, a "regulated entity" may sue "for an order requiring the Agency to remove itself as conservator." 12 U.S.C. § 4617(a)(5)(A). Since FHFA controls Fannie and Freddie during conservatorship and cannot sue itself, this provision would be meaningless if HERA transferred all of the GSEs' rights to FHFA.

3. Construing HERA to Bar All Derivative Claims Would Raise Serious Constitutional Issues.

Any construction of HERA that categorically wipes out all rights of shareholders would raise serious constitutional concerns because it would effectively preclude judicial review of constitutional violations. The Court has explained:

> [It is a] well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the "extraordinary" step of foreclosing jurisdiction unless Congress's intent to do so is manifested by "clear and convincing" evidence.

Califano v. Sanders, 430 U.S. 99, 109 (1977).

Applying this standard when faced with statutes that would render parties harmed by a constitutional violation without a forum in which to seek redress, the Court has consistently construed the statutes not to preclude such claims. *South Carolina v. Regan*, 465 U.S. 367, 380 (1984) (holding that despite Anti-Injunction Act's literal terms, it "cannot bar [an] action" if as a result, the party "will be unable to utilize any statutory procedure to contest the constitutionality of" the government action); *see also Bartlett v. Bowen*, 816 F.2d 695, 703 (D.C. Cir. 1987) ("[A] statutory provision precluding *all* judicial review of constitutional issues removes from the courts an essential judicial function under our implied constitutional mandate of separation of powers, and deprives an individual of an independent forum for the adjudication of a claim of constitutional right. We have little doubt that such a limitation … would be [an] unconstitutional infringement of due process.") (emphasis in original).

Notably, a decision the Government contends supports its position on the succession clause, *Perry Capital*, confirmed this important principle of statutory construction. The D.C. Circuit noted, in discussing HERA's "anti-injunction clause," that:

> [T]he [anti-injunction clause] only limits judicial remedies (barring injunctive, declaratory, and other equitable relief) after a court determines that the actions taken fall within the scope of statutory authority. *The Act does not prevent … constitutional claims (none are raised here) ….*

864 F.3d at 613–14 (emphasis added).

In excluding "constitutional claims" from the anti-injunction clause's scope, the D.C. Circuit was referring to prior decisions from the same court, in which it had held FIRREA's anti-injunction clause could not preclude remedies for constitutional violations. *Nat'l Trust for Historic Pres. v. FDIC*, 21 F.3d 469, 472 (1994). In that case, the court of appeals correctly held that although FIRREA's anti-injunction clause "bar[s] courts from restraining or affecting the exercise of powers or functions of the [FDIC] as a conservator or a receiver," an exception to that general rule must be made where the FDIC "*has acted or proposes to act beyond, or contrary to, its … constitutionally permitted … powers ….*" *Id.* at 470, 472 (*per curiam* opinion adopting concurrence of Wald, J. as part of opinion) (emphasis added). That holding, in turn, was based on the Court's decision in *South Carolina v. Regan*, discussed *supra*, in which this Court reiterated the principle that statutes should not be construed to deny remedies for constitutional violations.

The court of appeals in this case correctly recognized the same principle of statutory construction. It held, with respect to Count IV of the shareholders' complaint, in which the shareholders alleged that the structure of FHFA violated the U.S. Constitution, that different principles of statutory construction apply because "[o]nly a 'heightened showing' in the statute may be interpreted to 'deny any judicial forum for a colorable constitutional claim.'" App., 55a–56a (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)). Because the succession clause is devoid of any such express language reflecting legislative

intent to foreclose a constitutional claim, the court of appeals correctly decided that the succession clause did not bar the shareholders' claim challenging the constitutionality of the structure of FHFA. This Court should reaffirm that principle with respect to HERA's succession clause.

The Government argues that the succession clause's use of broad words such as "any" and "all" in providing that FHFA succeeds to "all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder," "leaves no room" for permitting derivative suits in any circumstances. Gov. Br. 29–30. The use of such terms, however, does not negate the importance of presumptions that guide statutory construction. For example, in *Small v. United States*, the Court considered whether a statute imposing criminal penalties on a person in possession of gun who was previously "convicted in any court" applied where the convictions were imposed by a foreign court. 544 U.S. 385, 388–89 (2005). The Court found that the statute did not apply to foreign convictions. Despite the statute's use of a broad phrase, "any court," the Court held the statute's terms did not overcome the presumption against extraterritorial application of statutes, given the lack of any clear statement in the statute providing for such application. *Id.*

Here, the presumption against the preclusion of judicial remedies for constitutional violations provides an even stronger reason to construe HERA not to eliminate all judicial remedies for such claims. HERA's terms, despite the use of the words "all" and "any," reflect no clear and convincing Congressional intent to preclude remedies for constitutional claims

such as the *amici's* takings and illegal exaction claims. *See also Bob Jones v. Simon*, 416 U.S. 725, 731, 746 (1974) (indicating that the Tax Injunction Act, which provides that "*no* suit for the purpose of restraining the assessment or collection of *any* tax shall be maintained in *any* court," could not be applied to preclude all "access..to judicial review" for a constitutional claim) (emphasis added; quotations omitted).

Moreover, even if HERA's succession clause were to meet the "heightened showing" required by *Webster*, the result would be that HERA would be unconstitutional as applied to the degree it completely forecloses any remedy for a constitutional claim.

Although this Court has suggested that foreclosing judicial review of constitutional claims may be possible upon a "clear and convincing" showing of Congressional intent, it has never found a statute to have met that standard. The Court has, however, suggested that if such a statute did meet that standard, the statute may then be unconstitutional if it precludes access to any judicial review. *Bob Jones*, 416 U.S. at 746 ("This is not a case in which an aggrieved party has no access at all to judicial review. Were that true, our conclusion [that the statute is constitutional] might well be different."); *Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 671 n.12 (1986) ("Our disposition avoids the serious constitutional question that would arise if we construed § 1395ii to deny a judicial forum for constitutional claims….") (quotations omitted); *Webster*, 46 U.S. at 603 ("We require this heightened showing in part to avoid the

serious constitutional question that would raise if a federal statute were construed to deny any judicial forum for a colorable constitutional claims.") (quotations omitted). As the D.C. Circuit observed in *Bartlett*:

> It has become something of a time-honored tradition for the Supreme Court and lower federal courts to find that Congress did not intend to preclude altogether judicial review of constitutional claims in light of the serious due process concerns such preclusion would raise. These cases recognize and seek to accommodate the venerable line of Supreme Court cases that cast doubt on the constitutionality of congressional preclusion of judicial review of constitutional claims.

816 F.2d at 699. Although this Court has never resolved the issue, lower courts and commentators agree that whatever power Congress may have to restrict the jurisdiction of particular courts, it cannot, consistent with due process, preclude *all* judicial review for a constitutional violation. *Id.* at 703 ("[A] statutory provision precluding *all* judicial review of constitutional issues removes from the courts an essential judicial function under our implied constitutional mandate of separation of powers, and deprives an individual of an independent forum for the adjudication of a claim of constitutional right. We have little doubt that such a 'limitation on the jurisdiction of *both* state and federal courts to review the constitutionality of federal [action] would be [an] unconstitutional' infringement of due process.") (emphasis in original) (quoting M. Reddish, FEDERAL JURISDICTION:

TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 7-34 (1980)); *Battaglia v. General Motors*, 169 F.2d 254, 257 (2d Cir. 1948) ("[W]hile Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not exercise that power so as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation."); P.R. Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895, 921 n.113 (1984) ("[A]ll agree that Congress cannot bar all remedies for enforcing federal constitutional rights."); J. Nowak, R. Rotunda & J. Young, CONSTITUTIONAL LAW 41 (3d ed. 1986) ("[U]nder the due process clause of the fifth amendment Congress may not exercise Article III power over the jurisdiction of the courts in order to deprive a party of a right created by the Constitution.").

In short, Congress may not insulate the federal government from liability for illegal exactions and takings without just compensation in violation of the Fifth Amendment of the U.S. Constitution by precluding all judicial review of such claims. Permitting the Government to transfer to itself the conflicted decision whether to pursue the constitutional claims against the Government arising from the Third Amendment would effect this impermissible outcome. It would negate by statute rights guaranteed by the Constitution. This, Congress may not do.

* * *

In sum, the text, structure, and legislative history underlying HERA make clear that its "succession clause" does not bar shareholder derivative claims when there is a conflict of interest. And were this Court to hold that HERA does bar derivative claims under these circumstances, it would render HERA's succession clause unconstitutional as applied to *amici's* takings and illegal exaction claims.

Therefore, in deciding the import of HERA's succession clause, the Court should not construe the clause in a way that would preclude judicial remedies for constitutional claims.

CONCLUSION

For these reasons, the Court should decide that shareholder claims arising from the Third Amendment are derivative in nature and that they are not barred by HERA's succession clause.

Respectfully submitted,

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