NOS. 19-422 & 19-563

In the

Supreme Court of the United States

PATRICK J. COLLINS, ET AL.,
Petitioners,

v.

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

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

v.

PATRICK J. COLLINS, ET AL.,
Respondents.

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

BRIEF FOR COURT-APPOINTED *AMICUS CURIAE*

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Court-Appointed Amicus Curiae

October 16, 2020

QUESTION PRESENTED

Whether the structure of the Federal Housing Finance Agency violates the separation of powers.

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INTEREST OF *AMICUS CURIAE*

On August 17, 2020, the Court invited Aaron L. Nielson to brief and argue in support of the position that the Federal Housing Finance Agency's (FHFA) structure does not violate the separation of powers.[1]

INTRODUCTION

Faced with perhaps the most powerful unelected official in the history of the United States, the Court last Term in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), held that the structure of the Consumer Financial Protection Bureau (CFPB) violates the separation of powers. In so holding, however, the Court noted that the FHFA is different. The Court granted review here to determine whether the distinct features of the FHFA have constitutional significance. In at least three independent respects, *Seila Law* supports the lawfulness of the FHFA's structure.

First, *Seila Law* recognizes the distinction between acting directors and Senate-confirmed directors. *See id.* at 2208. There, the Court addressed a decision made by a CFPB Director with protection from removal. Here, by contrast, an FHFA *Acting* Director made the challenged decision. The Fifth Circuit premised its separation-of-powers holding on its view that the FHFA Director's "removal restriction applied to the Acting Director." Pet.App.59a. Yet text,

[1] No counsel for any party authored this brief in whole or in part, and no entity or person aside from *amicus curiae* and his university has made a monetary contribution toward its preparation or submission. Consistent with the Court's order, this brief does not address issues unrelated to the FHFA's structure or issues of standing or remedy except where relevant to the merits of the separation-of-powers arguments.

context, and common sense all confirm that an FHFA Acting Director is removable at will by the President. Thus, properly interpreted, the only portion of the FHFA's structure at issue here is indisputably consistent with the separation of powers.

Second, even if the FHFA Director's tenure protection were relevant, this case would still be different from *Seila Law*. There, the Court confronted an official who could "bring the coercive power of the state to bear on millions of private citizens" without meaningful presidential control. 140 S. Ct. at 2200. Here, the FHFA does not regulate ordinary private citizens at all. Instead, it oversees a handful of federally chartered entities. And even for them, the FHFA's authority is limited. As the Court explained in *Seila Law*, the FHFA does not regulate "purely private actors" and has no "authority remotely comparable to that exercised by the CFPB." *Id.* at 2202.

And third, the Court in *Seila Law* confronted an official whom the President could only remove for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. §5491(c)(3). Again, the FHFA is different. The FHFA Director serves for five years unless removed "for cause by the President." 12 U.S.C. §4512(b)(2). Because "cause" is a broad term, this statute is a modest restriction. In fact, this statute can be read to allow removal based on policy disagreement with the President, and *must* be read that way if necessary to avoid constitutional concerns.

The FHFA's structure is thus constitutional by any measure. The President's charge to "take Care that the Laws be faithfully executed," U.S. Const. art. II, §3, cannot be frustrated by an agency like the

FHFA that exercises very little executive power and whose Director can be fired by the President for not executing the law as the President believes it should be faithfully executed. If the Court were to hold that the FHFA's structure violates the Constitution, moreover, the repercussions would extend far beyond this case. Other features of the Federal Government—including the Federal Reserve and the Civil Service—would also be vulnerable to attack. Nothing in *Seila Law* requires such dramatic upheaval.

STATEMENT OF THE CASE

A. Statutory Background

The United States housing market crashed in 2007. J.A.45.[2] "That downturn pushed two central players in the United States' housing mortgage market—the Federal National Mortgage Association ('Fannie Mae' or 'Fannie') and the Federal Home Loan Mortgage Corporation ('Freddie Mac' or 'Freddie')—to the brink of collapse." *Perry Cap. LLC v. Mnuchin*, 864 F.3d 591, 598 (D.C. Cir. 2017).

In response to this financial crisis, President Bush and Congress worked together to enact the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (Recovery Act), which created the FHFA and tasked it with ensuring the safety and soundness of Fannie, Freddie, the eleven Federal Home Loan Banks (FHLBs), and the Office of Finance of the Federal Home Loan Bank System (collectively, the Government-Sponsored Entities or GSEs). *See* 12

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[2] The Joint Appendix is designated "J.A." and cites to the Petition Appendix ("Pet.App.") refer to No. 19-563. This statement of the case focuses on the separation-of-powers issue.

U.S.C. §§4511, 4502(20). The FHFA replaced the Office of Federal Housing Enterprise Oversight (for Fannie and Freddie) and the Federal Housing Finance Board (for the FHLBs).

The GSEs are "not purely private actors." *Seila Law*, 140 S. Ct. at 2202. "Congress established the Federal Home Loan Bank system in 1932 as a government sponsored enterprise to support mortgage lending and related community investment activity in the wake of the Great Depression." FDIC, *Affordable Mortgage Lending Guide, Part III: Federal Home Loan Banks* (2017), https://tinyurl.com/AMLGFDIC. Congress chartered Fannie in 1938 and opened it to investors in 1968. J.A.44. Congress chartered Freddie in 1970 and opened it to investors in 1989. *Id.*

Fannie and Freddie serve "important public missions," 12 U.S.C. §4501(1), including providing "stability" to the mortgage market, *id.* §1716(1), and supporting "low- and moderate-income" housing, especially in "underserved" areas, *id.* §1716(3)–(4); *see also* 12 U.S.C. §1451 note. Thus, although Fannie and Freddie are not themselves governmental, they exist to further "governmental objectives." *Herron v. Fannie Mae*, 861 F.3d 160, 167–68 (D.C. Cir. 2017). To achieve those objectives, they purchase mortgages and either hold or repackage them as mortgage-related securities. J.A.44. Fannie and Freddie are limited to that role and can never originate loans or enter into other forbidden transactions. *See, e.g.*, 12 U.S.C. §§1454(a)(5), 1719(a)(2).

The FHFA Director is "appointed by the President … with the advice and consent of the Senate." 12 U.S.C. §4512(b)(1). The Director serves for five years unless removed by the President "for cause." *Id.* §4512(b)(2). In the event of a vacancy, the President may appoint a deputy director to serve as Acting Director. *Id.* §4512(f). The President can also use the Federal Vacancies Reform Act to choose from the Director's first assistant, certain other FHFA officials, or anyone in a Senate-confirmed position. *See* 5 U.S.C. §3345(a); Office of Legal Counsel, U.S. Dep't of Justice, *Designating an Acting Director of the Federal Housing Finance Agency*, 2019 WL 6655656, at *7 (Mar. 18, 2019). Nothing in the Recovery Act says an Acting Director can be removed only "for cause."

The FHFA has two distinct types of authority. Especially relevant here, one is to act as conservator or receiver of the GSEs. In these roles, the FHFA "steps into the shoes" of an entity, *cf. O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86 (1994), succeeding to its "rights, titles, powers, and privileges," in order "to put the regulated entity in a sound and solvent condition" or "wind[] up [its] affairs" as appropriate, 12 U.S.C. §§4617(a)(2), (b)(2)(D), & (b)(2)(A). It also has "such incidental powers as shall be necessary to carry out such powers." *Id.* §4617(b)(2)(J).

The FHFA is also a financial safety and soundness regulator for the GSEs and their "entity-affiliated part[ies]." *Id.* §4502(11). In this role, the FHFA may conduct examinations of the GSEs, *id.* §4517, and order them to cease and desist from "unsafe or unsound practice[s]," *id.* §4631(a)(1). Among other things, it may require reports, *e.g.*, *id.* §§1456(e)–(f), 1723a(m)–(n), 4514, 4547(d), and housing plans, *id.* §4566(c). If a GSE fails to comply, the FHFA may issue penalties, *e.g., id.* §§4585, 4636, and judicial review is available, *id.* §§4583, 4634.

The Federal Housing Finance Oversight Board (FHFOB) oversees the FHFA and advises the Director in setting the FHFA's "strategies and policies." *Id.* §4513a(a). The FHFOB consists of the Secretary of the Treasury, the Secretary of Housing and Urban Development, the Chairman of the Securities and Exchange Commission, and the FHFA Director. *Id.* §4513a(c). Although its guidance is nonbinding, the Recovery Act requires the FHFOB to meet at least quarterly, *id.* §4513a(d), and to testify annually to Congress about the GSEs' "safety and soundness," "operations," "status," and efforts "in carrying out their respective missions," as well as the FHFA's own "operations, resources, and performance" and "fulfillment of its mission." *Id.* §4513a(e).

The FHFA's budget comes from assessments on the GSEs that cannot "exceed[] … reasonable costs (including administrative costs) and expenses of the Agency." *Id.* §4516(a). The Comptroller General of the United States audits the FHFA and issues a public report about its finances. *Id.* §4516(h).

B. Factual Background

The first FHFA Director, James Lockhart, placed Fannie and Freddie into conservatorships in September 2008. The next day, the U.S. Treasury Department (Treasury) committed $100 billion to each through Preferred Stock Purchase Agreements (PSPAs). Pet.App.13a. In exchange, Fannie and Freddie promised Treasury: (1) senior liquidation preferences; (2) "a dollar-for-dollar increase in that preference each time [Fannie or Freddie] drew on the capital commitment"; (3) a right to fixed dividends; (4) warrants to acquire 79.9% of their stock; and (5) periodic commitment fees. Pet.App.13a–14a. The PSPAs forbade dividends absent Treasury's consent. Pet.App.14a.

"It quickly became clear, however, that Fannie and Freddie were in a deeper financial quagmire than first anticipated" and "would require even greater capital infusions by Treasury." *Perry*, 864 F.3d at 601. Treasury and the FHFA thus entered into the First Amendment in May 2009 in which Treasury pledged to double its funding. Pet.App.14a.

In August 2009, Lockhart resigned, and President Obama selected Edward DeMarco, a deputy director, as the Acting Director. In December 2009, Treasury and the FHFA entered into the Second Amendment, and Treasury made even more funds available. The Second Amendment, however, also proved insufficient. "As of August 2012, [Fannie and Freddie] had drawn approximately $187 billion from Treasury's funding commitment," but they often had "lacked the cash to pay [the fixed] dividends." Pet.App.14a.

Accordingly, in August 2012, Treasury and Acting Director DeMarco agreed to the Third Amendment (or Net Worth Sweep) that suspended the periodic commitment fee and replaced the fixed dividend with a variable one. J.A.234. After January 1, 2013, Fannie and Freddie pay a dividend equal to the amount—*if any*—by which their net worth exceeds a capital buffer. Pet.App.14a–15a. In exchange, when their quarterly net worth is positive, that amount must be paid to Treasury as a dividend. *Id.*

In 2013, after the FHFA agreed to the Third Amendment, the Senate confirmed Mel Watt as Director. When Watt's term ended, President Trump used the Vacancies Act to designate Comptroller of the Currency Joseph Otting as Acting Director. In April 2019, the Senate confirmed Mark Calabria as Director. *See Rop v. FHFA*, 2020 WL 5361991, at *5 (W.D. Mich. Sept. 8, 2020) (detailing history).

C. This Litigation

In October 2016, Patrick Collins, Marcus Liotta, and William Hitchcock (Private Petitioners) brought three statutory claims. They alleged that the FHFA, as "conservator," J.A.24, exceeded its authority by agreeing to the Third Amendment, that Treasury also exceeded its authority, and that Treasury acted arbitrarily and capriciously. J.A.108–116. Relevant to the constitutional issue here, they filed a fourth claim alleging that the Third Amendment is invalid and should be vacated because it "was adopted by FHFA when it was headed by a single person who was not removable by the President at will." J.A.117.

The district court dismissed their statutory claims and granted summary judgment to FHFA on the constitutional claim, explaining that "when viewed in light of the agency's overall structure and purpose," the FHFA Director's tenure "does not impede the President's ability to … take care that the laws are faithfully executed." Pet.App.267a. A Fifth Circuit panel affirmed dismissal of the statutory claims but reversed as to the constitutional claim. Pet.App.213a. Rather than invalidating the Third Amendment, the panel "str[uck] the language providing for good [*sic*] cause removal." Pet.App.215a. Chief Judge Stewart dissented from the constitutional holding, emphasizing the President's ability to "oversee the goings-on of the FHFA." Pet.App.221a.

In September 2019, the en banc Fifth Circuit affirmed in part. In a majority opinion by Judge Willett, the court reversed the district court's dismissal of the statutory claim against the FHFA but affirmed as to Treasury. As to the constitutional claim, the court found standing despite "the President's undisputed control over FHFA's counterparty, Treasury," because "standing does not require proof that an officer would have acted differently in the 'counterfactual world' where [the FHFA Acting Director] was properly authorized." Pet.App.53a (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 512 n.12 (2010)).

For reasons stated in the panel decision, the court also held that the FHFA's structure violates the separation of powers because "[a] single agency director … is more difficult for the President to influence" than a "multi-member body of experts." Pet.App.56a. Critical to this holding, the court reasoned that because the FHFA is an "independent agency," the Director's tenure provision must apply to the Acting Director. Pet.App.58a–59a. The court also stated that even if a "for cause" provision may provide weaker protection than what some other agencies enjoy, it is still "an independent agency's threshold feature," Pet.App.57a, and that the Third Amendment was an exercise of executive power, Pet.App.61a.

Judge Higginson, on behalf of four judges, dissented because "the FHFA's conservatorship function" is hardly "near the heart of executive power."

Pet.App.126a. He also explained that "for cause" as used in the Recovery Act may "'confer the weakest protection'" in removal law and that a court should not "base a momentous constitutional ruling on the expected effects of a statutory provision no one has made the effort to construe." Pet.App.114a, 125a n.15 (quoting Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 Cornell L. Rev. 769, 788 (2013)).

Dissenting on standing grounds, Judge Costa (joined by Judge Higginson) disagreed that an Acting Director has tenure protection. Pet.App.128a–132a. Indeed, Judge Costa ventured that "none of the numerous other statutory challenges to the Net Worth Sweep that courts of appeals have decided included the constitutional claim" because this threshold issue is so straightforward. Pet.App.131a–132a. He also stressed Treasury's direct involvement in the Third Amendment. Pet.App.133a.

A different majority led by Judge Haynes concluded that the remedy for the constitutional violation was "to sever the 'for-cause' restriction on removal" but not disturb the Third Amendment. Pet.65a. That majority felt it would be inappropriate to "wipe out an action approved or ratified by two different Presidents' directors under the guise of respecting the presidency." Pet.App.71a.

Both Private Petitioners and the United States petitioned for certiorari—the United States as to the statutory claim against the FHFA and Private Petitioners as to the constitutional remedy.

D. *Seila Law* and its Aftermath

Nearly ten months after the en banc decision, this Court decided *Seila Law*. The Court held that the CFPB's structure violates the separation of powers because its Director "wield[ed] significant executive power," 140 S. Ct. at 2192, yet the President could only remove the Director for "'inefficiency, neglect of duty, or malfeasance in office,'" *id.* at 2193 (quoting 12 U.S.C. §5491(c)). That standard has long been understood to prevent policy-based dismissal. *See id.* at 2206 (citing *Humphrey's Executor v. United States*, 295 U.S. 602, 619, 625–26 (1935)).

The Court based its decision on constitutional structure and history. *Id.* at 2192. As to structure, the Court reasoned that the President could not "meaningfully control[]" the CFPB's ability to "bring the coercive power of the state to bear on millions of private citizens." *Id.* at 2200, 2203. And as to history, the Court noted that the CFPB was *sui generis*. The Court distinguished the Comptroller of the Currency (Comptroller), Office of the Special Counsel (OSC), the Social Security Administration (SSA), and the FHFA. *Id.* at 2201–02. The Court observed that the FHFA "regulates primarily Government-sponsored enterprises, not purely private actors," and that the FHFA, OSC, and SSA "do not involve regulatory or enforcement authority remotely comparable to that exercised by the CFPB." *Id.* at 2022.

Shortly afterwards, the Court granted certiorari and, due to the position taken by the United States, appointed *amicus curiae* to argue "that the structure of the Federal Housing Finance Agency does not violate the separation of powers."

SUMMARY OF ARGUMENT

I. This case is the opposite of *Seila Law* in a critical respect. There, the CFPB Director made the challenged decision. Here, an FHFA Acting Director did. For many reasons, the Court should hold that the President can remove an FHFA Acting Director at will. The Fifth Circuit, however, premised its constitutional holding on its conclusion that the FHFA Director's tenure provision extends to the Acting Director. Because that conclusion was erroneous, this Court should reverse the Fifth Circuit's holding. Private Petitioners also argued below that even if an Acting Director is removable at will, the Third Amendment should still be vacated. That too is mistaken.

II. The Fifth Circuit's decision conflicts with *Seila Law*'s "significant executive power" analysis. 140 S. Ct. at 2192. The CFPB regulates millions of private citizens. By contrast, the FHFA's authority only extends to a handful of "not purely private actors." *Id.* at 2202. As this case shows, moreover, one of the FHFA's most important roles is to act as conservator. Conservatorship, however, does not implicate executive power. And to the extent that the FHFA does exercise executive power, it cannot do so in a way that threatens liberty because ordinary private parties do not fall within its jurisdiction. Examples from as early as 1790 demonstrate that Congress has greater flexibility to structure agencies that do not exercise coercive power over private citizens.

III. The Fifth Circuit's decision also departs from *Seila Law* in another important respect: "For cause" is not the same as "inefficiency, neglect, or malfeasance." Under any plausible interpretation, the Recovery Act provides only modest tenure protection to the FHFA Director. Accordingly, the fact that the Director *both* wields little executive power *and* enjoys modest tenure protection further confirms that the FHFA's structure is constitutional. And although the Court need not reach the issue, the Director's "for cause" tenure provision can be read to allow termination for failing to execute the law as the President sees fit, even for discretionary policies. It therefore follows that the Recovery Act allows the President to faithfully discharge his duties under the Take Care Clause.

IV. Finally, a holding that the FHFA's structure violates the separation of powers would have far-reaching effects. Plaintiffs could target other single-headed agencies and even multimember agencies like the Federal Reserve with chairs who are separately nominated by the President and confirmed by the Senate. Career civil servants, including many in leadership roles, also are not removable at will. Accordingly, unless the Court—correctly—(i) limits the officials covered by *Seila Law* to those who exercise more authority than the FHFA Director or (ii) holds that this "for cause" tenure provision does not offend Article II, federal courts should expect many more separation-of-powers challenges that follow the blueprint from this litigation.

ARGUMENT

I. THE PRESIDENT CAN REMOVE AN FHFA ACTING DIRECTOR AT WILL.

Private Petitioners urge the Court to vacate the Third Amendment "because [it] was adopted by FHFA when it was headed by a single person who was not removable by the President at will." J.A.117. Yet the

Third Amendment was adopted by *Acting* Director DeMarco whom the President could remove at will. Nonetheless, the Fifth Circuit concluded that an Acting Director has the same tenure protection as a Senate-confirmed Director. Pet.App.59a. Because that conclusion is incorrect, the Court should reverse the Fifth Circuit's constitutional holding.[3]

A. An Acting Director Is Removable At Will.

The Recovery Act states that "[t]he Director shall be appointed for a term of 5 years, unless removed before the end of such term for cause by the President." 12 U.S.C. §4512(b)(2). By contrast, the Acting Director does not have a term at all. Instead, he or she serves until (1) "the return of the Director" or (2) "the appointment of a successor." *Id.* §4512(f). Accordingly, as the FHFA has argued at every stage of this litigation, the Recovery Act does not provide *any* tenure protection to an Acting Director.

As Judge Costa explained below, "'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.'"

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[3] Although Judge Costa treated the issue as one of standing, Pet.App.129a, the removability of an FHFA Acting Director is also a merits issue about the FHFA's structure. *See, e.g.*, *Rop*, 2020 WL 5361991, at *4 ("Plaintiffs' claims require the Court to examine the structure of the FHFA and the office of the person who directed it at the time of the Third Amendment."); *id.* at *26. The Court, of course, is free to reach this threshold question. *See, e.g.*, *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 56 (2006) ("[G]ranting certiorari to determine whether a statute is constitutional fairly includes the question of what that statute says.").

Pet.App.129a (quoting *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002)). That each subsection "ends with a period [also] strongly suggest[s] that each may be understood completely without reading any further." *Jama v. ICE*, 543 U.S. 335, 344 (2005). And the fact that "[t]he removability restriction appears in the *same* section as the appointment of a confirmed director" confirms that Congress specifically tied the "for cause" provision only to a Senate-confirmed Director. Anne Joseph O'Connell, *Actings*, 120 Colum. L. Rev. 613, 691 (2020) (emphasis in original).

The Fifth Circuit's holding is erroneous for at least four additional reasons. First, context confirms that the FHFA's own reading of the Recovery Act is correct. As Judge Costa reported, until this decision, "[n]o authority has ever read in tenure protection for acting officials not subject to Senate confirmation." Pet.App.130a. That is because unless "Congress indicates in the legislation itself that it intends some measure of job protection during the holdover period … there is no reason at all to infer a congressional purpose to limit the President's removal power." *Swan v. Clinton*, 100 F.3d 973, 990 (D.C. Cir. 1996) (Silberman, J., concurring); *cf. Cafeteria & Rest. Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 896 (1961) (explaining the "settled principle" that "in the absence of legislation," removal is "at the will of the appointing officer").

Second, the traditional practice is that "the President may designate agency chairs and may remove agency chairs at will from their positions as chairs." *PHH Corp. v. CFPB*, 881 F.3d 75, 189 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting); *see* *also id.* at 189 n.15 (examples). Thus, the fact that Congress allowed "the President [to] *designate*" an "Acting Director," 12 U.S.C. §4512(f) (emphasis added), demonstrates that the President's power here follows the ordinary rule allowing at-will removal.

Third, a contrary decision would needlessly raise constitutional concerns. Since 1789, Congress has witnessed sharp disagreements over where the line falls between constitutional and unconstitutional tenure protections. Congress presumably is more willing to test that line for someone the Senate can reject. Accordingly, inferring tenure protection for an Acting Director would violate both the cardinal rule that courts should "avoid constitutional difficulties, not create them," Pet.App.131a, and the separate rule that Congress must clearly communicate its intention when enacting removal restrictions, *see Shurtleff v. United States*, 189 U.S. 311, 318 (1903).

And fourth, at-will removal of an Acting Director follows from one of the principal reasons for "for cause" tenure provisions. The tenure provision here is a modest restriction. *See* p.37, *infra*. It is not hard for a motivated President to find some "cause" to remove an officer. Yet such provisions signal that the President should use his removal power carefully or else the Senate will be reluctant to confirm a replacement. *See generally* Aditya Bamzai, *Tenure of Office and the Treasury: The Constitution and Control over National Financial Policy, 1787 to 1867*, 87 Geo. Wash. L. Rev. 1299, 1378–79 (2019) (recounting discussion in Congress about an analogous provision). This signaling function helps explain why the "for cause" provision here does not offend the separation of powers. But it also underscores why courts should not infer tenure protection for acting officials. One of the Senate's roles under the Appointments Clause is to check the President's temptation to replace Senate-confirmed officials for poor reasons. *See, e.g.*, *The Federalist No*. 76, p. 457 (C. Rossiter ed. 1961). Congress has much less interest in acting officials whom the Senate never approved to begin with.

Against the foregoing, the Fifth Circuit held that an Acting Director must have tenure protection because the FHFA is an "independent" agency. Pet.App.59a. That general point, however, cannot defeat the Recovery Act's specific text. *See NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 941 (2017). Congress also had reasons to call the FHFA "independent" that have nothing to do with tenure, including that the FHFA is not in a department. *See* 5 U.S.C. §104(1); ACUS, *Sourcebook of United States Executive Agencies* 44 (2d ed. 2018). In fact, the heads of some "independent" agencies have no tenure at all. *See e.g.*, *id.*; 22 U.S.C. §§2501-1, 2503. The Fifth Circuit also cited *Wiener v. United States*, 357 U.S. 349 (1958), but that case did not address acting officials, much less a statute that provides tenure to one office but not to another. *See* Pet.App.130a n.2. The Fifth Circuit's holding is thus mistaken for many reasons.

B. The Court Should Reverse the Fifth Circuit's Constitutional Holding.

The fact that the Third Amendment was approved by an Acting Director should be the end of this constitutional dispute. Private Petitioners ask the Court to "set aside the Third Amendment," Priv.Pet.Br.14–15, and even invite "vacatur of the

PSPAs in their entirety," *id.* at 76. Yet they cannot point to anyone who exercised unconstitutional authority—contrary to the premise of their claim. *See* J.A.117. To escape that problem, Private Petitioners offered two additional arguments below why the Third Amendment should fall even if an Acting Director is removable at will. Neither is persuasive.

First, Private Petitioners argued that even if Acting Director DeMarco was removable at will, the Third Amendment should be vacated because it "has been sustained, implemented, and defended by FHFA under the leadership of Director Watt—a Senate-confirmed FHFA Director who indisputably enjoys for-cause removal protection under 12 U.S.C. §4512." Priv.Pet.Supp.En.Banc.Br.11–12. This taint theory is flawed.[4] To begin, "[i]t is not … proper to assume" a plaintiff "can prove facts that it has not alleged." *Assoc. Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). Here, the complaint does not adequately allege that Watt's 2013 confirmation retroactively tainted DeMarco's 2012 approval of the Third Amendment. *See* J.A.117.

[4] Because the Willett majority and the Haynes majority each based their holdings on the same erroneous premise, *see* Pet.App.58a–59a (concluding that an Acting Director has tenure) (Willett, J.); Pet.App.65a (taking conclusion as a given) (Haynes, J.), neither addressed these alternative arguments. The Haynes majority did hold that Directors Watt and Calabria "approved or ratified" Acting Director DeMarco's *unconstitutional* (on their view) approval of the Third Amendment. Pet.App.70a–71a. But the Haynes majority never addressed Private Petitioners' more novel theory that Watt's subsequent actions tainted what was, in reality, DeMarco's *constitutional* decision.

Nor do Private Petitioners offer a plausible argument to support such a theory. The Third Amendment does not involve any discretion that could affect the shareholders' interests. *See* J.A.234–245. And the notion that merely defending lawful action or failing to rescind it—in essence, agency inaction—could *itself* be reviewable action has no limiting principle.

Second, Private Petitioners argued that "whatever the President's authority to fire Mr. DeMarco, he could have only been replaced by one of Mr. DeMarco's own handpicked deputies." Priv.Pet.Supp.En.Banc.Br.12. This argument is improper because they never pleaded what appears to be an Appointments Clause claim. It is also incorrect because the President could have designated *any* Senate-confirmed officer to serve as Acting Director—as President Trump did when he designated Acting Director Otting. *See* 5 U.S.C. §§3345(a)(2), 3346(a)(2); *see also* O'Connell, *supra*, at 668–71.

Because these issues are straightforward, the Court should reverse the Fifth Circuit's constitutional holding. At a minimum, the Court should hold that an FHFA Acting Director is removable at will and vacate and remand for the courts below to resolve any remaining issues. *See Dep't of Transp. v. Ass'n of Am. R.R.s*, 575 U.S. 43, 55–56 (2015).

II. THE FHFA'S LIMITED POWERS COMPORT WITH THE CONSTITUTION

Even if the FHFA Director's tenure protection were relevant, the Court should still reverse. In *Seila Law*, the Court confronted an official who "enjoy[ed] more unilateral authority than any other official in any of the three branches of the U.S. Government" other than the President. *PHH Corp.*, 881 F.3d at 166 (Kavanaugh, J., dissenting). By contrast, the FHFA does not wield "significant executive power" at all. *Seila Law*, 140 S. Ct. at 2192. The structural liberty concerns animating *Seila Law* also do not apply because the FHFA's jurisdiction ultimately rests on voluntary association. And unlike the CFPB, the FHFA has historical precedent: the Comptroller of the Currency and the Sinking Fund Commission.

A. The FHFA Does Not Wield "Significant Executive Power."

In *Seila Law*, the Court held that the CFPB's structure violated the separation of powers because the CFPB exercised "significant executive power." 140 S. Ct. at 2192. That holding does not apply to the FHFA. The FHFA's actions as conservator do not implicate executive power, and its regulatory authority is limited to just 13 GSEs and their affiliates. And even for that small group, Congress has restricted the FHFA's authority both in the Recovery Act and in the GSEs' own charters.

1. In the Recovery Act, Congress created the FHFA in large part to act as conservator or receiver of Fannie and Freddie. As they watched the housing crisis, President Bush and Congress concluded that Fannie and Freddie were at risk of failing. Not by accident, Congress limited many of the FHFA's most important powers to these roles. For example, the FHFA's power to collect obligations, enter contracts, and transfer assets can be exercised only as a conservator or receiver of nongovernmental entities. *See* 12 U.S.C. §4617(b)(2)(B).

Conservators and receivers, however, do not exercise executive power—which is why private individuals often served in such roles at common law. *See, e.g.,* Jacob Trieber, *The Abuses of Receiverships*, 19 Yale L.J. 275, 277–78 (1910); *Conservator* and *Receiver*, Henry Campbell Black, *A Dictionary of Law* 255, 1000 (1891). Rather than exercising sovereign authority over anyone, conservators stand in the place of troubled companies to help them "[r]enegotiat[e] dividend agreements, manag[e] heavy debt and other financial obligations, and ensur[e] ongoing access to vital yet hard-to-come-by capital." *Perry*, 864 F.3d at 607.

Precedent supports that conclusion. In *O'Melveny*, the Court held that when an agency acts as a receiver, it "steps into the shoes" of the private entity. 512 U.S. at 86. Accordingly, in this capacity, there is no cognizable "federal interest" in an agency's decisions. *Id.* at 88. That same principle also applies to conservators. As Judge Sentelle has explained (in an opinion joined by then-Judge Kavanaugh), when the FHFA stepped "into Fannie Mae's private shoes," it "shed its government character and became a private party." *Herron*, 861 F.3d at 169 (cleaned up).

Nor is it peculiar that the FHFA's conservatorship role does not implicate Article II. The Court in *Buckley v. Valeo* held that an agency's powers must be examined on a function-by-function basis. 424 U.S. 1, 137 (1976). Some functions, after all, do not implicate executive power. *See, e.g.*, *id.* (power to investigate and collect data is not executive); Bamzai, *supra*, at 1353–54 (explaining that the Bank of the United States was understood as private because banking was a "nonsovereign function[]"). More broadly, governments routinely act in ways that do not implicate sovereign authority. *See, e.g.*, *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598–98 (2008) (government "has significantly greater leeway" as employer); *Adderley v. Florida*, 385 U.S. 39, 47–48 (1966) (government can act like any "private owner of property"); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940) (government, like a "private" party, has an "unrestricted power" to choose its suppliers). By the same token, private parties can act as "assignee[s]" of the United States. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 & n.8 (2000). Constitutional analysis thus often rightly focuses on *what* is being done rather than on *who* is doing it.

That the FHFA's actions as conservator do not implicate executive power may defeat Private Petitioners' challenge to the Third Amendment. *See* U.S.Cert.Opp.17–18. But it also goes far toward vindicating the FHFA's structure under the separation of powers. It would be anomalous to say that the FHFA exercises "significant executive power," *Seila Law*, 140 S. Ct. at 2211, when one of the most important things it does is not even executive.

2. Congress did assign the FHFA some regulatory power. But that power—much of which has never been used[5]—is also limited in key respects. The FHFA thus

[5] Less than six weeks after President Bush signed the Recovery Act, the FHFA became conservator. Hence, the FHFA has never sought penalties from Fannie or Freddie or taken them to court. Nor has it done so for the FHLBs. As regulator, the FHFA has entered into two non-judicial settlements with former employees of an FHLB, *see* FHFA, *Agreements*, https://tinyurl.com/FHFAAgreements, and has barred the GSEs from doing business

lacks "regulatory or enforcement authority remotely comparable to that exercised by the CFPB." *Seila Law*, 140 S. Ct. at 2202.

The Court's assessment of the FHFA's limited authority is correct. The CFPB enforces 19 consumer protection statutes, potentially making its Director "the single most powerful official in the entire U.S. Government, other than the President." *PHH Corp.*, 881 F.3d at 172 (Kavanaugh, J., dissenting). In fact, the CFPB may regulate "*any* person that engages in offering or providing a consumer financial product or service." 12 U.S.C. §5481(6)(A) (emphasis added). The scope of that power is hard to overstate. *See, e.g.*, CFPB, *Arbitration Agreements*, 81 Fed. Reg. 32830, 32907, 32909 (May 24, 2016) (addressing over 50,000 businesses across a dozen industries).

By contrast, the FHFA only regulates GSEs. And even for those 13 entities and their affiliates, Congress has limited the FHFA's discretion by telling the FHFA what to do and how to do it. *See, e.g.*, 12 U.S.C. §4513b (required criteria); *id.* §4514a (required study); *id.* §4517(a) (required examinations); *id.* §§4521, 4544 (required reports); *id.* §4611 (required objectives).

Congress also placed separate limits on the GSEs. Because their duties are enacted in statutory law, *no one*—including the FHFA—can tell Fannie or Freddie to start originating loans or advancing funds in ways that Congress has not allowed. *See, e.g.*, 12 U.S.C. §§1716, 1719(a). Indeed, Fannie's charter alone comes

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with various "individuals and entities with a history of fraud or other financial misconduct," FHFA, *Suspended Counterparty Program*, https://tinyurl.com/FHFACounterparty.

in at 42 pages on Westlaw and has been amended by Congress more than 50 times. The FHFA's regulatory power is thus not only circumscribed by the Recovery Act but also by many independent statutory limits on the GSEs' own powers. The FHFA therefore "is in an entirely different league" from the CFPB, which can "creat[e] substantive rules for a wide swath of industries, prosecuting violations, and levying knee-buckling penalties against private citizens." *Seila Law*, 140 S. Ct. at 2202 n.8.

Private Petitioners' constitutional argument to this Court mentions just four statutory sections which, in their view, make the powers of the CFPB and the FHFA comparable. In particular, they observe that the FHFA, like the CFPB, can "issue subpoenas, bring enforcement actions, and impose civil penalties," and that both agencies "are exempted from the normal appropriations process." Priv.Pet.Br.60–61 (citing 12 U.S.C. §§4516, 4581, 4585, 4588). Yet these four sections—like the other parts of the Recovery Act that Private Petitioners do not mention[6]—only highlight just how different the FHFA is from the CFPB.

As the Court witnessed firsthand in *Seila Law*, the CFPB can seek information from ordinary citizens about all manner of financial practices. *See* 140 S. Ct.

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[6] Private Petitioners do not mention the FHFA's rulemaking authority, which is nothing like the CFPB's. The CFPB can issue new substantive standards for entire sectors of the economy. *See, e.g.*, 12 U.S.C. §5536(a)(1)(B) (authority to define "unfair, deceptive, or abusive act or practice"); *cf. Atl. Ref. Co. v. FTC*, 381 U.S. 357, 367 (1965) (describing breadth of such power). By contrast, the FHFA's rulemaking powers are directly tied to its limited functions vis-à-vis the GSEs. *See, e.g.*, 12 U.S.C. §4526.

at 2193, 2200–01. By contrast, Section 4588 of the Recovery Act authorizes the FHFA to issue subpoenas *only* if Fannie or Freddie are not meeting reporting requirements and the housing goals required by Congress. *See* 12 U.S.C. §§4581, 4588. Indeed, all of the FHFA's subpoena powers, *see e.g.*, *id.* §4641, are necessarily narrow because this agency does not regulate ordinary private citizens.

The CFPB may also bring enforcement actions against "*any* person that engages in offering or providing a consumer financial product or service" or "provides a material service" to someone who does, *id.* §§5481(6)(A), (26)(A) (emphasis added), under *any* "law, rule, or any condition imposed in writing on the person by the Bureau," *id.* §5563(b)(1)(A). That authority can capture millions of people. By contrast, under Section 4581 of the Recovery Act, the FHFA can only bring an enforcement action against Fannie and Freddie and only for the same reporting requirements and housing goals. *Id.* §4581; *see also id.* §4631(a) (soundness enforcement for GSEs and affiliates).

The remedies available to the CFPB and the FHFA also differ. Whereas the CFPB has the power to fine hosts of private citizens under nearly a score of statutes, *Seila Law*, 140 S. Ct. at 2200–01, the FHFA under Section 4585 of the Recovery Act can only fine Fannie and Freddie, and only for specific conduct, 12 U.S.C. §4585; *see also id.* §§4631(a), 4636 (soundness enforcement and remedies for GSEs and affiliates). There are thus no penalties against ordinary private citizens here.

Finally, although the FHFA is funded through assessments under Section 4516, the FHFA's budget cannot "exceed[] … reasonable costs (including administrative costs) and expenses" and is subject to an annual audit. *Id.* §4516(a), (h). Unlike the CFPB, it would be fanciful to say that the FHFA could take "$500 million per year to fund the agency's chosen priorities." *Seila Law*, 140 S. Ct. at 2204. Not only is the FHFA's entire budget only roughly half that amount, but Congress itself has already identified the FHFA's priorities: its job is to oversee 13 GSEs.

The breadth of the FHFA's authority is insignificant when compared with the CFPB's. It is also insignificant in an absolute sense. Accordingly, the Court should hold that this particular agency lacks "significant executive power." *Id.* at 2192.

3. The counterarguments do not move the needle. The Fifth Circuit observed that Congress gave the FHFA broad powers as conservator. *See* Pet.App.36a, 62a. But "[l]egislatures can expand conservatorship and similar powers without transforming conservators into agents of the government." *Bhatti v. FHFA*, 332 F. Supp. 3d 1206, 1226 (D. Minn. 2018) (citing *Pegram v. Herdrich*, 530 U.S. 211, 225–26 (2000)). The Fifth Circuit's view that the FHFA's conservatorship role is "executive" because it can "enrich[]" the United States and is not "quasi-legislative or quasi-judicial," Pet.App.61–62a, is thus mistaken. And at any rate, *even if* the FHFA's conservatorship role may implicate executive power, it would still only apply to "not purely private actors," *Seila Law*, 140 S. Ct. at 2202. As explained below, that fact has constitutional implications. *See* pp.27–31, *infra*.

For their part, Private Petitioners stress that the FHFA's actions may affect "a major segment of the U.S. economy." Priv.Pet.Br.61 (quotation omitted). The Bank of the United States, however, played a more significant role in the nation's economy, yet it was private. *See e.g.*, *Bank of the United States v. Planters' Bank*, 22 U.S. (9 Wheat.) 904, 906 (1824); Bamzai, *supra*, at 1346–57. The separation-of-powers question is not how consequential a power is but rather the *nature* of that power. And here, Private Petitioners have only sued the FHFA as a "conservator." J.A.24. In any event, the FHFA's limited powers as regulator are nothing like the CFPB's, which is why the Court has already concluded that the CFPB is unlike other agencies—including the FHFA. *Seila Law*, 140 S. Ct. at 2202 n.8.

B. The FHFA Does Not Offend Structural Constitutional Principles.

Importantly, not only is the *amount* of power wielded by the FHFA insignificant, so is the *type* of power. As the Court explained in *Seila Law*, the FHFA "regulates primarily Government-sponsored enterprises, not purely private actors." 140 S. Ct. at 2202. Accordingly, the structural liberty concerns animating *Seila Law* are absent here. This distinction is meaningful under the separation of powers.

1. The GSEs are not ordinary businesses. Fannie and Freddie, for example, enjoy exemptions from regulation and taxation, 12 U.S.C. §1719(d)–(e); *id.* §1452(e), and special borrowing rights from Treasury, *id.* §1719(b)–(c). Before the housing crisis, the Congressional Budget Office valued such "subsidies" at billions of dollars. *See* CBO*, Updated Estimates of* *the Subsidies to the Housing GSEs* at 1 (2004), https://tinyurl.com/CBOestimates. In fact, because "[m]ost purchasers of the GSEs' debt securities believe that this debt is implicitly backed by the U.S. government," the subsidy may be worth "between $122 and $182 billion." Wayne Passmore, *The GSE Implicit Subsidy and the Value of Government Ambiguity*, 33 Real Est. Econ. 465, 465–66 (2005). Without these "special privileges," Fannie and Freddie could well "be forced out of business."[7]

The charters of Fannie and Freddie reflect their unique nature. These charters—found in the U.S. Code—mandate public goals, including: "provid[ing] stability" to the market, 12 U.S.C. §1716(1); encouraging "housing for low- and moderate-income families," *id.* §1716(3); and increasing "credit" for "central cities, rural areas, and underserved areas," *id.* §1716(4). Fannie and Freddie thus serve "important public missions." *Id.* §4501(1). Nor is any of this kept secret from those who, like Private Petitioners, voluntarily chose to invest in Fannie and Freddie. *See, e.g.*, *Jacobs v. FHFA*, 908 F.3d 884, 887 (3d Cir. 2018) (explaining that Fannie and Freddie

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[7] *See, e.g.*, Harold Seidman, *The Quasi World of the Federal Government*, 6 Brookings Rev. 23, 26 (1988) ("In objecting to Reagan administration proposals to cut off its special privileges—its line of credit with the Treasury, tax exemptions, eligibility of obligations for purchase by federal trust funds, exemption from Securities and Exchange Commission regulations—[Fannie] protested that 'Congress established Fannie Mae to run efficiently as an agency, not as a fully private company.' Without these special ties to the government, Fannie Mae says it would be forced out of business.").

could "borrow money … more cheaply" because the public understands their status).

2. The GSEs' "not purely private" character has constitutional significance. Removal is not expressly found in the Constitution's text.[8] Instead, the power stems from a structural understanding of the Constitution and in particular its focus on liberty. As *Seila Law* explains, executive power is important but without safeguards can slip its leash. To check that danger, "the Framers made the President the most democratic and politically accountable official in Government." 140 S. Ct. at 2203. *Seila Law* thus holds that allowing the CFPB to bring the weight of the federal government down on private citizens without real presidential control would upend the "calibrated system" that allows the People to hold the President accountable for abusive behavior by the Executive Branch. *Id.* Such "structural protections against abuse of power [are] critical to preserving liberty." *Id.* at 2202 (quotation omitted).

Concerns about liberty, however, ring hollow where the only entities an agency regulates are themselves "not purely private actors." The CFPB can regulate millions of private citizens who just want to enter the stream of commerce. The FHFA, by contrast,

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[8] Indeed, from *Seila Law*, one learns that: (i) the Constitution says nothing about removal, 140 S. Ct. at 2205; (ii) the subject did not come up at the Convention, *id.* at 2213 (Thomas, J., concurring in part); (iii) English practice does not answer the question, *id.* at 2228 (Kagan, J., dissenting in part); (iv) nor does the Federalist, *id.* at 2229; (v) the First Congress was divided, *id.* at 2229–31; (vi) the Attorney General in 1818 suggested that Congress *could* limit removal, *id.* at 2231 n.5; and (vii) at least some limits on removal are lawful, *id.* at 2192 (majority op.).

only regulates GSEs—and no one is forced to invest a single penny in those GSEs if they don't want to. The GSEs themselves, moreover, also lack regulatory authority; no statute gives them coercive power to force anyone to do anything. The FHFA's relationship with the public thus ultimately rests on voluntary choices rather than sovereign commands.

Liberty concerns are also hard to find where the United States' own property is at issue. The United States has pledged hundreds of billions of dollars to Fannie and Freddie and, like any investor, has an interest in ensuring that its money is safe. *See, e.g.*, *Adderley*, 385 U.S. at 47–48 (government "no less than a private owner" can use "its own property for its own lawful nondiscriminatory purpose"); *Lukens*, 310 U.S. at 128–29 (the United States' purchasing decisions do not implicate "private rights"). Hence, the United States—*as owner of the money*—would have been within its rights to have insisted as a condition of any further investment that Fannie and Freddie be subject to audits and an outside overseer. Private investors make similar demands, even at the expense of minority shareholders. *See, e.g.*, Ianthe Jeanne Dugan, *Shadow Lending: As Banks Retreat, Hedge Funds Smell Profit*, Wall St. J., July 23, 2013, at A1.

When all of this is put together, the situation is plain: Congress did not empower the FHFA to regulate commercial practices generally. Indeed, the FHFA does not even regulate *financial* practices generally. *Cf.* 12 U.S.C. §5512(a) (CFPB). Instead, the FHFA merely oversees a handful of GSEs whose charters mandate public missions, with whom investors voluntarily align themselves, and whose very existence may depend on federal support. Because none of this is "coercive," *Seila Law*, 140 S. Ct. at 2200, structural concerns about liberty fall away, *see, e.g.*, *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373–74 (2018) (because no one has a right to a patent, Congress has greater flexibility to structure patent adjudication); *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1939 (2015) (where parties consent, Congress has greater flexibility to structure bankruptcy proceedings).

This structural focus on liberty also explains why the SSA and the OSC are constitutional. Not only do these agencies not wield significant executive power, but the type of power they exercise is noncoercive. The SSA's "role is largely limited to adjudicating claims for Social Security benefits," and the OSC "enforce[s] certain rules governing Federal Government employers and employees." *Seila Law*, 140 S. Ct. at 2202. Just as no one is forced to invest in a GSE, Social Security benefits and government employment do not rest on coercive power. *See Califano v. Aznavorian*, 439 U.S. 170, 174–75 (1978); *McElroy*, 367 U.S. at 895–97. Each of these agencies' ability to act thus depends in large part on voluntary association.

3. Acting without the benefit of *Seila Law*, the Fifth Circuit reasoned that "every federal agency must function within the federal Constitution's checks and balances." Pet.App.63a. That is true. But the Fifth Circuit misunderstood those checks and balances.

Even where liberty is not implicated, "the Executive power" is vested in the President who must see that "the Laws be faithfully executed." U.S. Const. art. II, §§1, 3. But where the *reason* for structural interpretation is absent, the Court does not rely on structural interpretation. The anti-commandeering doctrine, for example, is also a structural principle that protects liberty. *See Printz v. United States*, 521 U.S. 898, 921, 932 (1997). Yet if liberty is not threatened, the doctrine does not apply, even where Congress requires the States to implement federal law. *See Reno v. Condon*, 528 U.S. 141, 151 (2000) (declining to apply the anti-commandeering doctrine because the States were not required to "regulate their own citizens"). The presumption against preemption is another structural principle. *See Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 449 (2005). Yet it does not apply where "States' rights" are not at issue. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999). A similar conclusion is warranted here. Because the FHFA does not implicate the structural concerns identified in *Seila Law*, Congress was well within its power to enact a modest tenure provision for the FHFA Director.

Private Petitioners' brief says little about these structural issues—despite *Seila Law*'s observation that the FHFA's lack of authority over "purely private actors" distinguishes it from the CFPB. 140 S. Ct. at 2202. In other words, the CFPB and the FHFA are different in kind when it comes to coercive power.

Rather than address that difference, Private Petitioners stress that the FHFA "is even less accountable than the CFPB" because some of its actions might be "unreviewable" in court. Priv.Pet.Br.61. This argument is in tension with their effort to seek robust judicial review. It also overlooks that Fannie and Freddie could have challenged the conservatorships. But most important for purposes here, this argument is irrelevant. There is no logical connection between *judicial* review and *executive* control. In *Seila Law*, the Court reasoned that the appropriations process is material *because* it allows the President to "influence" agencies. 140 S. Ct. at 2204.[9] Private Petitioners' brief does not even hypothesize such a causal relationship between judicial review and accountability to the President.

C. The FHFA Has Historical Precedent.

In *Seila Law*, the Court also condemned the CFPB as having "no basis in history." 140 S. Ct. at 2201. This is yet another way that the FHFA differs from the CFPB. The FHFA's regulatory powers are modeled on the Comptroller of the Currency, a federal office that has existed for over 150 years. And the broader principle that Congress has increased flexibility to structure agencies that do not exercise coercive power goes back to the First Congress.

1. To ensure the "safety and soundness" of the national banking system, the Comptroller regulates banks that request a federal charter. 12 U.S.C. §1(a). The Comptroller's budget comes from assessments rather than appropriations. *Id.* §16. And the Comptroller has a five-year term that cannot be cut short unless the President "communicate[s]" his

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[9] *Seila Law* does not say that funding through assessments (common for financial regulators) is itself fatal. *See* 140 S. Ct. at 2204. The Court focused on the President's budget as a tool of control. Yet Congress is not bound by that budget and may require the President to spend money outside of it. *See Train v. City of New York*, 420 U.S. 35, 44–47 (1975).

"reasons … to the Senate." *Id.* §2. By design, this "reasons" requirement inhibits presidential removal.[10]

The FHFA is essentially a mini-Comptroller. Whereas the Comptroller regulates over 800 federally chartered, privately owned banks to ensure their financial soundness, *see* Office of the Comptroller of the Currency, *Key Data & Statistics*, https://tinyurl.com/OCCKeyStatements, the FHFA only regulates 11 congressionally chartered banks and 2 congressionally chartered mortgage companies to ensure their financial soundness. *Compare* 12 U.S.C. §1(a) (Comptroller), *with id.* §4513(a)(1)(B)(i) (FHFA). Both are "independent regulatory agenc[ies]." 44 U.S.C. §3502(5). And both of their heads serve five-year terms subject to removal by the President.

This precedent is important because the Court has not suggested that the Comptroller is constitutionally problematic. This same conclusion should apply to the FHFA—but even more strongly. The FHFA exercises a similar type of power, albeit

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[10] *See, e.g.*, Bamzai, *supra*, at 1378–79 (documenting contemporaneous explanation, viz., that "'if the Senate did not approve of the reasons given by the President, they could refuse to confirm the successor,'" which prospect would limit the President's "'discretion' by ensuring that he would 'not exercise this power unless he has good reasons for it'") (quoting Cong. Globe, 38th Cong., 1st Sess. 1865, 2122 (1864) (statements of Sens. Pomeroy and Buckalew)). In *Seila Law*, the Court observed that a "reasons" requirement does not prevent removal if the President is in a "firing mood," but did not dispute that such a requirement makes removal *more difficult* than in a pure at-will situation. 140 S. Ct. at 2201 n.5 (quotation omitted); *see also* Datla & Revesz, *supra*, at 789 (explaining that the provision "increas[es] the political risks involved").

much less of it, especially because private banks are not subject to the detailed mission-and-methods restrictions that Congress has placed on Fannie and Freddie. And neither agency's head is subject to pure at-will removal. Indeed, if anything, the FHFA Director's tenure provision is weaker; the President must give a public explanation when firing the Comptroller but need not do any such thing for the FHFA Director. And the FHFOB is a watchdog to ensure that the FHFA follows the President's lead. *See* 12 U.S.C. §4513a. By contrast, the Comptroller does not need to worry about the FHFOB looking over its shoulder and racing off to the White House. *Compare id.* §4513a(d) (requiring at least quarterly FHFOB meetings), *with id.* §1(b)(1) (stating that the Comptroller acts under the "general direction of the Secretary of the Treasury" but forbidding interference with core aspects of the Comptroller's operations).

2. Precedent for the FHFA, moreover, runs all the way back to 1790 when Congress created the Sinking Fund Commission to purchase U.S. securities following the Revolutionary War. S*ee* Sinking Fund Act of Aug. 12, 1790, ch. 47, 1 Stat. 186. The Commission was proposed by Alexander Hamilton, supported by George Washington, enacted by the First Congress, and staffed by "the President of the Senate, the Chief Justice, the Secretary of State, the Secretary of the Treasury, and the Attorney General," *id.* §2—John Adams, John Jay, Thomas Jefferson, Hamilton, and Edmund Randolph. *See generally* Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 Notre Dame L. Rev. 1 (2020).

Under the Sinking Fund Act, the Commission could only act if the President approved *and* three Commissioners agreed. *See* 1 Stat. 186 §2. Otherwise, the Commission could do nothing, regardless of what the President wanted. And here is the key point: the President could not remove the Vice President—a political rival—or the Chief Justice, meaning that when no one was confirmed to lead State, Treasury, or Justice, or when one of them was unavailable for whatever reason, the President could not control the Commission's exercise of executive power.

For purposes here, the takeaway is that when an agency acts noncoercively, Congress has a freer hand. The views of the First Congress merit great weight in understanding the Constitution's original meaning. *See, e.g.*, *Seila Law*, 140 S. Ct. at 2198. That principle applies to the Decision of 1789, but it also should apply to the Decision of 1790—Congress's creation of the Sinking Fund Commission. Notably, James Madison later served on the Commission, *see, e.g.*, Annual Report of Commissioners of Sinking Fund to 7th Cong., 1st Sess. (1801), *in* 1 *American State Papers, Finance* 699 (1832), and John Marshall served on it almost his entire tenure as Chief Justice, *see, e.g.*, H.R. Doc. No. 128, 23rd Cong., 2nd Sess., at 1 (1835).

III. "FOR CAUSE" REMOVAL DOES NOT PREVENT FAITHFUL EXECUTION.

In *Seila Law*, the Court "h[e]ld that the CFPB's leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers." 140 S. Ct. at 2197. By contrast, the President has broader statutory authority to remove the FHFA Director "for cause." 12 U.S.C.

§4512(b)(2). Under any plausible interpretation, the Recovery Act's use of "for cause" offers modest protection to the FHFA Director. That fact, in combination with this agency's limited powers, further vindicates the FHFA's structure. And although the Court need not reach the issue here, the language in this statute can easily be read to allow termination based on policy disagreement, thus obviating any potential constitutional concerns.

A. The FHFA's Combination of Narrow Powers and Modest Tenure Is Lawful.

As Judge Higginson admonished, a court should not "base a momentous constitutional ruling on … a statutory provision no one has made the effort to construe." Pet.App.114a. Had the en banc court properly followed that admonition, it would not have issued the constitutional decision that it did.

1. The FHFA Director's tenure provision "'confer[s] the weakest protection'" in removal law. Pet.App.125a n.15 (quoting Datla & Revesz, *supra*, at 788). It is much easier for the President to find "cause" to remove an official than it is to find inefficiency, neglect, or malfeasance. Indeed, Congress routinely makes clear that "cause" is a broader term that *includes* inefficiency, neglect, or malfeasance but is not limited to them.[11]

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[11] *See, e.g.*, 45 U.S.C. §154 ("inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no *other* cause") (emphasis added); 29 U.S.C. §153(a) ("neglect of duty or malfeasance in office, but for no *other* cause") (emphasis added); 42 U.S.C. §10703(h) ("malfeasance in office, persistent neglect of, or inability to discharge duties, or for any offense involving moral turpitude, but for no *other* cause") (emphasis added).

Context reinforces that textual conclusion. Congress created the FHFA and the CFPB "in response to the same financial crisis." *Seila Law*, 140 S. Ct. at 2202. In fact, the two are "essentially … companion" agencies. *Id.* Yet Congress used different words. When Congress uses different phrases in related statutes, the standard rule of interpretation is that Congress intends different things. *See, e.g.*, 2A *Sutherland Statutory Construction* §46:6 (7th ed. 2014); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* §25, at 170 (2012). Congress's use of dissimilar language in these companion statutes thus confirms that "for cause" cannot mean the same thing as "inefficiency, neglect, or malfeasance." *See, e.g.*, *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2071–72 (2018).

History also teaches that the Recovery Act's use of "for cause" is a less protective standard. Congress gave the CFPB Director power to disagree with the President. The CFPB's champion, then-Professor Elizabeth Warren, declared that if the votes were not there for a "strong, independent agency," she wanted "no agency at all and plenty of blood and teeth left on the floor." Victoria McGrane, *Warren Pledges to Fight for Consumer Agency*, Boston Globe, Nov. 21, 2016, at A1. Congress also enacted the CFPB's tenure provision on July 21, 2010, three weeks after this Court said that an "inefficiency, neglect of duty, and malfeasance" standard does not allow removal based on policy disagreement. *See Free Enter. Fund*, 561 U.S. at 496 (citing *Humphrey's Executor*, 295 U.S. at 620). Congress thus plainly intended to endow the CFPB Director with robust removal protection.

Once again, the FHFA is different in almost every respect. Although a product of the same housing crisis, the Recovery Act was enacted in 2008 by President Bush and Congress to address the very real prospect that Fannie and Freddie might collapse. There is no evidence that Congress was trying to create a super-regulator like the CFPB. To the contrary, the fact that the FHFA's authority is limited to the GSEs, and to ensuring their ability to accomplish their congressional charters, is evidence that Congress was not trying to push the envelope when it comes to removal restrictions. All of this shows that the "for cause" provision here offers modest protection.[12]

2. The fact that the Recovery Act provides the FHFA with limited authority, *see* pp.20–27, *supra*, and separately gives the FHFA Director modest tenure protection, confirms that the FHFA's structure does not violate the separation of powers. The Court has blessed the "inefficiency, neglect, or malfeasance" standard for multimember commissions. In *Seila Law* the Court even suggested that Congress could turn the CFPB into a multimember commission with such protection. *See* 140 S. Ct. at 2211. Because the FHFA exercises orders of magnitude less power than the CFPB, it follows under the logic of this Court's cases that Congress can grant "for cause" tenure protection to the FHFA Director, even though the FHFA is headed by single individual.

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[12] Congress's decision to omit any tenure protection for an FHFA Acting Director, *see* pp.14–17, *supra*, further demonstrates that Congress does not believe that tenure protection is essential to the FHFA's operations.

Put differently, this Court's cases reflect a sliding scale. *Cf. Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 475 (2001) ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."). Congress can grant strong tenure to individual officers who do not exercise much executive power. *See, e.g.*, *United States v. Perkins*, 116 U.S. 483, 485 (1886) (agreeing that for an inferior officer with limited duties, Congress may "limit and restrict the power of removal as it deems best for the public interest"). Congress can also grant strong tenure to multimember commissions because any individual commissioner does not exercise much power. *See Seila Law*, 140 S. Ct. at 2203–04, 2211. But under Article II, no single official can both exercise significant executive power *and* enjoy strong tenure protection. *See id.* at 2197, 2206. Thus, the less executive power exercised, the more tenure protection allowed.

This sliding scale supports the FHFA. The FHFA's authority is not "remotely comparable" to the CFPB's. *Id.* at 2202. And no matter how "for cause" is read, the FHFA Director has less robust protection. Combined, these features confirm that the FHFA's structure cannot violate the separation of powers. Because the FHFA has relatively little regulatory discretion—(i) the FHFA cannot choose whom it regulates, (ii) the FHFA must follow statutory instructions from Congress about what and how to regulate, and (iii) the GSEs' own missions and methods are largely controlled by statutory charters, *see* pp.22–26, *supra*—the Recovery Act's "for cause" provision gives the President ample control.

B. The Recovery Act's Text Further Supports the FHFA's Constitutionality.

If the Court does definitively resolve what "for cause" means in this statute, it will find an additional reason to uphold the FHFA's structure: the Recovery Act can easily be read to allow the President to terminate an FHFA Director who disobeys a lawful order about how to exercise the agency's (limited) policy discretion. This interpretation of the Recovery Act, which is at least permissible, defeats constitutional concerns.

1. It is hornbook law that "a refusal to obey an order that a superior officer is authorized to give" constitutes "cause" for termination. 82 Am. Jur. 2d *Wrongful Discharge* §173 (2013). Indeed, the Court has held that there is "cause" to fire someone who refuses to do what a superior says. *See NLRB v. Local Union No. 1229*, 346 U.S. 464, 475 (1953) ("The legal principle that insubordination, disobedience or disloyalty is adequate cause for discharge is plain enough."); *id.* at 472 ("There is no more elemental cause for discharge of an employee than disloyalty to his employer."). Because "insubordination, disobedience or disloyalty" fall within this settled meaning of the term "cause," courts have also long held that "failure to follow a supervisor's directive on a discretionary matter, constitutes 'good cause' for removal." Kent Barnett, *Avoiding Independent Agency Armageddon*, 87 Notre Dame L. Rev. 1349, 1374 n.142 (2012) (collecting citations); *see also, e.g.*, *Sewell v. Grand Lodge of Int'l Ass'n of Machinists & Aerospace Workers*, 445 F.2d 545, 551–52 (5th Cir. 1971) (upholding termination for failure to promote a superior's discretionary policies).

This common understanding of what "cause" means is not limited to the private sector. Rather, "insubordination has long been a ground on which the Merit Systems Protection Board and the Federal Circuit have permitted 'for cause' removals under federal civil service laws." Barnett, *supra*, at 1374–75 & nn. 142–43 (citing, *inter alia*, *Nagel v. HHS*, 707 F.2d 1384, 1387 (Fed. Cir. 1983)); *see also* 5 U.S.C. §7513(a). In fact, "federal law *uniformly* provides that insubordination is a suitable ground for good-cause removal." Barnett, *supra*, at 1375 (emphasis added); *see also Redfearn v. Dep't of Labor*, 58 M.S.P.R. 307, 316 (1993) ("[R]efusal to follow supervisory instructions constitutes serious misconduct that cannot properly be condoned.").

The upshot is that removal for "cause" can "rather easily be interpreted as including … the failure of an agency head to comply with the President's instructions to take some action otherwise within his or her statutory authority." Geoffrey P. Miller, *Independent Agencies*, 1986 Sup. Ct. Rev. 41, 86–87 (1986). After all, not only is such an interpretation textually sound, but it also tracks how courts read the term "cause" in other statutes. *See* Barnett, *supra*, at 1375.

This textual analysis is even stronger in light of constitutional avoidance. "[I]t is the duty of federal courts to construe a statute in order to save it from constitutional infirmities," especially when the language "has not been tested in practice." *Morrison v. Olson*, 487 U.S. 654, 682 (1988). Here, the language has "been tested": "cause" includes disloyalty and disobedience. *See Local Union No. 1229*, 346 U.S. at 474–75. But even if it were an open question, reading "cause" to allow the President to fire the FHFA Director for policy disagreement would be at least a permissible interpretation. *See* John F. Manning, *The Independent Counsel Statute: Reading "Good Cause" in Light of Article II*, 83 Minn. L. Rev. 1285, 1296 (1999). Indeed, "the very indeterminacy of the statutory standard seems to invite the application of the framework of avoidance long used by the Court—a background convention against which, under standard premises of interpretation, Congress is presumed to have legislated." *Id.* at 1301.

Avoidance is also available here, unlike in *Seila Law*. In that case, there was no reason to think Congress intended to let the President remove the CFPB Director for policy disagreement and every reason to think the contrary. *See, e.g.*, 140 S. Ct. at 2206. Congress, however, chose to use different language in the Recovery Act. The history of the Comptroller, moreover, confirms that Congress does not *per se* object to policy-based removal of regulators like the FHFA whose mission is to oversee federally chartered financial entities. *See id.* at 2201 n.5.

2. Because the Recovery Act's text and structure can be read to allow the President to dismiss the FHFA Director for "insubordination, disobedience or disloyalty," *Local Union No. 1229*, 346 U.S. at 474–75, even for "a discretionary matter," Barnett, *supra* at 1374, and *must* be read that way if the Court concludes the statute would otherwise be unconstitutional, it follows that the FHFA's structure comports with the separation of powers. It would be incoherent to hold that the President's ability to faithfully execute the laws can be frustrated by a statute that allows the President to remove a Director who, for an issue within the FHFA's authority, refuses to execute the law as the President instructs.

In *Seila Law*, the Court identified the principle: "Without [a removal] power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." 140 S. Ct. at 2191 (quoting *Free Enter. Fund*, 561 U.S. at 514). That principle explains why preventing the President from removing the CFPB Director except for "inefficiency, neglect of duty, or malfeasance in office" is unconstitutional. The CFPB cannot set policy "dead set *against* [the President's] agenda." *Id.* at 2204.

That principle from *Seila Law*, however, is inapplicable here because the FHFA Director *is* obligated to obey the President. Especially in light of constitutional avoidance, so long as an action is within the FHFA's lawful authority, the Director cannot chart a policy course counter to the President's. Should he attempt to do so, the President can fire him, just like anyone else who disobeys a superior. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 366 (1976) (plurality opinion) ("[Even public] employees may always be discharged for good cause, such as insubordination or poor job performance, when those bases in fact exist."). This important feature of the Recovery Act disposes of any concerns under the Take Care Clause.

3. To be sure, although "for cause" in the Recovery Act can readily be interpreted to cover policy disagreement with the President, the term does not mean the same thing as "at will." The President can fire someone who serves at will for any reason—including rooting for the wrong baseball team. "The basic principle of at-will employment is that an employee may be terminated for a good reason, bad reason, or no reason at all." *Engquist*, 553 U.S. at 606 (cleaned up). Not so here. Tautologically, however, if the President may remove someone who will not execute the law as the President faithfully believes it should be executed, that person cannot prevent the President from faithfully executing the law.

The distinction between "at will" and "for cause" also matters when it comes to unlawful orders. Under an "at will" standard, the President may terminate someone for any reason—including, arguably, refusal to act unlawfully. Yet the President has no Article II power to violate the law. *See, e.g.*, *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible."); Joseph Story, *A Familiar Exposition of the Constitution of the United States* §292, at 177 (1842) (rejecting such a "despotic" power). A "for cause" provision thus cannot thwart the President's ability to "'control[] those who *execute* the laws.'" *Seila Law*, 140 S. Ct. at 2197 (quoting 1 Annals of Cong. 463 (1789) (emphasis added)).[13]

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[13] As Dean Manning explains, there would be cause to remove an officer who disobeys the President about "reasonably contestable legal judgments." Manning, *supra*, at 1288 n.17; *see also id.* at 1287–88 n.16; *id.* at 1301–02 n.57. But if the President

"For cause" also matters for remedy. It is debatable whether a court can order reinstatement. *See* Aziz Z. Huq, *Removal as a Political Question*, 65 Stan. L. Rev. 1, 74 n.358 (2013) ("[I]njunctive relief against an executive branch official in the form of a reinstatement order would raise substantial constitutional issues."). But a dismissed official can sue for wrongfully withheld pay. *See, e.g.*, *Myers v. United States*, 272 U.S. 52, 106 (1926). Such a suit also provides a dismissed official a chance to restore his or her good name. *Cf. Shurtleff*, 189 U.S. at 317. A "for cause" provision provides the standard from which to argue that termination was improper.

Finally, a "for cause" provision is an interbranch signal. As *Seila Law* recognizes, the President cannot dismiss the Comptroller unless he "'communicate[s]' his 'reasons' … to the Senate." 140 S. Ct. at 2201 n.5 (quoting 12 U.S.C §2). By design, this requirement tells the President that Congress is watching closely. *See* Bamzai, *supra*, at 1378–79. The provision here serves the same purpose. The President is on notice that if he removes the Director for a poor reason, the Senate may push back when it comes to confirming a successor—as the Senate is *supposed* to do. *See The Federalist No.* 76, *supra*, at 457.

4. Private Petitioners say little about the Recovery Act's text. The Fifth Circuit also only briefly addressed the issue, concluding that "requiring 'cause' for removal is well recognized as an independent agency's threshold feature." Pet.App.57a. But that

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were to ever attempt to go beyond that line, this provision of the Recovery Act would squarely protect the FHFA Director.

observation does not answer the constitutional question. No one disputes that the FHFA is an "independent" agency—a statutory term that cannot itself be dispositive. *See, e.g.*, p.17, *supra*. What matters is whether the President can "take Care that the Laws be faithfully executed." U.S. Const. art. II, §3. Because nothing in the Recovery Act prevents the President from doing just that, the FHFA's structure does not offend the separation of powers.

IV. A HOLDING THAT THE FHFA VIOLATES THE SEPARATION OF POWERS WOULD HAVE FAR-REACHING EFFECTS.

Finally, Private Petitioners ask the Court to overrule *Humphrey's Executor*. But their theory goes much further—indeed, if accepted, it would also toss out *Seila Law*. Just last Term, the Court emphasized the importance of structure, history, and statutory text in evaluating removal restrictions. In contrast to the CFPB, each of those factors supports the FHFA. Accordingly, although Private Petitioners would face an uphill climb to overcome stare decisis, the Court need not even get into that issue in this case. Private Petitioners' separation-of-powers challenge to the FHFA fails even without stare decisis.

The nation, moreover, has a long history of allowing some tenure protection, especially for individuals who do not exercise significant executive power and who can be removed for insubordination. The Court therefore should not be surprised to learn that a decision invalidating the FHFA's structure would also call into question many other aspects of the Federal Government.

Most obviously, if Private Petitioners' view of removal prevails, copycat suits presumably would next target the SSA, the OSC, and the Comptroller. Other plaintiffs might also challenge multimember agencies for which *the chair* is nominated by the President and confirmed by the Senate to a fixed term. *Compare* 12 U.S.C. §242 (requiring Senate confirmation of Federal Reserve Chair to four-year term), *and id.* §248(s)(3) (allowing the Federal Reserve to release information "if the Chairman determines that such disclosure would be in the public interest"), *with Seila Law*, 140 S. Ct. at 2204 ("[A]n unlucky President might get elected on a [The-Fed-is-Not-Transparent] platform and enter office only to find herself saddled with a holdover [Chair] from a competing political party who is dead set *against* that agenda.") (alterations added).[14] Such constitutional challenges would be especially likely if courts started inferring removal restrictions from the penumbras of statutes rather than demanding clear statements.

But the consequences would not end there. The Civil Service would also be a fertile ground for litigation. Many civil servants have leadership roles, including the Director of the Secret Service, Director of the National Hurricane Center, and Director of the Office of Highway Safety. *See, e.g.*, *SES Positions That Were Career Reserved During CY 2018*, 85 Fed. Reg. 9524, 9531, 9568, 9596 (Feb. 19, 2020). Congress has limited when such individuals can be reassigned. *See,*

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[14] *See also* Samuel Rubinstein, *Chairpointment: Rethinking the Appointment of Independent Agency Chairpersons*, Harv. J. Leg. Online n.212 & tbl. (2020), https://tinyurl.com/Rubinstein Chairpointment (listing chairs with "statutory duties").

e.g., 5 U.S.C. §3395(e). And moving beyond such high-profile positions, members of the competitive service can only be removed "for such cause as will promote the efficiency of the service." *Id.* §7513(a).

To date, courts have seldom been asked to define the line between employees and officers. *See, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044, 2051–52 (2018). But if at-will removal were required for any officer involved in policymaking, then those unhappy with agency action would have strong incentives to identify *some* civil servant who may have participated and could even arguably be an officer. There is no harm, after all, in tacking on a constitutional claim as the last count of a complaint challenging agency action. Thus, "[t]he combination of a broad officer definition and close scrutiny of removal restrictions could leave any government agency that employs career civil servants vulnerable to constitutional challenge." David Hahn, Note, *Late for an Appointment: Balancing Impartiality and Accountability in the IRS Office of Appeals*, 103 Minn. L. Rev. 385, 389 (2018).

This danger, of course, would be even more pronounced if courts also accepted capacious theories of Article III standing. As Judge Costa explained, for example, Private Petitioners' own "allegations confirm that the Third Amendment was not the product of any improper insulation of the FHFA from presidential control." Pet.App.132a; *see also Bhatti*, 332 F. Supp. 3d at 1214. Those challenging agency action might not even be required to "plausibl[y]" show that a removal restriction had anything to do with the challenged action. Priv.Pet.Br.67. Instead, it could be enough to simply identify an adverse action and then point to someone with protection from at-will removal.

The Court can prevent this deluge of separation-of-powers cases. As *Seila Law* suggests, the Court should hold that the "significant executive power" test does not capture officials like the FHFA Director who do not exercise much power (and even less coercive power). *See* 140 S. Ct. at 2201–02. The Court can also read "for cause" to mean what it says: the President can fire someone for not following lawful commands. But unless the Court does at least one of those things, it should expect many more cases like this one.

Thankfully, however, the Court need not address such issues here. Instead, the Court should hold that Acting Director DeMarco was removable at will, and thus reverse the Fifth Circuit's constitutional holding—saving the harder line-drawing for another case and another day.

CONCLUSION

The Fifth Circuit's separation-of-powers holding should be reversed.

Respectfully submitted,

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