Appeal No. 17-20364

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PATRICK J. COLLINS; MARCUS J. LIOTTA;
WILLIAM M. HITCHCOCK,
Plaintiffs-Appellants,
v.

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

On Appeal from the United States District Court
for the Southern District of Texas, No. 4:16-cv-03113

BRIEF OF DEFENDANTS-APPELLEES
FEDERAL HOUSING FINANCE AGENCY AND MELVIN L. WATT

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1, undersigned counsel of record certifies that the following persons and entities, in addition to those listed in Appellants' Certificate of Interested Persons, have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

- Federal National Mortgage Association ("Fannie Mae")
- Federal Home Loan Mortgage Corporation ("Freddie Mac")
- Ian S. Hoffman, Arnold & Porter Kaye Scholer LLP, counsel for Defendants-Appellees the Federal Housing Finance Agency and Melvin L. Watt (appearance entered Sept. 8, 2017)
- Asim Varma, Arnold & Porter Kaye Scholer LLP, counsel for Defendants-Appellees the Federal Housing Finance Agency and Melvin L. Watt (appearance entered Sept. 8, 2017)

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STATEMENT REGARDING ORAL ARGUMENT

The Federal Housing Finance Agency and Melvin L. Watt respectfully request oral argument. This appeal raises substantial and important issues, and involves requests for extraordinary relief. Plaintiffs seek, *inter alia*, the transfer of billions of dollars from the U.S. Department of Treasury to Fannie Mae and Freddie Mac and an order enjoining FHFA, as Conservator for Fannie Mae and Freddie Mac, from taking "any action whatsoever pursuant to" a financing transaction between the Conservator and Treasury. ROA.90.

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INTRODUCTION

This appeal addresses one of the latest in a long line of suits brought by shareholders of Fannie Mae and Freddie Mac (the "Enterprises" or "GSEs") challenging an agreement between the Federal Housing Finance Agency ("FHFA"), as Conservator for the Enterprises, and the U.S. Department of Treasury. At issue is the agreement between FHFA and Treasury to amend, for a third time ("the Third Amendment"), the financing agreements by which Treasury provided the Enterprises a critical lifeline of hundreds of billions of taxpayer dollars during the financial crisis, which Treasury continues to provide today. Like nearly every shareholder plaintiff before them, Plaintiffs here assert claims under the Administrative Procedure Act (the "APA"), seeking to vacate the Third Amendment and undo dividend payments made to Treasury thereunder.

The District Court correctly dismissed Plaintiffs' APA claims. In agreeing to the Third Amendment, FHFA exercised its expansive statutory authority as Conservator. Plaintiffs' APA claims seek to second-guess a business decision of the Conservator regarding the Enterprises' obligation to compensate Treasury for its massive financial assistance and ongoing commitment. As such, Plaintiffs' APA claims are barred by federal law, 12 U.S.C. § 4617(f), which provides that "no court may take any action to restrain or affect the exercise of [FHFA's] powers or functions" as Conservator.

Every court that has considered APA claims challenging the Third Amendment—including the D.C. Circuit—has dismissed them as barred by federal law. *See Perry Capital LLC v. Mnuchin*, 848 F.3d 1072 (D.C. Cir. Feb. 21, 2017), *reissued as modified*, 864 F.3d 591 (D.C. Cir. 2017); *Roberts v. FHFA*, --- F. Supp. 3d ----, 2017 WL 1049841, at *7 (N.D. Ill. Mar. 20, 2017); *Saxton v. FHFA*, --- F. Supp. 3d ----, 2017 WL 1148279, at *13 (N.D. Iowa Mar. 27, 2017); *Robinson v. FHFA*, 223 F. Supp. 3d 659, 670 (E.D. Ky. 2016); *Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828, 840 n.6 (S.D. Iowa 2015). Here, Plaintiffs raise identical APA claims and rehash the same arguments already rejected in these prior cases. The District Court got it right: Plaintiffs' APA claims are squarely foreclosed.

Unlike the prior cases, Plaintiffs here tacked on a novel constitutional claim, alleging HERA violates Article II of the Constitution by making a Senate-confirmed FHFA Director removable by the President only for cause. The District Court properly rejected that claim as well. Supreme Court precedent going back almost a century confirms the constitutionality of independent agencies headed by individuals not removable at will; FHFA fits directly within that paradigm. Plaintiffs invite this Court to hold that independent agencies must be structured as multi-member commissions rather than headed by a single individual. Nothing in law, logic, or the principles undergirding the separation of powers supports that novel thesis. This Court accordingly should affirm.

STATEMENT OF JURISDICTION

This case arises under 28 U.S.C. § 1331. The District Court entered final judgment on May 22, 2017. Plaintiffs noticed their appeal on May 25, 2017. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether 12 U.S.C. § 4617(f)—which provides that "no court may take any action to restrain or affect the exercise of [FHFA's] powers or functions" as Conservator of Fannie Mae and Freddie Mac—bars Plaintiffs' claims seeking to enjoin the Conservator's decision to amend the funding agreements between the Enterprises and Treasury through the Third Amendment.

II. Whether 12 U.S.C. § 4617(b)(2)(A)(i)—which provides that FHFA as Conservator succeeds to "all rights, titles, powers, and privileges" of the Enterprises and their stockholders—bars Plaintiffs' claims, which purport to exercise Plaintiffs' asserted rights as stockholders.

III. Whether Plaintiffs have Article III standing to bring a constitutional challenge to 12 U.S.C. § 4512(b)(2)—which provides that a Senate-confirmed Director of FHFA is removable by the President for cause—and, if so, whether 12 U.S.C. § 4512(b)(2) violates Article II of the U.S. Constitution and the separation-of-powers principle.

STATEMENT OF THE CASE

1. The Enterprises and Their Importance to the National Economy

The Enterprises are government-sponsored enterprises chartered by Congress to provide liquidity to the mortgage market by purchasing residential loans from banks and other lenders, thus freeing up capital for those lenders to make additional loans. ROA.9, 25. The Enterprises, which own or guarantee trillions of dollars of mortgages and mortgage-backed securities, play a vital role in housing finance and the U.S. economy. *Id.*

Throughout the first half of 2008, the Enterprises suffered multi-billion dollar losses on their mortgage portfolios and guarantees, as the housing market collapsed and homeowners defaulted on mortgages at accelerating rates. ROA.26. On July 30, 2008, "[c]oncerned that a default by Fannie and Freddie would imperil the already fragile national economy," *Perry Capital*, 864 F.3d at 599, Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, § 1101, 122 Stat. 2654, 2661 (codified at 12 U.S.C. § 4511 *et seq*.).

HERA created FHFA, an independent federal agency, to supervise and regulate the Enterprises and Federal Home Loan Banks. 12 U.S.C. § 4511. The Director of FHFA "shall be appointed for a term of 5 years, unless removed before the end of such term for cause by the President." *Id*. § 4512(b)(2). HERA also includes a provision for the appointment of an acting Director: "In the event of the

death, resignation, sickness, or absence of the Director, the President shall designate [one of the three subordinate Deputy Directors], to serve as acting Director until the return of the Director, or the appointment of a successor pursuant to subsection (b)." *Id.* § 4512(f). Whereas § 4512(b)(2) expressly states that the Director may serve for a term of five years unless removed "for cause," § 4512(f) does not contain equivalent language for the acting Director.

2. FHFA Is Appointed Conservator of the Enterprises and Succeeds to All Rights of the Enterprises and Their Stockholders

HERA granted FHFA's Director the discretionary authority to place the Enterprises in conservatorship and to act as their conservator "for the purpose of reorganizing, rehabilitating, or winding up the[ir] affairs." 12 U.S.C. § 4617(a)(2). On September 6, 2008, having concluded that the Enterprises could not operate safely and soundly and fulfill their critical statutory mission, FHFA's Director placed the Enterprises into conservatorships. ROA.11, 31-32.

HERA provides that, upon its appointment as Conservator, FHFA "immediately succeed[ed] 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) (emphasis added).

In addition, HERA accords FHFA as Conservator broad powers to "operate" and "conduct all business" of the Enterprises. *Id.* § 4617(b)(2)(B)(i). Specifically, HERA empowers the Conservator to:

- "perform all functions of the [Enterprises] in the name of the [Enterprises] which are consistent with the appointment as conservator," *id.* § 4617(b)(2)(B)(iii);
- "preserve and conserve the assets and property of the [Enterprises]," *id.* § 4617(b)(2)(B)(iv);
- "take over the assets of and operate the [Enterprises] with all the powers of the shareholders, the directors, and the officers," *id.* § 4617(b)(2)(B)(i); and
- "transfer or sell any asset or liability of the [Enterprises] without any approval, assignment, or consent with respect to such transfer or sale," *id.* § 4617(b)(2)(G).

Further, HERA authorizes the Conservator to "take any [authorized action], which the Agency determines is in the best interests of the [Enterprises] or the Agency." *Id.* § 4617(b)(2)(J)(ii).

Reinforcing and facilitating the exercise of the Conservator's plenary operational authority, Congress shielded the Conservator's actions from judicial review. Under 12 U.S.C. § 4617(f), "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator."

3. Treasury Provides Unprecedented and Continuing Financial Support to the Enterprises in Exchange for Compensation

The extraordinary conservatorship powers are in addition to Congressional authorization to Treasury to provide billions of dollars in support of the continued

operations of the Enterprises in conservatorship. HERA amended the Enterprises' statutory charters to grant Treasury authority to purchase securities issued by the Enterprises, so long as they reached "mutual agreement" on the terms. *See* 12 U.S.C. §§ 1455(*l*)(1)(A) (Freddie Mac), 1719(g)(1)(A) (Fannie Mae). Treasury exercised this authority in September 2008, purchasing senior preferred stock in the Enterprises. Treasury and the Conservator entered into two Senior Preferred Stock Purchase Agreements (the "PSPAs"), through which Treasury agreed to infuse hundreds of billions of taxpayer dollars into the Enterprises to allow them to continue operating. *See* ROA.209-36 (PSPAs).

The PSPAs remain in effect and work as follows: if in any quarter an Enterprise's net worth is negative—defined as liabilities exceeding assets in accordance with Generally Accepted Accounting Principles ("GAAP")—then Treasury must invest additional funds in the Enterprise sufficient to cure its negative net worth. *See* ROA.212-13, 226-27 (PSPAs § 2.2). The PSPAs thus provide the Enterprises with "unprecedented access to guaranteed capital." *Perry Capital*, 864 F.3d at 609.

As consideration for this massive commitment, the PSPAs gave Treasury a comprehensive bundle of rights, including the following:

- A senior liquidation preference starting at $1 billion per Enterprise, which increases dollar-for-dollar whenever the Enterprises draw Treasury funds. ROA.214, 228.

- A 10% annual dividend, assessed quarterly, based on the total amount of the liquidation preference. ROA.239, 248-49. If not paid in cash, the dividend would accrue at a 12% rate and be added to Treasury's liquidation preference. *Id.*

- A periodic commitment fee "intended to fully compensate [Treasury] for the support provided by the ongoing Commitment," and to be set to reflect "the market value of the Commitment as then in effect." ROA.214, 228.

- Warrants to acquire 79.9% of the Enterprises' common stock. ROA.212, 214, 226, 228.

In sum, consistent with Treasury's statutory obligation to "protect the taxpayers," 12 U.S.C. §§ 1455(*l*)(1)(C), 1719(g)(1)(C), the PSPAs assure that federal taxpayers, who contributed billions to save the Enterprises, are compensated for their ongoing commitments to sustain the Enterprises' operations.

4. The Enterprises Draw Billions from Treasury, and the Parties Increase the Amount of the Treasury Commitment

By late 2008, the Enterprises' liabilities exceeded their assets under GAAP; Treasury thus began infusing billions of dollars into the Enterprises. ROA.44. While the PSPAs initially capped Treasury's commitment at $100 billion per Enterprise, the parties amended the PSPAs via the "First Amendment" to double the cap to $200 billion per Enterprise. ROA.40. Later, the parties amended the PSPAs again via a "Second Amendment," which permitted the Enterprises to draw *unlimited* amounts from Treasury to cure net-worth deficits through 2012. ROA.257-268. Pursuant to the Second Amendment, Treasury's commitment

became fixed at the end of 2012, and future draws would reduce the remaining funds available. ROA.40.

To date, the Enterprises have drawn a total of $187.5 billion from Treasury. ROA.44. Pursuant to the formula established by the Second Amendment, the remaining amount of the commitment available for Fannie Mae is $117.6 billion (over and above the $116.1 billion already infused), and $140.5 billion for Freddie Mac (over and above the $71.3 billion already infused). *Id.* Accordingly, Treasury has committed an additional $258 billion, for a total of $445 billion, to the Enterprises.

5. The Third Amendment to the PSPAs

Due to the substantial amounts drawn from Treasury, the Enterprises' dividend obligations—calculated as 10% of the Treasury liquidation preference—were also substantial. Between 2009 and 2011, the Enterprises' net worth was insufficient to pay the Treasury dividend. The Enterprises drew billions more from Treasury to make their dividend payments. Those draws, in turn, increased Treasury's liquidation preference and the Enterprises' future dividend obligations. After the amount of the Treasury commitment became fixed in 2012, any such draws would reduce the finite amount remaining in the Treasury commitment.

On August 17, 2012, FHFA and Treasury executed the Third Amendment to the PSPAs, which ended the practice of the Enterprises taking draws from Treasury

to pay dividends to Treasury. In particular, the Third Amendment (1) eliminated the fixed-rate 10% annual dividend, (2) added a quarterly variable dividend in the amount (if any) of each Enterprise's positive net worth, subject to a declining reserve, and (3) suspended the periodic commitment fee while the quarterly variable dividend is in effect. *See* ROA.270-85.

By June 30, 2012, the Enterprises were obligated to pay Treasury approximately $19 billion per year—which exceeded the Enterprises' average historical earnings per year[1]—plus commitment fees equal to the market value of Treasury's massive and historic commitment. Just before the Third Amendment, the Enterprises stated in SEC filings that they "d[id] not expect to generate net income or comprehensive income in excess of our annual dividend obligation to Treasury over the long term." Fannie 10-Q at 12; *see also* Freddie 10-Q at 10. After the Third Amendment, the Enterprises owed only variable net-worth dividends, and no periodic commitment fees. Accordingly, if the Enterprises' net worth is negative, they pay no dividend. If the Enterprises' net worth is positive, they pay that amount as a dividend, even if that amount is less (or greater) than the prior 10% dividend obligation. Thus, under the Third Amendment, Treasury

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[1] *See* Fannie Mae, Quarterly Report (Form 10-Q), at 4 (Aug. 8, 2012), http://goo.gl/bGLVXz ("Fannie 10-Q"); Freddie Mac, Quarterly Report (Form 10-Q), at 8 (Aug. 7, 2012), http://goo.gl/2dbgey ("Freddie 10-Q").

accepted the risk that the Enterprises' net worth would be less than 10% of the liquidation preference plus the amount of the periodic commitment fee.

6. Procedural History

Plaintiffs' complaint asserted APA claims against FHFA and Treasury (Counts I and II) for allegedly exceeding their statutory authority in agreeing to the Third Amendment, and against Treasury for allegedly engaging in arbitrary and capricious conduct in agreeing to the Third Amendment (Count III). Plaintiffs also alleged that FHFA's structure violates the separation of powers because the President lacks the power to remove the Director at will (Count IV).

Defendants filed motions to dismiss the complaint, which the District Court granted. This appeal followed.

SUMMARY OF ARGUMENT

I. The District Court correctly recognized that the plain text of HERA resolves Plaintiffs' APA claims: while the Enterprises are in conservatorship, "no court may take any action to restrain or affect the exercise of powers or functions" of FHFA as their Conservator. 12 U.S.C. § 4617(f). The powers and functions of the Conservator are far-reaching; they include, *inter alia*, the power to conduct all business of the Enterprises, reorganize their affairs, transfer or sell any Enterprise assets, and take all such actions in a manner the Conservator determines is in the best interests of the Enterprises or FHFA. *Id*. § 4617(a)(2), (b)(2)(B), (G), (J). The

District Court correctly held that FHFA acted within its statutory powers and functions in agreeing to the Third Amendment.

II. Although the District Court did not reach the issue, Plaintiffs' claims also are barred by a separate, independently dispositive HERA provision that transfers "all rights" of the shareholders to the Conservator. 12 U.S.C. § 4617(b)(2)(A)(i). This provision forecloses Plaintiffs' claims, as FHFA has succeeded to Plaintiffs' rights to pursue those claims during conservatorship.

III. The District Court also properly granted summary judgment for FHFA on Plaintiffs' claim challenging the constitutionality of the HERA provision making its Senate-confirmed Director removable only for cause.

A. Although the District Court did not reach this issue, Plaintiffs lack standing to assert their constitutional claim. At the time of the Third Amendment, FHFA had an Acting Director not covered by the for-cause removal provision they challenge. In addition, Plaintiffs' factual allegations belie any causal link between FHFA's independence and its decision to enter into the Third Amendment. Moreover, even if the Constitution requires the FHFA Director to be removable at will, that conclusion would not affect the validity of the Third Amendment, negating the redressability necessary for standing.

B. In any event, the District Court correctly held that the for-cause removal provision is constitutional under *Humphrey's Executor v. United States*,

295 U.S. 602 (1935). Plaintiffs' theory that *Humphrey's Executor* does not apply to agencies headed by a single individual is wrong and has been rejected by numerous courts. The Constitution gives Congress ample flexibility to devise agency structures to best meet the emergent needs and situations it confronts, and Congress did not cross any constitutional lines by creating FHFA as an independent agency with a single Director removable for cause.

STANDARD OF REVIEW

This Court reviews *de novo* the District Court's grant of a motion to dismiss. *TOTAL Gas & Power N. Am., Inc. v. Fed. Energy Regulatory Comm'n*, 859 F.3d 325, 332 (5th Cir. 2017).

ARGUMENT

I. SECTION 4617(F) BARS PLAINTIFFS' APA CLAIMS

The District Court correctly dismissed Plaintiffs' APA claims as barred by 12 U.S.C. § 4617(f). ROA.960-961. Plaintiffs' APA claims seek solely declaratory and equitable relief. ROA.89-90. Because the Conservator's decision to execute the Third Amendment falls squarely within its broad statutory powers and functions, Section 4617(f) bars Plaintiffs' APA claims, including those directed at Treasury.

A. Section 4617(f) Bars Courts from Ordering Declaratory or Equitable Relief that Would Restrain or Affect FHFA's Exercise of Conservatorship Powers

To enable the Conservator to carry out its functions, Congress insulated the Conservator's actions from judicial second-guessing, mandating that "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator." 12 U.S.C. § 4617(f). As the D.C. Circuit explained in affirming the dismissal of APA claims identical to those Plaintiffs assert here, the "plain statutory text draws a sharp line in the sand against litigative interference—through judicial injunctions, declaratory judgments, or other equitable relief—with FHFA's statutorily permitted actions as conservator." *Perry Capital*, 864 F.3d at 606.

Courts routinely apply Section 4617(f) to bar all manner of claims, including APA claims, seeking relief that would "restrain or affect" the exercise of powers of FHFA as Conservator. *See, e.g.*, *Cty. of Sonoma v. FHFA*, 710 F.3d 987, 994 (9th Cir. 2013); *Leon Cty. v. FHFA*, 700 F.3d 1273, 1279 (11th Cir. 2012). These decisions applying Section 4617(f) are consistent with the substantial body of case law—including from this Court—interpreting 12 U.S.C. § 1821(j), the materially identical provision governing Federal Deposit Insurance Corporation ("FDIC") conservatorships and receiverships. Like Section 4617(f), Section 1821(j) "effect[s] a sweeping ouster of courts' power to grant equitable remedies,"

Freeman v. FDIC, 56 F.3d 1394, 1399 (D.C. Cir. 1995), and applies "regardless of [the plaintiff]'s likelihood of success on the underlying claims," *281-300 Joint Venture v. Onion*, 938 F.2d 35, 39 (5th Cir. 1991).

The analysis to determine whether Section 4617(f) precludes judicial review is straightforward and "quite narrow." *Bank of Am. Nat'l Ass'n v. Colonial Bank*, 604 F.3d 1239, 1243 (11th Cir. 2010) (discussing 12 U.S.C. § 1821(j)). "[A]s long as the [conservator] is exercis[ing] judgment under one of its enumerated powers such as running the affairs of a troubled financial institution . . . the courts may not enjoin the [conservator's] activities." *Ward v. Resolution Tr. Corp.*, 996 F.2d 99, 103 (5th Cir. 1993) (internal quotation marks and citation omitted); *see also Dittmer Props., L.P. v. FDIC*, 708 F.3d 1011, 1017 (8th Cir. 2013) (Section 1821(j) applies if the "challenged action is within the [conservator's] power or function."); *281-300 Joint Venture*, 939 F.2d at 38.

B. The Third Amendment Is Within FHFA's Statutory Conservatorship Powers

HERA "endows FHFA with extraordinarily broad flexibility to carry out its role as conservator." *Perry Capital*, 864 F.3d at 606. FHFA's statutory powers are at least as extensive and broad as those given to FDIC conservators and receivers under the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), which courts have also described as "extraordinary," *MBIA Ins.*

Corp. v. FDIC, 708 F.3d 234, 236 (D.C. Cir. 2013), and "exceptionally broad," *In re Landmark Land Co. of Okla., Inc.*, 973 F.2d 283, 288 (4th Cir. 1992).

Here, the Conservator's execution of the PSPAs and Third Amendment fell squarely within its broad statutory powers and functions: the Conservator exercised its power to "take over the assets of and operate the [Enterprises]," "carry on [their] business," "perform all functions" of the Enterprises, "contract" on their behalf, and "conduct all business of the [Enterprises]"—all in the manner the Conservator "determines is in the best interests of the [Enterprises] or the Agency [FHFA]." 12 U.S.C. § 4617(b)(2)(B)(i), (iii), (v), (D)(ii), (J)(ii). Indeed, HERA specifically authorized the PSPAs, which were later amended via the Third Amendment, by authorizing the Enterprises (and thus the Conservator) to issue stock to Treasury based on their "mutual agreement." *Id.* §§ 1455(*l*)(1)(A), 1719(g)(1)(A). At bottom, the PSPAs are funding agreements that provide the Enterprises with a capital backstop of hundreds of billions of dollars. Just as securing funding is a quintessential act for the conservator of a financial institution—a proposition Plaintiffs do not dispute—so too is agreeing to amend the PSPAs in a manner the Conservator believes, in its judgment, is in the best interests of the Enterprises or FHFA. *See id.* § 4617(b)(2)(J)(ii).

Further, HERA specifically authorizes the Conservator to "transfer or sell any asset" of the Enterprises "without any approval, assignment, or consent," *id.*

§ 4617(b)(2)(G), and Plaintiffs themselves characterize the Third Amendment as a "transfer" of Enterprise assets, *see* ROA.21, 54, 58, 74. *See United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1323-24 (6th Cir. 1993) (Section 1821(j) barred rescission of receiver transaction "transferr[ing] substantially all" institution assets.); *Waterview Mgmt. Co. v. FDIC*, 105 F.3d 696, 700-02 (D.C. Cir. 1997) (similar).[2]

As the D.C. Circuit held, "FHFA's execution of the Third Amendment falls squarely within its statutory authority to '[o]perate the [Companies,]' 12 U.S.C. § 4617(b)(2)(B); to 'reorganiz[e]' their affairs, *id.* § 4617(a)(2); and to 'take such action as may be . . . appropriate to carry on the[ir] business,' *id.* § 4617(b)(2)(D)(ii)." *Perry Capital*, 864 F.3d at 607 (alterations in original). "Renegotiating dividend agreements, managing heavy debt and other financial obligations, and ensuring ongoing access to vital yet hard-to-come-by capital are quintessential conservatorship tasks designed to keep the Companies operational." *Id.* Every court that has addressed this issue is in accord. *See supra* at 2 (collecting cases).

[2] Contrary to Plaintiffs' argument (Collins Brief 28-29 (hereinafter "Br.")), "Section 4617(b)(2)(D) obviously does not set out the exclusive powers of FHFA as conservator." *Robinson*, 223 F. Supp. 3d at 670. "As a plain textual matter, [HERA] provides FHFA many '[g]eneral powers' 'as conservator or receiver,' 12 U.S.C. § 4617(b)(2), that are not delineated in Section 4617(b)(2)(D) or (E)." *Perry Capital*, 864 F.3d at 608.

This case is no different: Plaintiffs challenge the same transaction, pursue the same theory, and seek the same relief as the *Perry Capital* plaintiffs. Thus, the District Court correctly followed *Perry Capital* to hold that Plaintiffs "fail to demonstrate that the FHFA's conduct was outside the scope of its broad statutory authority as conservator." ROA.955.

C. Plaintiffs' Attempts to Circumvent Section 4617(f) Are Meritless

Plaintiffs assert a variety of arguments in seeking to avoid, or create exceptions to, Section 4617(f). The District Court correctly rejected these arguments, just as other courts have done in dismissing identical claims.

At the outset, Plaintiffs repeatedly cite this Court's decision in *McAllister v. Resolution Trust Corporation*, as somehow limiting a conservator's powers. Br. 26, 30, 41-42 (citing 201 F.3d 570 (5th Cir. 2000)). But that decision addressed only whether certain employee benefits allegedly provided by a conservator were "expenses of liquidation" for purposes of determining the priority of a receivership claim. *McAllister*, 201 F.3d at 579-80. The Court found they were not because conservators (unlike receivers) lack the power to liquidate the institution's assets. *Id*. Here, there is no receivership, no employment benefits, and no liquidation. *McAllister* is thus inapt.

Plaintiffs also cite two Ninth Circuit decisions—*Sharpe v. FDIC*, 126 F.3d 1147 (9th Cir. 1997) and *Bank of Manhattan, N.A. v. FDIC*, 778 F.3d 1133 (9th

Cir. 2015) (Br. 25)—that are simply inapt and unpersuasive. Both addressed breach-of-contract claims, which are not asserted here. *See Meritage Homes of Nev., Inc. v. FDIC*, 753 F.3d 819, 825 (9th Cir. 2014) ("*Sharpe* is not controlling outside of its limited context."). Further, *Bank of Manhattan* held only that FIRREA does not "immunize the FDIC [as receiver] from *damage claims* if it elects to breach pre-receivership contractual arrangements." 778 F.3d at 1134 (emphasis added). There are no claims for damages asserted here. And while *Sharpe* declined to apply Section 1821(j) to a claim for alleged breach of contract, that ruling conflicts with the law of this circuit, which has rejected attempts to avoid Section 1821(j) by alleging a receiver acted "improperly or even unlawfully" when exercising its powers. *Ward*, 996 F.2d at 103.[3]

1. Allegations of Failure to Comply with a Purported "Duty" to Preserve and Conserve Assets Cannot Overcome Section 4617(f)

Plaintiffs' primary argument seeks to convert the Conservator's broad powers and functions—*e.g.*, to preserve and conserve assets—into mandatory duties and obligations the Conservator is supposedly "required" to undertake, and which Plaintiffs purport to police through litigation. Br. 33-43. Plaintiffs contend these alleged duties and obligations circumscribe how the Conservator may

[3] *Accord RPM Invs., Inc. v. Resolution Tr. Corp.*, 75 F.3d 618, 621 (11th Cir. 1996); *Volges v. Resolution Tr. Corp.*, 32 F.3d 50, 52 (2d Cir. 1994); *Nat'l Tr. for Historic Pres. v. FDIC*, 995 F.2d 238, 240 (D.C. Cir. 1993).

exercise all other statutory powers, and that private shareholders (and any other party) can sue the Conservator—notwithstanding Section 4617(f)—to enforce these purported obligations. Plaintiffs are wrong.

The District Court correctly rejected this argument, explaining that "[e]ntirely absent from [HERA's] text is any mandate, command, or directive to build up capital for the financial benefit of [Fannie Mae's and Freddie Mac's] stockholders." ROA.955 (quoting *Perry Capital*, 848 F.3d at 1088). Every other court that has addressed this issue has likewise held that HERA "makes the actions listed [therein] discretionary rather than obligatory." *Roberts*, 2017 WL 1049841, at *8 ("FHFA did not violate any 'core statutory mandates' as conservator—largely because these mandates do not exist, at least not as the Plaintiffs have alleged."); *Perry Capital*, 864 F.3d at 607 (HERA "does not compel [FHFA] in any judicially enforceable sense, to preserve and conserve Fannie's and Freddie's assets and to return the Companies to private operation."); *Robinson*, 223 F. Supp. 3d at 670 ("FHFA's alleged failure to exercise its permissive power . . . does not remove Plaintiffs' claims from the ambit of Section 4617(f)'s bar on equitable relief."); *Saxton*, 2017 WL 1148279, at *10 (similar).

Lacking a statutory hook for their "mandatory duty" argument, Plaintiffs revert to arguing the Conservator has an "overarching statutory mission" or "goal" to preserve Enterprise assets, and that the Third Amendment is "antithetical" to

that mission. Br. 26, 29, 38. In support, Plaintiffs cite statements by FHFA and Director Watt discussing the Conservator's efforts to carry on the Enterprises' business and to preserve and conserve their assets. Br. 31-32. But these statements do not advance Plaintiffs' argument. At most, they reflect the Conservator's efforts to balance various, potentially competing, high-level goals and priorities set forth by Congress. That does not mean Congress required FHFA to take specific measures that are judicially enforceable by private plaintiffs in litigation. *See Perry Capital*, 864 F.3d at 607 (HERA "does not compel [FHFA] *in any judicially enforceable* sense to preserve and conserve Fannie's and Freddie's assets." (emphasis added)). Nor does it give Plaintiffs license to challenge the manner in which the Conservator balances its goals and priorities.

Adopting Plaintiffs' approach would allow litigants to sue the Conservator for purportedly failing to comply with its "mission" based merely on an allegation that some *other* course of action would have *better* preserved and conserved the Enterprises' assets. That would expose the Conservator to a flood of litigation aimed at second-guessing the Conservator's operational decisions—precisely what Congress prohibited through enactment of Section 4617(f).

Plaintiffs also repeatedly refer to the notion of a "traditional conservator" and fiduciary principles purportedly applicable to "conservators at common law." *See* Br. 28-29, 36. However, in HERA, "Congress did not set up a typical

conservatorship," which is "best evidenced by the fact that FHFA is empowered, in its role as conservator, to act in *its own best interests*." *Roberts*, 2017 WL 1049841, at *8; *see also Morissette v. United States*, 342 U.S. 246, 263 (1952) (common law meanings presumed only in the "absence of contrary direction"). Indeed, HERA's conservatorship powers "bear[] no resemblance to the type of conservatorship measures that a private common-law conservator would be able to undertake. . . . Congress made clear in [HERA] that FHFA is not your grandparents' conservator. For good reason." *Perry Capital*, 864 F.3d at 613; *see also Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012) (rejecting arguments "delving deep into pre-HERA common law" in favor of "read[ing] the statute." (citation omitted)).[4]

2. Allegations of Improper Motive Cannot Overcome Section 4617(f)

Plaintiffs also assert that Section 4617(f) does not apply because the Conservator supposedly had a host of improper motives for the Third Amendment—*e.g.*, to "nationalize" the Enterprises, "siphon" their assets, "shackle them in perpetual conservatorship," "affirmatively sabotage" their recovery, and "to harm Fannie's and Freddie's shareholders." Br. 1, 9, 13, 25, 29, 35, 38. But as

[4] For the same reason, the Court should reject Plaintiffs' reliance on *Fahey v. Mallonee*, 332 U.S. 245, 250–53 (1947) (Br. 36-37) and attempt to read purported historical principles into HERA in order to constrain the Conservator's express powers and functions.

even the dissenting judge in *Perry Capital* acknowledged, the Conservator's motives are irrelevant in considering whether the Conservator acted within its statutory powers and functions. *See Perry Capital*, 864 F.3d at 644 (Brown, J., dissenting); *see also id.* at 612 (majority) ("[N]othing . . . in [HERA] hinges FHFA's exercise of its conservatorship discretion on particular motivations."); *Roberts*, 2017 WL 1049841, at *6 ("When considering whether FHFA or Treasury has acted ultra vires, the agencies' motives are irrelevant."). Instead, courts evaluate challenges to the Third Amendment by reviewing the Conservator's actions "on their face," without "wad[ing] into the merits or motives" of those actions. *Cont'l W.*, 83 F. Supp. 3d at 840 n.6; *cf. Leon Cty. v. FHFA*, 816 F. Supp. 2d 1205, 1208 (N.D. Fla. 2011), *aff'd*, 700 F.3d 1273 (11th Cir. 2012).

3. Allegations that the Third Amendment Was Unwise or Ineffective Cannot Overcome Section 4617(f)

Plaintiffs also attempt to overcome Section 4617(f) by asserting that the Third Amendment failed to preserve and conserve assets or maximize their value, and was "financially reckless" and "needless[]." Br. 38-40.

But these allegations are merely attacks on the *merits* of the Conservator's decision to execute the Third Amendment—not allegations that the Conservator lacked authority to do so. Just as there is no "bad motive" exception to Section 4617(f), there also is no "bad job" exception. "Congress has removed from the purview [of] the court the power to second-guess the FHFA's business judgment."

Massachusetts v. FHFA, 54 F. Supp. 3d 94, 101 n.7 (D. Mass. 2014). Accordingly, "[w]hatever Plaintiffs' views of the wisdom of the Third Amendment, FHFA's adherence to its statutory role as conservator does not turn on the wisdom of its decision-making." *Saxton*, 2017 WL 1148279, at *10 (citing *Ward*, 996 F.3d at 103); *see also Cty. of Sonoma*, 710 F.3d at 993 ("[I]t is not our place to substitute our judgment for FHFA's."). To create such an exception would expose the Conservator to all manner of hindsight analysis and render "Section 4617(f)'s strict limitation on judicial review . . . an empty promise." *Perry Capital*, 864 F.3d at 615.

Plaintiffs assert the Third Amendment was unnecessary in light of the Enterprises' ability to accrue dividends at a 12% (so-called "in kind") rate, rather than paying them at a 10% rate. Br. 5-6, 10, 40. But "[n]othing in [HERA] confines FHFA's conservatorship judgments to those measures that are driven by financial necessity." *Perry Capital*, 864 F.3d at 612. Accordingly, HERA "does not compel that [in kind dividend] choice over the variable dividend to Treasury put in place by the Third Amendment. Either way, Section 4617(f) flatly forbids declaratory and injunctive relief aimed at superintending to that degree FHFA's conservatorship or receivership judgments." *Id*. at 610; *see also Saxton*, 2017 WL 1148279, at *10 (Section 4617(f) renders "[a]ny suggestion that FHFA could have

or should have taken different actions to pursue the goals of conservatorship . . . irrelevant.”).

4. Allegations that the Third Amendment Is Improperly “Winding Up” the Enterprises Cannot Overcome Section 4617(f)

Plaintiffs next assert that the Conservator exceeded its powers by acting in the “exclusive[] . . . province of a receiver” (Br. 43) because the Third Amendment is allegedly “winding up” the Enterprises’ affairs and liquidating their assets. Br. 40-44. The Third Amendment does no such thing; five years after its execution, the Enterprises “continue to operate long-term, purchasing more than 11 million mortgages and issuing more than $1.5 trillion in single-family mortgage-backed securities,” and “remain fully operational entities with combined operating assets of $5 trillion.” *Perry Capital,* 864 F.3d at 610-11.[5]

Regardless, contrary to Plaintiffs’ contention, HERA’s plain text authorizes FHFA as “conservator *or* receiver” to be appointed “for the purpose of reorganizing, rehabilitating, *or winding up* the affairs” of the Enterprises. 12 U.S.C. § 4617(a)(2) (emphasis added). Even the authorities cited by Plaintiffs

[5] For this reason, Plaintiffs’ citation to *Resolution Trust Corporation v. CedarMinn Building Limited Partnership*, 956 F.2d 1446 (8th Cir. 1992) is inapt. Br. 26, 28, 41-42. That decision simply observed that the “conservator’s mission is to conduct an institution as an ongoing business,” *CedarMinn*, 956 F.2d at 1454, which is precisely what the Conservator has done, both before and after the Third Amendment.

recognize that where, as here, Congress authorizes an agency to "exercise a duty, right, or power in its capacity as 'a conservator *or* receiver,'" that generally means that "the duty, right, or power [is] to be enjoyed or exercised by *both* the conservator and the receiver." *CedarMinn*, 956 F.2d at 1451-52 (emphases added). This is particularly true where, as here, Congress took care in *other* portions of the statute to delineate the powers that can be pursued only by a receiver or only by a conservator, but not by both. *See id.* at 1452; 12 U.S.C. § 4617(b)(2)(D)-(E). *Cf. Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1722 (2017) (rejecting notion that, when "Congress set two words cheek by jowl in the same phrase," it "meant them to speak to entirely different periods of time"). As such, FHFA may undertake a mix of actions under its various statutory authorities.

Plaintiffs argue that HERA uses the terms "liquidation" and "winding up" synonymously, and because the Conservator is not permitted to do the former, it must not be permitted to do the latter. Br. 43-44. But winding up is different from liquidation; it includes prudential steps short of liquidation, such as transferring Enterprise assets without approvals and shrinking the Enterprises' operations to ensure soundness until an ultimate resolution is determined. *See* 12 U.S.C. § 4617(b)(2)(G). "Undertaking permissible conservatorship measures even with a receivership mind" is not outside of the Conservator's "statutory bounds," *Perry Capital*, 864 F.3d at 612, as multiple courts have recognized. *See Roberts*, 2017

WL 1049841, at *8 ("FHFA can operate the companies as a conservator in anticipation of moving onto receivership."); *Robinson*, 223 F. Supp. 3d at 670 ("HERA clearly envisions the possibility" of FHFA "convert[ing] its current conservatorship into a receivership.").

Plaintiffs also argue that Section 4617(a)(2)'s statement that either the "conservator *or* receiver" may "*wind[] up* the affairs" of an Enterprise cannot mean what it says. *See* Br. 43-44 (quoting 12 U.S.C. § 4617(a)(2)). Plaintiffs assert that giving effect to this text would permit a receiver to act with the purpose of rehabilitation, instead of liquidation. *Id*. But this makes perfect sense: HERA directs the receiver not only to liquidate Enterprise assets, but also to "rehabilitat[e]" the business of the Enterprise by creating a limited-life regulated entity ("LLRE"). 12 U.S.C. § 4617(a)(2). An LLRE, once established, "succeed[s] to the charter" of the Enterprise and "thereafter operate[s] in accordance with, and subject to, such charter." *Id.* § 4617(i)(2)(A)(i). Thus, HERA empowers a receiver both to liquidate and, through an LLRE, rehabilitate and reorganize the Enterprises upon a selective transfer of assets and liabilities.

Finally, Plaintiffs argue the Third Amendment improperly allows an "end run" around the receivership distribution-priority scheme outlined in HERA. Br. 42-43. But the Enterprises are neither in receivership nor liquidating assets, so the priority scheme is inapplicable here. *See Perry Capital*, 864 F.3d at 612

("[R]eceivership procedural protections" apply when "FHFA [is] actually liquidating the Companies."). In all events, allegations that a conservator is violating the statutory order of priority for receiverships are insufficient to overcome Section 4617(f). *See Courtney v. Halleran,* 485 F.3d 942, 945 (7th Cir. 2007) (applying Section 1821(j) despite argument that asset transfer was a "thinly disguised way of circumventing the statutory priority scheme").

D. Plaintiffs' Nondelegation Argument Is Meritless

Finally, though Plaintiffs raise no nondelegation claim, they argue that *Perry Capital*'s (and the District Court's) approach "raises grave doubts about Section 4617's constitutionality under the nondelegation doctrine." Br. 36-37. However, "the limits on delegation are frequently stated, but rarely invoked: the Supreme Court has not struck down a statute on nondelegation grounds since 1935." *United States v. Whaley*, 577 F.3d 254, 263 (5th Cir. 2009).

Plaintiffs' argument fails because the Conservator's execution of the Third Amendment was not the exercise of any legislative—or even any governmental—function. *See Pittston Co. v. United States*, 368 F.3d 385, 397-98 (4th Cir. 2004) (observing the "central inquiry" in a private nondelegation challenge "is whether the *function* of the [actor] is governmental in nature" and holding the act of "preserving and investing money" is nongovernmental). The Third Amendment was an exercise of "FHFA's *business* judgment." *Perry Capital*, 864 F.3d at 615

(emphasis added); it was adopted by FHFA acting as Conservator, "not as an executive enforcing the laws of the United States." ROA.959.

Even if the Conservator had exercised a legislative function in executing the Third Amendment—it did not—Plaintiffs' argument still would fail because Congress provided intelligible principles to guide FHFA's discretion in carrying out its role as Conservator. "[S]ome amount of delegation is unavoidable," and the "modern test" is "whether Congress has provided an 'intelligible principle' to guide the agency's regulations." *Whaley*, 577 F.3d at 263. "The intelligible principle can be broad," *id.* at 264, including to act in the "public interest," *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943).

Here, the Enterprises' statutory charters identify the Enterprises' purposes, including to "provide stability in" and "ongoing assistance to the secondary market for residential mortgages" by increasing liquidity and improving investment capital. 12 U.S.C. § 1716 (Fannie Mae); *see also id.* § 1451 (Freddie Mac). In HERA, Congress empowered the Conservator "to carry on the business of the [Enterprises]." *Id.* § 4617(b)(2)(D)(ii). HERA also identifies the "purpose" of FHFA's appointment as conservator as "reorganizing, rehabilitating, or winding up the affairs" of the Enterprises. *Id.* § 4617(a)(2). Congress thus "empower[ed] FHFA to 'take such action' as may be necessary or appropriate to fulfill several goals." *Perry Capital*, 864 F.3d at 608. As even Plaintiffs' cited authority

confirms, these statutory goals easily provide a sufficient "intelligible principle" to avoid any unconstitutional delegation. *See Fahey*, 332 U.S. at 250–53 (cited at Br. 36-37) (upholding statute providing a banking agency with broad discretion to appoint conservators and receivers despite no specific statutory guidance).

Moreover, that Section 4617(f) bars courts from *policing* the Conservator's pursuit of its goals does not raise a nondelegation problem. *See United States v. Bozarov*, 974 F.2d 1037, 1038 (9th Cir. 1992) (rejecting nondelegation challenge of statute barring judicial review of agency action).

* * *

FHFA also adopts and incorporates by reference Treasury's arguments that (a) Congress's enactment of the Consolidated Appropriations Act, 2016, confirms the Conservator's statutory authority to execute the Third Amendment; and (b) Section 4617(f) extends to the declaratory and injunctive relief sought against Treasury. *See* Treasury Brief Sections I.B-C.

II. HERA'S SUCCESSION PROVISION BARS PLAINTIFFS' CLAIMS

All of Plaintiffs' claims can be dismissed for an additional, independently dispositive reason: HERA transfers "all rights" of the stockholders to the Conservator, 12 U.S.C. § 4617(b)(2)(A)(i), including the purported rights Plaintiffs seek to assert here. Although the District Court did not reach the issue, this Court

can affirm on this alternate ground. *See Williams v. J.B. Hunt Transp., Inc.*, 826 F.3d 806, 810 (5th Cir. 2016).

A. The Conservator Succeeded to All Stockholder Rights

Upon its appointment, the Conservator "immediately succeed[ed] to . . . all rights, titles, powers, and privileges of the [Enterprises], and of any stockholder, officer, or director of [the Enterprises] with respect to the [Enterprises] and the assets of the [Enterprises]." 12 U.S.C. § 4617(b)(2)(A) (the "Succession Provision"). This broad, unequivocal language evidences Congress's intent to ensure "that nothing was missed" and to "transfer[] everything it could to the [Conservator]." *Kellmer*, 674 F.3d at 851 (citation omitted). Accordingly, "[t]he shareholders' rights are now the FHFA's." *Esther Sadowsky Testamentary Tr. v. Syron*, 639 F. Supp. 2d 347, 351 (S.D.N.Y. 2009). Courts uniformly hold that the Succession Provision bars stockholders from asserting, at a minimum, derivative claims during the conservatorships. *See Perry Capital*, 864 F.3d at 623-25; *La. Mun. Police Emps. Ret. Sys. v. FHFA*, 434 F. App'x 188, 191 (4th Cir. 2011).

B. The Conservator Succeeded to Plaintiffs' Claims, Whether Those Claims Are Characterized as Derivative or Direct

Plaintiffs argue that HERA's Succession Provision does not apply because Plaintiffs supposedly have a "direct, personal interest" in their claims. Br. 49-52. This argument is wrong twice-over.

First, Plaintiffs claims are derivative, not direct. FHFA hereby adopts and incorporates by reference Treasury's explanation of why Plaintiffs' claims are derivative. *See* Treasury Brief Sections II.A and III.B. Plaintiffs' claims are derivative because they seek to vindicate the Enterprises' interests, not Plaintiffs' own interests. The theory underlying all of Plaintiffs' claims is that the Enterprises were harmed by Third Amendment, Plaintiffs lost value in their stock as a result, and the Court can redress these alleged injuries by an order vacating the Third Amendment and returning to the Enterprises all dividends paid thereunder. These are classically derivative claims. *See id*. Section II.A (applying *Tooley* analysis).[6]

That one of Plaintiffs' claims is constitutional in nature is of no matter. While the direct versus derivative distinction is one "regularly encountered in traditional business litigation," the same analysis "has been uniformly applied on the infrequent occasions" that the distinction "has arisen in suits [alleging] constitutional violations." *Smith Setzer & Sons, Inc. v. S.C. Procurement Review Panel*, 20 F.3d 1311, 1316-17 (4th Cir. 1994) (shareholder had no direct constitutional claim for injury resulting when allegedly unconstitutional state statute caused "the corporation's loss of revenue and earnings"). This Court has

[6] As explained by Treasury, the *Gentile* exception upon which Plaintiffs appear to rely has no application here. *See Edwards v. Deloitte & Touche, LLP*, No. 16-21221-CIV, 2017 WL 1291994, at *7 (S.D. Fla. Jan. 18, 2017) *appeal docketed* No. 17-12852 (declining to apply *Gentile* exception and holding Third-Amendment related claims were derivative); *Saxton*, 2017 WL 1148279, at *6.

long recognized the "firmly established" rule that financial institution shareholders lack standing to pursue constitutional claims based on alleged harm to the value of their stock. *See Gregory v. Mitchell*, 634 F.2d 199, 202 (5th Cir. 1981); *see also Sinclair v. Hawke*, 314 F.3d 934, 939 (8th Cir. 2003).

Here, the alleged constitutional claim belongs to the Enterprise. *See Citigroup Inc. v. AHW Inv. P'ship*, 140 A.3d 1125, 1138 (Del. 2016) (derivative analysis applicable to claims that "could plausibly belong" to the company). Indeed, Plaintiffs' claim is modeled after the claim asserted in *PHH Corporation v. Consumer Financial Protection Bureau*, 839 F.3d 1 (D.C. Cir. 2016), *reh'g en banc granted, order vacated* (Feb. 16, 2017), in which the regulated entity (PHH)—not its stockholders—challenged an action by the entity's regulator (the CFPB) by alleging that the for-cause removal provision for the agency's director violated the Constitution. Here, Plaintiffs attempt to pursue the identical claim against FHFA. That claim is derivative.

Second, Plaintiffs' characterization of their claims as direct is irrelevant because HERA's Succession Provision applies equally to all shareholder claims, including those "enforceable through a direct lawsuit, not a derivative lawsuit." *Pagliara v. Freddie Mac*, 203 F. Supp. 3d 678, 687, 692 (E.D. Va. 2016) (succession to shareholder right to inspect books and records). Under HERA, the Conservator succeeded to "all" shareholder rights, 12 U.S.C. § 4617(b)(2)(A)(i),

and when interpreting HERA, "'all' means all." *Hennepin Cty. v. Fannie Mae*, 742 F.3d 818, 822 (8th Cir. 2014).

FHFA respectfully disagrees with the conclusion in *Perry Capital* that HERA's succession language does not cover direct claims. *See* 864 F.3d at 624-25. Though the D.C. Circuit stated that shareholders' rights "'with respect to' [the regulated entity] and its assets are only those an investor asserts derivatively on the Company's behalf," *id.* at 624, this reading "strain[s] any reasonable interpretation" of HERA, because Plaintiffs' claims are unquestionably related to the Enterprises and their assets. *Pagliara*, 203 F. Supp. 3d at 688; *see also Levin v. Miller*, 763 F.3d 667, 673 (7th Cir. 2014) (Hamilton, J., concurring) (observing analogous FIRREA language "could be interpreted, for sound policy reasons, more broadly to include a stockholder's *direct* claims that are based on harms resulting from dealings with the assets of the failed institution").

C. There Is No "Conflict of Interest" Exception to HERA's Succession Provision

Plaintiffs also argue their claims can survive HERA's Succession Provision based upon a so-called "conflict of interest" exception. Br. 52-55. As Treasury explains in its brief, and FHFA hereby adopts and incorporates by reference, issue preclusion bars Plaintiffs from advancing this argument. *See* Treasury Brief Section II.C.1.

In all events, there is no "conflict of interest" exception. Every court to have addressed this issue under HERA has rejected any such judicially created exception as "contrary" to "the plain statutory text." *Perry Capital*, 864 F.3d at 625; *see also Edwards*, 2017 WL 1291994, at *7 ("Looking at the plain wording of HERA's succession clause, there is no exception to the bar on derivative suits."); *Saxton*, 2017 WL 1148279, at *12; *Pagliara*, 203 F. Supp. 3d at 691 n.20.

Plaintiffs cite the only two decisions that have applied a conflict-of-interest exception to FIRREA's succession provision. Br. 53 (citing *First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279, 1295-96 (Fed. Cir. 1999) and *Delta Savs. Bank v. United States*, 265 F.3d 1017, 1021-24 (9th Cir. 2001)). Those decisions are outliers, and *Perry Capital* correctly rejected them as being poorly reasoned, "mak[ing] little sense," and contradicting FIRREA's plain language. 864 F.3d at 625. Moreover, the limited holdings of *First Hartford* and *Delta*, both receivership cases, "make[] still less sense in the conservatorship context, where FHFA enjoys even greater power free from judicial intervention." *Perry Capital*, 70 F. Supp. 3d at 231 n.30.

Plaintiffs also argue that another provision of HERA, 12 U.S.C. § 4617(a)(5), "would be meaningless if shareholders could not sue the conservator derivatively on behalf of the Companies." Br. 54. Not at all. In Section 4617(a)(5), Congress provided the "regulated entity" (*i.e.*, Fannie Mae or Freddie

Mac) itself—not FHFA as Conservator—a 30-day window in which to challenge FHFA's appointment of a conservator or receiver. That limited, statutorily-authorized challenge mechanism—which was not exercised by either of the Enterprises—in no way supports the creation of a conflict-of-interest exception.

Plaintiffs further argue that Congress should be presumed to have adopted *First Hartford* and *Delta Savings* when it enacted HERA. Not so. Such a presumption is improper where, as here, there is "no direct evidence that Congress ever considered the issue . . . or voiced any views upon it." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 336 n.7 (1971); *see also Brown v. Gardner*, 513 U.S. 115, 121 (1994) (similar). Moreover, as the *Perry Capital* court recognized, "two circuit court decisions do not so clearly 'settle[ ] the meaning of [the] existing statutory provision' in FIRREA that we must conclude the Congress intended *sub silentio* to incorporate those rulings into the Recovery Act." 864 F.3d at 625 (citation omitted). *Accord SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 965 (2017); *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 351 (2005).

III. PLAINTIFFS' SEPARATION-OF-POWERS CLAIM FAILS

In addition to being barred by HERA's Succession Provision, Plaintiffs' constitutional claim fails for several additional reasons. As the District Court correctly held, "the for-cause removal provision for the FHFA's Director does not

violate the United States Constitution." ROA.956. Further, Plaintiffs lacked Article III standing to assert their constitutional claim in the first place. Although the District Court did not address FHFA's standing arguments, this Court may affirm on that ground. *See Williams*, 826 F.3d at 810.[7]

A. Plaintiffs Lack Article III Standing to Assert Their Separation-of-Powers Claim

To establish standing to challenge the constitutionality of a statute, plaintiffs must show both that their alleged injury-in-fact is "fairly traceable" to the allegedly unconstitutional provision and that it "will be redressed in the event that statute is enjoined and/or declared unconstitutional." *Henderson v. Stalder*, 287 F.3d 374, 379 (5th Cir. 2002); *see also Comm. for Monetary Reform v. Bd. of Gov. of Fed. Reserve Sys.*, 766 F.2d 538, 542-43 (D.C. Cir. 1985) (rejecting constitutional challenge to Federal Reserve System structure because plaintiffs' injury was not traceable). Plaintiffs claim to have been injured by FHFA's execution of the Third Amendment. But that injury is neither traceable to the cause requirement for removal of a Senate-confirmed FHFA Director, nor redressable by a holding that such a cause requirement is unconstitutional.

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[7] Plaintiffs' lack of standing does not foreclose this Court from affirming the District Court's ruling that FHFA's structure is constitutional. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) (Courts may dismiss on merits notwithstanding jurisdictional issues where a claim is "insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit.").

Plaintiffs argued below that separation-of-powers claims always require automatic reversal of agency action without any inquiry into traceability and redressability. That is wrong; those bedrock Article III requirements apply here the same way they do in any other case. *See Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 264 (1991); *Comm. for Monetary Reform*, 766 F.2d at 542-43; *see also Allen v. Wright*, 468 U.S. 737, 750-53 & n.19 (1984) (explaining each Article III standing element must be independently satisfied). Plaintiffs cannot meet those requirements for multiple reasons and therefore lack standing.[8]

1. Plaintiff's Alleged Injury Is Not Traceable to the Tenure Protection Enjoyed By a Full FHFA Director

Plaintiffs cannot meet the traceability requirement for two separate and independent reasons. First, Plaintiffs' challenge centers on 12 U.S.C. § 4512(b)(2), which provides that an FHFA Director appointed by the President and confirmed by the Senate shall serve "for a term of 5 years, unless removed before the end of such term for cause by the President." But the Conservator's decision to enter into

[8] While some courts recognize a more general form of "standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate [parties'] rights," that type of standing is only for parties "directly subject to the authority of the agency, whether such authority is regulatory, administrative, or adjudicative in nature," not for those who simply claim to be "substantially affected" by an agency action. *Comm. for Monetary Reform*, 766 F.2d at 543. Plaintiffs have not argued and do not qualify for that form of standing.

the Third Amendment was made by an FHFA deputy director, Edward DeMarco, who was temporarily *acting* as FHFA director, not appointed by the President nor confirmed by the Senate. ROA.48, 52, 74-75; Br. 10. As such, § 4512(b)(2) and its for-cause standard did not apply to Mr. DeMarco.

A separate provision of the statute, not challenged by Plaintiffs, governs the circumstances in which deputy directors may serve temporarily as acting Director. *See* 12 U.S.C. § 4512(f) ("In the event of the death, resignation, sickness, or absence of the Director, the President shall designate [the Deputy Director of one of three divisions] to serve as acting Director until the return of the Director, or the appointment of a successor pursuant to subsection (b)."). Section 4512(f) neither sets a fixed term nor contains any "cause" limitations on the President's authorities. Because § 4512(b)(2)'s cause requirement for removal was inoperative at the time, there cannot have been any connection between that provision and FHFA's execution of the Third Amendment.

Plaintiffs took the position below that the for-cause standard should somehow be engrafted onto § 4512(f). But "[w]here 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 purposefully in the disparate inclusion or exclusion." *In re Burnett*, 635 F.3d 169, 172 (5th Cir. 2011) (citation omitted). Plaintiffs also relied on news articles portraying policy

disagreements between the Obama Administration and Mr. DeMarco and attributing to certain officials a belief that Mr. DeMarco had some form of tenure protection. But courts address constitutional challenges to statutes by consulting statutory text, not hearsay reports of what certain officials may believe a statute means.

There is a separate, more fundamental reason why the Third Amendment is not traceable to the for-cause standard for removal of a Senate-confirmed Director. The crux of Plaintiffs' claim is that FHFA's independence "diminishes the President's ability to influence FHFA's decisions." Br. 17. Thus, traceability requires Plaintiffs to demonstrate that greater Presidential ability to influence FHFA's decisions might have spurred FHFA to reject the Third Amendment.

But Plaintiffs' own allegations indicate exactly the opposite. Plaintiffs challenge what they term "joint FHFA-Treasury action," ROA.515: a contract between FHFA as Conservator and the Secretary of the Treasury, who is removable by the President at will. Plaintiffs' Complaint lumps FHFA and Treasury together under the plural "Agencies" over fifty times. ROA.8-90. Plaintiffs go so far as to characterize the Third Amendment as an affirmative part of the Administration's agenda. *See, e.g.*, ROA.17-18, 55-56 ("senior White House official" actively worked to bring about the Third Amendment); ROA.17 (purpose was to facilitate "the Administration's plans"); Br. 9 (imputing Treasury

purpose to Third Amendment). Those allegations belie any notion that FHFA's independence from the Administration was a causal factor in its approval of the Third Amendment.

2. Plaintiff's Alleged Injury Would Not Be Redressed If They Were to Prevail on the Merits of Their Constitutional Claim

Nor would Plaintiffs' alleged injury be redressed by a holding that § 4512(b)(2) is unconstitutional. When a limitation on the President's removal authority crosses constitutional lines (which the removal limitation here does not), the remedy is to declare that limitation prospectively inoperative, not to void past actions by the official who was protected from removal. That is particularly so where, as here, the action challenged was not even "Executive" in nature.

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), the Supreme Court held a unique set of restrictions on the President's ability to remove PCAOB members unconstitutional. However, neither the Supreme Court nor the lower courts on remand vacated any actions taken by the PCAOB, such as an investigation that caused the plaintiff injury. Rather, the Court "reject[ed]" the plaintiffs' argument that the removal restrictions rendered "all power and authority exercised by [the Board] in violation of the Constitution." 561 U.S. at 508. It was not "the existence of the Board" that "violate[s] the separation of powers," but the particular removal restrictions in the statute. *Id.* at 508-09. Since "[w]hen confronting a constitutional flaw in a statute, [courts] try to

limit the solution to the problem," the appropriate remedy for such a claim is simply to strike down the problematic provisions so they do not constrain the President's powers going forward. *Id.* at 508 (citation omitted); *accord John Doe Co. v. CFPB*, 849 F. 3d 1129, 1133 (D.C. Cir. 2017) ("[T]raditional constraints on separation-of-powers remedies" refuted the plaintiffs' position that a removal-restrictions claim could invalidate a CFPB action against them.).

If Plaintiffs here were to succeed on their constitutional claim, the result would therefore be an order striking the "cause" limitation from § 4512(b)(2) and altering the conditions under which a Senate-confirmed FHFA Director might be removed by the President in the future. That would not help Plaintiffs here, who complain not of any ongoing or anticipated future action by FHFA but rather about entry into the Third Amendment five years ago.

Plaintiffs' argument that a "violation of the separation of powers" automatically means any agency actions are "*ultra vires* and must be vacated" (Br. 20) is misplaced and overbroad. The cases upon which they rely involve situations where judges or other officials were invalidly appointed and invalidly serving.[9] A

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[9] *See NLRB v. Canning*, 134 S. Ct. 2550 (2014) (invalid recess appointment meant NLRB members lacked authority to act); *Nguyen v. United States*, 539 U.S. 69 (2003) (criminal appeal heard by non-Article III judge); *Ryder v. United States*, 515 U.S. 177 (1995) (criminal appeal heard by invalidly appointed military judges); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111 (D.C. Cir. 2015) (copyright board members invalidly appointed).

purported official act by an individual *who had no power to take it* may be void, though the *de facto* officer doctrine often insulates such actions from even those types of challenges. *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 81 (D.C. Cir. 2015) (act by invalidly appointed official is accorded *de facto* validity unless plaintiff raises challenge "at or around the time that the challenged government action [was] taken" (citation omitted)), *aff'd on other grounds*, 137 S. Ct. 929 (2017).

Those cases do not support vacatur where, as here, Plaintiffs simply challenge the constitutionality of limitations on the President's power to remove a properly appointed official, because such limitations do not go to the power of the official to act. *Free Enterprise Fund* and *John Doe Co.* govern remedies in removal-restriction cases and reject vacatur. That negates the redressability necessary for Plaintiffs to have standing.

Even if vacatur could in theory be an available remedy, there is a further reason why it would not apply to the particular agency action at issue here. The theoretical underpinning for Plaintiffs' constitutional claim is that "the Constitution vests the Executive power in the President," and that limits on his control of other officials who perform executive functions could interfere with his duty to "take Care that the Laws be faithfully executed." Br. 15 (quoting U.S. Const. art. II, §§ 1, 3). But as the District Court observed, "the challenged Third Amendment was

adopted by the FHFA in its capacity as conservator of Fannie Mae and Freddie Mac, not as an executive enforcing the laws of the United States." ROA.959.

When government agencies serve as conservators or receivers of financial institutions, they "step[] into the shoes" of those institutions. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86 (1994). Thus, when acting on behalf of those institutions, they are not acting as the Government at all, let alone carrying out functions that are "Executive" in character. *See United States v. Beszborn*, 21 F.3d 62, 68 (5th Cir. 1994) ("In its capacity as receiver," the Resolution Trust Corporation stood "as a private, non-governmental entity, and is not the Government for purpose[s] of the Double Jeopardy Clause."); *Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017) (Fannie Mae and FHFA as Conservator were not government actors for purposes of *Bivens* claims); *Meridian Invs., Inc. v. Freddie Mac*, 855 F.3d 573, 579 (4th Cir. 2017) (FHFA as Conservator "shed[s] its government character and also becom[es] a private party."). Here, when the Conservator approved the Third Amendment, it was engaging in a business transaction on behalf of private entities, not carrying out law enforcement or other executive governmental functions.

The D.C. Circuit's recent decision in *John Doe Co.* illustrates why that distinction matters. There, the court held that claims challenging limitations on the President's ability to remove the CFPB Director could not be a basis for

invalidating a CFPB investigative request because the function of "requesting information from private entities subject to regulation" is not "exclusively confined to the Executive Branch." 849 F.3d at 1132; *accord CFPB v. Future Income Payments, LLC*, --- F. Supp. 3d ----, 2017 WL 2190069, at *9 (C.D. Cal. May 17, 2017). The constitutional claim made by Plaintiffs here could likewise serve as a basis for invalidating the Third Amendment only if the act of entering into such financial contracts were exclusively confined to the Executive Branch, making it the type of function the Constitution requires the President to supervise. Because it is not, there would be no logical basis for an order holding the cause requirement unconstitutional to result in vacatur of the Third Amendment.

Anticipating this issue, Plaintiffs insist that "FHFA's Director acted in his *regulatory* capacity when he appointed FHFA to be conservator, and he exercises regulatory authority to oversee the conservatorship's operations." Br. 21. However, Plaintiffs sued FHFA solely "in its capacity as Conservator" and did not challenge the initial appointment of the Conservator by the regulator. ROA.8. Plaintiffs also protest that "whether a federal conservator 'should be treated as the United States depends on the context.'" Br. 22 (quoting *Auction Co. of Am. v. FDIC*, 132 F.3d 746, 748 (D.C. Cir. 1997)). Here, the context is a separation-of-powers claim premised on the notion that the President must retain control over *Executive* actions. The Conservator's agreement to the Third Amendment, a

financing transaction, on behalf of the Enterprises was not an Executive action, and Plaintiffs' separation-of-powers theory is therefore inapposite.

B. Plaintiffs' Separation-of-Powers Claim is Without Merit

If Plaintiffs have standing, their separation-of-powers claim is nevertheless without merit, and the District Court properly granted summary judgment for FHFA on that claim. It is long settled that Congress is not prohibited from creating independent agencies run by officers removable only for cause. *See Free Enter. Fund*, 561 U.S. at 483 (citing *Humphrey's Ex'r*, 295 U.S. 602). It is also beyond dispute that Congress may structure agencies to be headed by a single officer. Plaintiffs' position is that those two aspects are somehow mutually exclusive, *i.e.*, that Congress is forbidden from attaching removal protection to an office unless that office will share leadership with multiple other officers also having removal protection. No authority supports that novel and illogical thesis, and it finds no purchase in the principles that animate separation-of-powers jurisprudence.

1. FHFA's Structure Is Consistent With Longstanding Supreme Court Precedent Endorsing Independent Agencies

Over eighty years ago, the Supreme Court held in *Humphrey's Executor* that Congress may "create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause." *Free Enter. Fund*, 561 U.S. at 479. In *Humphrey's Executor*, the Court "found it 'plain' that the Constitution did not give the President 'illimitable power

of removal' over the officers of independent agencies." *Morrison v. Olson*, 487 U.S. 654, 687 (1988) (quoting *Humphrey's Ex'r*, 295 U.S. at 629). The Court has repeatedly reaffirmed this central principle in the decades since, including most recently in 2010. *See Wiener v. United States*, 561 U.S. at 483, 352 (1958); *Morrison*, 487 U.S. at 686-87; *Free Enter. Fund*, 561 U.S. at 483, 509. In the modern era, Congress has created dozens of independent agencies, performing a vast array of important functions, based on this judicially approved model. *See CFPB v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 899 (S.D. Ind. 2015) (describing "the independent regulatory agency with enforcement power" as "a theme . . . that has been a recurring feature of the modern administrative state").

FHFA fits squarely and easily within this framework. Congress created FHFA to regulate and supervise, among select other entities, Fannie Mae and Freddie Mac, financial institutions that play a vital role in housing finance. It has long been recognized that "[i]ndependence from presidential control is arguably important if agencies charged with regulating financial institutions . . . are to successfully fulfill their responsibilities; people will likely have greater confidence in financial institutions if they believe that the regulation of these institutions is immune from political influence." *Swan v. Clinton*, 100 F.3d 973, 983 (D.C. Cir. 1996). Congress's decision that FHFA should be led by a Director removable by the President for cause serves those important interests and was well within the

constitutional latitude provided to Congress by *Humphrey's Executor* and its progeny.

2. Plaintiffs' Efforts to Manufacture an Exception From Supreme Court Precedent Endorsing Independent Agencies Are Unavailing

a. Plaintiffs ask this Court to fashion from whole cloth a new exception to *Humphrey's Executor* by holding that it does not apply to agencies, like FHFA, headed by a single individual. As the District Court held, in accord with numerous recent decisions addressing the same issue with respect to the Consumer Financial Protection Bureau, there is no basis for such an exception. *See CFPB v. Navient Corp.*, No. 3:17-cv-00101, 2017 WL 3380530 (M.D. Pa. Aug. 4, 2017); *Future Income Payments*, 2017 WL 2190069; *ITT*, 219 F. Supp. 3d 878; *CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1086-89 (C.D. Cal. 2014). This Court should similarly decline the invitation.

While *Humphrey's Executor* happened to involve an agency structured as a multi-member commission (the FTC), that feature played no part in the Court's constitutional analysis. *See* 295 U.S. at 626-32. As the District Court noted, "the Supreme Court did not limit its decision in *Humphrey's Executor* to a multimember board rather than a single director." ROA.960. The fact that the *Humphrey's Executor* Court did not rely on the multi-member nature of the FTC is telling because the main issue the Court confronted was how to deal with its

decision nine years earlier in *Myers v. United States*, 272 U.S. 52 (1926), which had held unconstitutional certain limitations on the President's ability to remove the Postmaster General—who happened to be a single head of an agency. Had the Court perceived any constitutional significance to the number of individuals at the helm of an agency, it would have been only natural to distinguish *Myers* on that basis. Instead, the Court distinguished the postmaster based solely on the character of the office, namely that a postmaster performed purely executive functions with no rationale for independence. 295 U.S. at 627-28.[10]

Plaintiffs argue that an agency's structure is "presumptively unconstitutional" if it is not exactly like a structure previously upheld by the Supreme Court, *i.e.*, the FTC in *Humphrey's Executor* and the independent counsel in *Morrison*. Br. 15-16. That is wrong: "unless the Supreme Court expressly limits its opinion to the facts before it, it is the principle which controls and not the specific facts upon which the principle was decided." *Walker v. Georgia*, 417 F.2d 5, 8 (5th Cir. 1969). Moreover, Plaintiffs' "presumptively unconstitutional" approach is backward: "the premise from which [courts] must start in exercising

[10] The Supreme Court has since clarified that "the determination of whether the Constitution allows Congress to impose a 'good cause'-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.'" *Morrison*, 487 U.S. at 725; *see Free Enter. Fund*, 561 U.S. at 494-95. Plaintiffs here do not argue that FHFA is outside *Humphrey's Executor* because FHFA (as regulator) performs executive duties, or, for that matter, for any reason other than having a single Director.

judicial review over Congress" is "the presumption of constitutionality." *ITT*, 219 F. Supp. 3d at 898 (citing *United States v. Morrison*, 529 U.S. 598, 607 (2000)). "Where Congress has acted, a challenge to the constitutionality of its enactments must show not merely that the legislature has taken a path not before explicitly sanctioned by the judicial branch, but that it has affirmatively violated constitutional principles." *Id.*

b. As the District Court correctly observed, "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty." ROA.958 (quoting *Morrison*, 487 U.S. at 691). Here, because Plaintiffs claim not that the removal restriction is problematic by itself, but only combined with FHFA's single-director structure, Plaintiffs must establish that tenure protection for a single agency head impedes the President's performance of his constitutional duties to a greater degree than if the same tenure protection were provided to multiple members of a commission.

Plaintiffs fail to support the counterintuitive notion that a President would find it more difficult to supervise a single individual removable for cause than a board composed of numerous individuals who are each removable for cause. As one court reasoned, "[i]t is no more difficult for the President to assure that the Director of the CFPB is 'competently performing his or her statutory responsibilities' than it was for the President to oversee the leadership of the FTC

at the time of *Humphrey's Executor*." *Morgan Drexen*, 60 F. Supp. 3d at 1088 (citation omitted). After all, "if the President had needed to fully revamp the leadership of the FTC at that time, he would have been required to [effect] five separate for cause removals, while only one is required in order to change the leadership of the CFPB." *Id.* Furthermore,

> With a multi-member body, it is more difficult to assess or allocate responsibility among the members of the body for policy decisions or actions taken because decision making is made within the group and may be the product of compromise. In contrast, with a single director, it is very clear who made the decision. Further, it is a similarly difficult task to hold an individual commissioner or board member responsible for the acts or omissions of the agency. This is not the case with a single director whose responsibility for any agency action or omission is easily assessed.

Navient, 2017 WL 3380530, at *17; *accord Future Income Payments*, 2017 WL 2190069, at *8 (observing that a commission "may be less responsive to the Executive or the public due to internal divisions or sheer sluggishness").

Plaintiffs' arguments to the contrary have nothing to do with removal authority and do not withstand scrutiny. They contend that "[b]ecause the terms of commission members are staggered, a President inevitably will have the ability to influence a multi-member commission's deliberations by appointing one or more members." Br. 17. But far more influence would seem to come from replacing a sole agency head than from appointing one or two members of a commission that

may be stocked with loyalists to a prior administration. *See Navient*, 2017 WL 3380530, at *17 (appointment of a single director "has an immediate impact because the appointee, and the appointee alone, now heads the agency"). Plaintiffs are likely to rejoin that there may be occasions in which a President who serves a single four-year term never gets an opportunity to appoint an FHFA Director (whose term is five years). But that stems from the fact that an FHFA Director's term happens to be a year longer than a President's term, not any inherent difference between a single-director structure and a board structure. Indeed, the same effect would occur with a board consisting of multiple members with staggered five-year terms.[11]

Plaintiffs likewise insist that the bipartisanship feature of some commissions helps the President by assuring that "at least some members will belong to the President's party." Br. 17. But that again is an added option and not an innate attribute of a multi-member structure, and Plaintiffs ignore the flip side that bipartisanship just as effectively guarantees at least some members (perhaps a majority) will owe their loyalty to the opposition party. Plaintiffs' speculation that

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[11] Notably, Presidents will more often have an opportunity to appoint an FHFA Director than to appoint a majority of the FTC. *See Navient*, 2017 WL 3380530, at *17 & n.7 (calculating that only four out of seven presidential terms would include the ability to appoint three commissioners of the FTC, whereas four out of five presidential terms will include the ability to appoint a single agency director with a five-year term).

"[m]ulti-member commissions also must deliberate and compromise in ways that reduce the risk that they will adopt extreme policies that are inconsistent with those of the President" (Br. 18) is tenuous at best. A President who sees an emergent situation as calling for quick and bold action might well consider the need to "deliberate and compromise" to be a hindrance to his policy agenda.

The bottom line is that, depending on particular facts, a multi-member board structure might be more conducive to Presidential supervision in some situations and contexts, while a single agency head is preferable in others. *See Future Income Payments*, 2017 WL 2190069, at *8 (observing that "there are many potentially competing trade-offs and no empirical evidence that establishes the superiority of either" structure). Nothing Plaintiffs offer suggests that a multi-member structure, in and of itself, inherently or systematically enhances Presidential control of the Executive Branch. In short, these are policy choices for Congress, not dictated by Article II of the Constitution.

c. Plaintiffs try to salvage their separation-of-powers claim by asserting that there is "no support in historical precedent" for a single agency head with removal protection. Br. 17. That too is wrong. Plaintiffs admit that the CFPB, Office of Special Counsel, and Social Security Administration are all agencies headed by a single official protected from removal without cause. Br. 17; *see* ROA.14 (rejecting novelty argument). The Office of the Comptroller of the

Currency, dating to 1864, is an additional longstanding example within the financial regulatory sector.[12]

In any event, Plaintiffs' focus on historical precedent is misguided. Even if there were no historical precedents at all, "[o]ur constitutional principles of separated powers are not violated . . . by mere anomaly or innovation." *Mistretta v. United States*, 488 U.S. 361, 385 (1989); *Future Income Payments*, 2017 WL 2190069, at *8 (rejecting argument equating novelty with unconstitutionality because "everything is new the first time it is enacted" (alteration and citation omitted)).

Finally, Plaintiffs suggest that their claim challenging the for-cause removal requirement is enhanced by unrelated provisions of HERA preventing litigative interference with certain FHFA actions and to placing FHFA outside the congressional appropriations process. Br. 19. But their Complaint fails to assert any claims relating to those provisions, which each reflect policy choices by Congress that do not pose any constitutional issues at all, let alone under Article II. *See Morgan Drexen*, 60 F. Supp. 3d at 1091 n.5 (emphasizing that Congress may

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[12] *See* 12 U.S.C. § 2 (Comptroller serves for five-year term, subject to potential removal by President which must be for "reasons"); *id.* § 1(b)(1) (specifically barring intervention by Administration in OCC matters); *Future Income Payments*, 2017 WL 2190069, at *7; *Case of Dist. Atty. of U.S.*, 7 F. Cas. 731, 737 (E.D. Pa. 1868). Plaintiffs assert that FHFA is an "independent" agency because it is so designated in 44 U.S.C. § 3502(5) (Br. 3); that same statute includes OCC in that same designation.

"entirely preclude judicial review" of at least non-constitutional challenges to agency action); *ITT*, 219 F. Supp. 3d at 896 ("[T]he Constitution does not prohibit Congress from enacting funding structures for agencies that differ from the procedures prescribed by the ordinary appropriations process."); *Navient*, 2017 WL 3380530, at *16. Plaintiffs do not explain how limitations on judicial review or FHFA's funding mechanism threaten to "impede the President's ability to perform his constitutional duty" to supervise the Executive Branch. *Morrison*, 487 U.S. at 691.

* * *

Plaintiffs make no effort to hide the fact that their constitutional claim is modeled on a decision issued by a split panel of the D.C. Circuit in a CFPB case a few days before Plaintiffs filed this lawsuit. Br. 12-13. But as Plaintiffs acknowledge, that opinion has been vacated and is being reheard *en banc*, and another D.C. Circuit panel expressly declined to assign any weight to it. *John Doe Co.*, 849 F.3d at 1131-32. The District Court did not err by agreeing with every other court that has considered the issue that "the reasoning of the panel decision in *PHH Corp.* [is] unpersuasive even if it had not been vacated." ROA.959.

Plaintiffs state that the U.S. Department of Justice "recently argued to the en banc D.C. Circuit" that "FHFA's unusual structure . . . diminishes the President's ability to influence FHFA's decisions," referring to DOJ's *en banc* amicus brief in

PHH pertaining to the CFPB. Br. 17; *see* ROA.745-77. Contrary to Plaintiffs' characterization, the DOJ brief in *PHH* did not take a position on the constitutionality of FHFA's structure or its potential to diminish the President's ability to influence FHFA's decision. The DOJ brief in fact contrasts FHFA's narrow role as a safety and soundness regulator of a handful of specified "regulated entities" with the CFPB's sweeping authority over "any person that engages in offering or providing a consumer financial product or service." ROA.771. The DOJ brief in *PHH* further explains, consistent with FHFA's position expressed above, that the proper remedy for an unconstitutional removal restriction would simply be "to sever the provision limiting the President's authority . . . not to declare the entire agency and its operations unconstitutional." *Id.*; *see supra* Section III.A.2.

In sum, whether because the Succession Provision bars the claim, Plaintiffs lack standing, or because the District Court's decision on the constitutional question was correct, this Court should affirm summary judgment for FHFA on Plaintiffs' constitutional claim.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment dismissing the Complaint.

Dated: September 8, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because the brief contains 12,963 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

Dated: September 8, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2017, I electronically filed the foregoing with the Court via the appellate CM/ECF system, and that copies were served on the following counsel of record by operation of the CM/ECF system on the same date:

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STATUTORY ADDENDUM

12 U.S.C. § 4512

§ 4512. Director.

(a) Establishment of position

There is established the position of the Director of the Agency, who shall be the head of the Agency.

(b) Appointment; term

(1) Appointment

The Director shall be appointed by the President, by and with the advice and consent of the Senate, from among individuals who are citizens of the United States, have a demonstrated understanding of financial management or oversight, and have a demonstrated understanding of capital markets, including the mortgage securities markets and housing finance.

(2) Term

The Director shall be appointed for a term of 5 years, unless removed before the end of such term for cause by the President

. . .

(f) Acting Director

In the event of the death, resignation, sickness, or absence of the Director, the President shall designate either the Deputy Director of the Division of Enterprise Regulation, the Deputy Director of the Division of Federal Home Loan Bank Regulation, or the Deputy Director for Housing Mission and Goals, to serve as acting Director until the return of the Director, or the appointment of a successor pursuant to subsection (b).

12 U.S.C. § 4617

§ 4617. Authority over critically undercapitalized regulated entities

(a) Appointment of the Agency as conservator or receiver

(1) In general

Notwithstanding any other provision of Federal or State law, the Director may appoint the Agency as conservator or receiver for a regulated entity in the manner provided under paragraph (2) or (4). All references to the conservator or receiver under this section are references to the Agency acting as conservator or receiver.

(2) Discretionary appointment

The Agency may, at the discretion of the Director, be appointed conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity.

. . .

(4) Mandatory receivership

(A) In general

The Director shall appoint the Agency as receiver for a regulated entity if the Director determines, in writing, that--

(i) the assets of the regulated entity are, and during the preceding 60 calendar days have been, less than the obligations of the regulated entity to its creditors and others; or

(ii) the regulated entity is not, and during the preceding 60 calendar days has not been, generally paying the debts of the regulated entity (other than

debts that are the subject of a bona fide dispute) as such debts become due.

. . .

(7) Agency not subject to any other Federal agency

When acting as conservator or receiver, the Agency shall not be subject to the direction or supervision of any other agency of the United States or any State in the exercise of the rights, powers, and privileges of the Agency.

(b) Powers and duties of Agency as conservator or receiver

. . .

(2) General Powers

(A) Successor to regulated entity

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

(i) all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity; and

(ii) title to the books, records, and assets of any other legal custodian of such regulated entity.

(B) Operate the regulated entity

The Agency may, as conservator or receiver--

(i) take over the assets of and operate the regulated entity with all the powers of the shareholders, the

directors, and the officers of the regulated entity and conduct all business of the regulated entity;

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

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

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

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

. . .

(D) Powers as conservator

The Agency may, as conservator, take such action as may be --

(i) necessary to put the regulated entity in a sound and solvent condition; and

(ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.

. . .

(G) Transfer or sale of assets and liabilities

The Agency may, as conservator or receiver, transfer or sell any asset or liability of the regulated entity in default, and may do so without

any approval, assignment, or consent with respect to such transfer or sale.

. . .

(J) Incidental Powers

The Agency may, as conservator or receiver--

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

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

. . .

(f) Limitation on court action

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