No. 18-2506

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ATIF F. BHATTI; TYLER D. WHITNEY; MICHAEL F. CARMODY,

Plaintiffs-Appellants,

v.

FEDERAL HOUSING FINANCE AGENCY; MELVIN L. WATT, in his official capacity as Director of the Federal Housing Finance Agency; DEPARTMENT OF THE TREASURY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA (No. 17-2185)

BRIEF FOR THE TREASURY DEPARTMENT

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CASE SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT

To avert the catastrophic impact on the housing market that would have resulted from the collapse of mortgage giants Fannie Mae and Freddie Mac (the enterprises), Congress enacted the Housing and Economic Recovery Act of 2008, which created the Federal Housing Finance Agency (FHFA), authorized the Treasury Department to purchase securities issued by the enterprises, and authorized FHFA to act as conservator of the enterprises. After FHFA placed Fannie Mae and Freddie Mac into conservatorship in 2008, Treasury purchased preferred stock in each entity and committed to provide billions of dollars in taxpayer funds to support the enterprises.

This is one of many suits brought by shareholders of the enterprises challenging a 2012 amendment (the "Third Amendment") to the preferred stock purchase agreements. The courts of appeals, including this Court, have uniformly rejected challenges to the Third Amendment on statutory grounds as barred by HERA's anti-injunction provision, 12 U.S.C. § 4617(f). *See Saxton v. FHFA*, 901 F.3d 954, 956 (8th Cir. 2018); *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 615 (D.C. Cir. 2017); *Roberts v. FHFA*, 889 F.3d 397, 408-10 (7th Cir. 2018); *Robinson v. FHFA,* 876 F.3d 220, 228 (6th Cir. 2017); *see also Collins v. Mnuchin*, 896 F.3d 640, 652-53 (5th Cir. 2018) (per curiam), *vacated, pending rehearing en banc* (5th Cir. Nov. 12, 2018).

Plaintiffs here argue that the Third Amendment must be set aside on various constitutional grounds. Because the suit raises significant questions, Treasury agrees with plaintiffs that twenty minutes of oral argument is appropriate.

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STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331 because their claims arise under the U.S. Constitution. JA.10. On July 9, 2018, the district court entered judgment granting the defendants' motions to dismiss. Add.48. Plaintiffs timely filed a notice of appeal on July 10, 2018. JA.162. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

To avert the catastrophic impact on the housing market that would result from the collapse of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (the enterprises), Congress enacted the Housing and Economic Recovery Act of 2008 (HERA), which created the Federal Housing Finance Agency (FHFA) and empowered it to act as conservator or receiver of the enterprises. 12 U.S.C. §§ 4511, 4617(a). Congress recognized that federal assistance of vast proportions could be required and authorized the Treasury Department to "purchase any obligations and other securities issued by" the enterprises. *Id.* §§ 1455(*l*)(1)(A), 1719(g)(1)(A).

After FHFA placed the enterprises into conservatorship, Treasury immediately purchased preferred stock in each entity and committed to provide up to $100 billion in taxpayer funds to each enterprise to avoid insolvency. The preferred stock purchase agreements (Purchase Agreements) were amended three times. The Third Amendment challenged here replaced a fixed dividend obligation with a variable dividend equal to the amount, if any, by which the enterprises' net worth exceeds a capital buffer. Plaintiffs allege that the Third Amendment must be set aside because HERA provides that FHFA's permanent Director is removable only for cause; because Edward DeMarco, who signed the Third Amendment, had served too long as Acting Director of FHFA; and because HERA violates the non-delegation doctrine. Plaintiffs did not assert independent claims against Treasury.

The district court rejected plaintiffs' invitation to invalidate the Third Amendment on any of these grounds. The issues presented are the following:

(1) Whether plaintiffs' claims are barred by HERA's transfer-of-shareholder-rights provision, 12 U.S.C. § 4617(b)(2)(A)(i).

Authorities: 12 U.S.C. § 4617(b)(2)(A)(i); *Roberts v. FHFA*, 889 F.3d 397, 408-10 (7th Cir. 2018).

(2) Whether the district court correctly rejected plaintiffs' argument that the Third Amendment should be set aside because the director of FHFA is removable only for cause.

Authorities: *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 513-14 (2010); *United States v. Beszborn*, 21 F.3d 62, 68 (5th Cir. 1994).

(3) Whether the district court correctly rejected plaintiffs' argument that the Third Amendment should be set aside because the length of Acting Director DeMarco's tenure violated the Appointments Clause.

Authorities: 12 U.S.C. § 4512(f); *United States v. Eaton,* 169 U.S. 331, 343 (1898); *Citizens & Landowners against the Miles City/New Underwood Powerline v. Secretary of the Dep't of Energy,* 683 F.2d 1171, 1175 (8th Cir. 1982).

(4) Whether the district court correctly rejected plaintiffs' argument that HERA violates the non-delegation doctrine.

Authorities: *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 799 (8th Cir. 2005); *Yakus v. United States*, 321 U.S. 414, 420 (1944).

STATEMENT OF THE CASE

A. Fannie Mae and Freddie Mac

Congress created Fannie Mae and Freddie Mac to, among other things, "promote access to mortgage credit throughout the Nation . . . by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing." 12 U.S.C. § 1716(4). These government-sponsored enterprises provide liquidity to the mortgage market by purchasing residential loans from banks and other lenders, thereby providing lenders with capital to make additional loans. *Saxton v. FHFA*, 901 F.3d 954, 956 (8th Cir. 2018). Fannie Mae and Freddie Mac are private, publicly traded companies. *Id.* at 956.

B. The 2008 Housing Crisis and HERA

With the 2008 collapse of the housing market, Fannie Mae and Freddie Mac experienced overwhelming losses due to a dramatic increase in default rates on residential mortgages. *See Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 599 (D.C. Cir.

2017). At the time, the enterprises owned or guaranteed over $5 trillion of residential mortgage assets, representing nearly half the United States mortgage market. *Id.* at 599. Their failure would have had a catastrophic impact on the national housing market and economy.

The enterprises lost more in 2008 ($108 billion) than they had earned in the past 37 years combined ($95 billion). Office of Inspector General (OIG), FHFA, *Analysis of the 2012 Amendments to the Senior Preferred Stock Purchase Agreements* 5 (Mar. 20, 2013).[1] As a result, the enterprises faced capital shortfalls, and private investors were unwilling to provide Fannie Mae and Freddie Mac with the capital they needed to weather their losses and avoid receivership and liquidation. *Perry Capital*, 864 F.3d at 601.

In July 2008, Congress enacted the Housing and Economic Recovery Act of 2008 (HERA), Pub. L. No. 110-289, 122 Stat. 2654; *see Saxton*, 901 F.3d at 956. The legislation created FHFA as an independent agency to supervise and regulate the enterprises. FHFA is headed by a single director nominated by the President and confirmed by the Senate. 12 U.S.C. § 4512(a), (b)(1). The Director serves a five-year term and may be removed only for cause. *Id.* § 4512(b)(2). If the Director vacates the office before the five-year term ends, the President may designate one of three deputy

[1] https://www.fhfaoig.gov/Content/Files/WPR-2013-002_2.pdf

directors to serve as Acting Director until a new Director can be confirmed. *Id.* § 4512(f).

HERA also granted FHFA the authority to act as conservator or receiver of the enterprises. 12 U.S.C. §§ 4511, 4617(a). FHFA's authority to appoint itself conservator or receiver is generally discretionary, *id.* § 4617(a)(2), but it must place the enterprises into receivership if it determines that the enterprises' assets have been worth less than their obligations for sixty calendar days, *id.* § 4617(a)(4).

HERA further provides that FHFA, as conservator or receiver, "immediately succeed[s] to—(i) all rights, titles, powers, and privileges of the [enterprises] and of any stockholder, officer, or director of such [enterprises], with respect to the [enterprises.]" 12 U.S.C. § 4617(b)(2)(A)(i). The legislation authorizes FHFA, as conservator, to "take such action as may be—(i) necessary to put the [enterprises] in a sound and solvent condition; and (ii) appropriate to carry on the business of the [enterprises] and preserve and conserve the assets and property of the [enterprises]." *Id.* § 4617(b)(2)(D). HERA also permits a conservator to take actions "for the purpose of reorganizing, rehabilitating, or winding up the affairs" of the enterprises. *Id.* § 4617(a)(2). HERA further states that FHFA, when acting as conservator, may exercise its statutory authority in a manner "which the Agency determines is in the best interests of the [enterprises] or the Agency." *Id.* § 4617(b)(2)(J)(ii). Finally, HERA contains an anti-injunction provision, which provides that "[e]xcept 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 [FHFA] as a conservator or a receiver." *Id.* § 4617(f).

Recognizing that an enormous commitment of taxpayer funds could be required, Congress also amended the enterprises' statutory charters to authorize Treasury to "purchase any obligations and other securities issued by" the enterprises upon "Treasury's specific determination that the terms of the purchase would 'protect the taxpayer,'" *Perry Capital*, 864 F.3d at 600, and to "exercise any rights received in connection with such purchases." 12 U.S.C. §§ 1455(*l*)(1)(A), (2)(A), 1719(g)(1)(A), (B).

C. Conservatorship and the Purchase Agreements

FHFA (under Director James Lockhart, Add.5) placed the enterprises in conservatorship on September 6, 2008. *Perry Capital*, 864 F.3d at 600. One day later, Treasury purchased senior preferred stock in each entity. *Id.* Under the Purchase Agreements, Treasury committed to provide up to $100 billion in taxpayer funds to each enterprise to maintain their solvency by ensuring that their assets were at least equal to their liabilities. *Id.* at 601.

The Purchase Agreements entitled Treasury to four principal contractual rights. Add.6-7. First, Treasury received preferred stock with a senior liquidation preference of $1 billion for each enterprise, plus a dollar-for-dollar increase each time the enterprises drew upon Treasury's funding commitment. Add.6.[2] Second, Treasury was entitled to quarterly dividends equal to 10% of its liquidation preference. Add.7. Third, Treasury received warrants to purchase the enterprises' common stock. Add.6. Fourth, Treasury would be entitled to a periodic commitment fee. *Perry Capital*, 864 F.3d at 601.

Treasury's initial funding commitment soon appeared to be inadequate. In May 2009, FHFA and Treasury agreed to double Treasury's funding commitment to $200 billion per enterprise. Add.7. FHFA Director James Lockhart resigned in August 2009, and Edward DeMarco was designated by the President to serve as Acting Director under 12 U.S.C. § 4512(f). Add.5.

In December 2009, in the face of ongoing losses, Treasury and FHFA (now headed by Acting Director DeMarco) amended the Purchase Agreements for a second time to allow the enterprises to draw unlimited amounts from Treasury to cure net-worth deficits until the end of 2012, at which point Treasury's funding commitment would be fixed. Add.7.

As of June 30, 2012, the enterprises had drawn $187.5 billion from Treasury's funding commitment, making Treasury's liquidation preference $189.5 billion, including the initial $1 billion senior liquidation preference for each enterprise. JA.93;

[2] "A liquidation preference is a priority right to receive distributions from the [enterprises'] assets in the event they are dissolved." *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 216 n.6 (D.D.C. 2014).

Perry Capital, 864 F.3d at 601. Under the terms of the original Purchase Agreements, the enterprises' dividend obligations to Treasury were thus nearly $19 billion per year. Between 2009 and 2011, the enterprises could not pay these substantial dividend obligations out of their earnings, and drew on Treasury's funding commitment. *Perry Capital*, 864 F.3d at 601.

D. The Third Amendment

On August 17, 2012, Treasury and FHFA (through Acting Director DeMarco) agreed to modify the Purchase Agreements for a third time. This "Third Amendment" broke the draws-to-pay-dividends cycle by replacing the previous fixed dividend obligation with a variable dividend equal to the amount, if any, by which the enterprises' net worth for the quarter exceeds a capital buffer. Add.7. Treasury also agreed to suspend the periodic commitment fee it was owed under the original Purchase Agreements for as long as the variable dividend was in place.

In May 2013, the President nominated Melvin Watt to serve as FHFA Director; he was confirmed by the Senate and sworn into office on January 6, 2014. Add.5-6.

E. This Court's Decision in *Saxton*

In *Saxton*, this Court affirmed the district court's dismissal of a shareholder suit challenging the Third Amendment. 901 F.3d at 956. In that case, shareholders argued that FHFA exceeded its powers as conservator, and that both FHFA and Treasury acted in an arbitrary and capricious manner. *Id.* Rejecting the plaintiffs' arguments, this Court held that the anti-injunction provision in HERA, 12 U.S.C. § 4617(f), barred plaintiffs' suit against both FHFA and Treasury. This Court also rejected the plaintiffs' argument that the non-delegation doctrine required that HERA be narrowly construed. The Court explained that "[t]he canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them." *Id.* at 959 (quoting *Clark v. Martinez*, 543 U.S. 371, 385 (2005)).

Judge Stras concurred in the Court's decision, *Saxton*, 901 F.3d at 959 (Stras, J., concurring), agreeing with the majority that the terms of HERA barred plaintiffs' suit because agreeing to the Third Amendment was "an authorized act" under HERA. *Id.* at 960. Judge Stras explained that it was "clear that the choice among suitable alternatives belongs to the FHFA, not to the shareholders and certainly not to the courts." *Id.* at 962.

F. District Court Proceedings

Plaintiffs are stockholders in Fannie Mae and Freddie Mac. Add.7-8. They brought suit challenging the Third Amendment on the grounds that FHFA's structure is unconstitutional; that DeMarco's service as Acting Director was unconstitutionally long; and that FHFA's conservatorship powers violate the non-delegation doctrine. Add. 8.

As to plaintiffs' separation-of-powers claims, the district court first held that plaintiffs lacked standing because, in its view, "[t]here is no causal connection between their injury—a Third Amendment that (in plaintiffs' view) is too favorable to the Executive Branch—and the lack of Executive Branch influence over FHFA." Add.12. Turning to the merits, the district court followed the reasoning of the D.C. Circuit in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc), and concluded that FHFA was not unconstitutionally structured. Add.16-18.

The district court also rejected plaintiffs' Appointments Clause challenge. The court reasoned that "subordinate officers who have not been confirmed by the Senate may discharge the duties of a principal officer for a limited time." Add.22 (citing *United States v. Eaton*, 169 U.S. 331, 343-44 (1898)). The district court rejected plaintiffs' claim that Acting Director DeMarco's tenure "was unconstitutionally long," holding that the question of how long an inferior officer may perform the duties of a principal officer was a non-justiciable question. Add.22. The court also held that even if it agreed "with plaintiffs that DeMarco's service as acting director was invalid at the time that FHFA entered into the Third Amendment," it would hold that the *de facto* officer doctrine bars plaintiffs' attempts to undo the Third Amendment. Add.35.

The district court next rejected plaintiffs' non-delegation doctrine challenge. The court recognized that the non-delegation doctrine did not apply because FHFA was acting as conservator when it undertook the Third Amendment. Add.40. The court then held that, in any event, even assuming FHFA exercised government authority, "HERA provides the requisite 'intelligible principle.'" Add.45. The court observed that "FHFA does not operate without oversight," and Congress's "continuing supervision is sufficient to satisfy the requirements of the non-delegation doctrine." Add.46.

SUMMARY OF ARGUMENT

Plaintiffs' arguments that this Court should set aside the Third Amendment fail for multiple reasons.

1. All of plaintiffs' claims are barred by HERA. HERA provides that FHFA, as conservator or receiver, "immediately succeed[s]" to "all rights, titles, powers, and privileges of the [enterprises], and of any stockholder[]" with respect to the enterprises and their assets. 12 U.S.C. § 4617(b)(2)(A)(i). This provision "plainly transfers [to the FHFA the] shareholders' ability to bring derivative suits" on behalf of the enterprise. *Perry Capital, LLC v. Mnuchin*, 864 F.3d 591, 623 (D.C. Cir. 2017). Plaintiffs assert that the Third Amendment deprived the enterprises of capital, and that the relief they seek—invalidation of the Third Amendment—would require transfer of funds to the enterprises and would allegedly result in future increases in the enterprises' capital. These claims are quintessentially derivative claims and fall squarely within the transfer-of-shareholder-rights provision. *See Roberts v. FHFA*, 889 F.3d 397, 409 (7th Cir. 2018) ("[Plaintiffs] complain, in effect, of a combination of mismanagement and depletion of corporate assets through overpayment, both of which are classic derivative claims."). That the claims are constitutional in nature is of no moment; the

claims asserted here do not belong to the shareholders and nothing about shareholder standing requires that shareholders be permitted to enforce alleged constitutional rights on the part of a corporation.

2. Plaintiffs' claims, even if not barred, in no way support their contention that the Third Amendment should be invalidated. They first argue that the "for cause" restriction on the removal of the FHFA Director requires nullification of the Third Amendment on separation-of-powers grounds, an outcome that, plaintiffs assert, would return matters to the status quo immediately before the Amendment. Although plaintiffs are correct that the FHFA Director, acting as regulator, must be removable at will, their argument that the Third Amendment must be invalidated fails. The separation-of-powers concerns raised by restrictions on the removal of persons exercising significant governmental authority do not apply where, as here, a government-appointed conservator steps into the shoes of private entities; the "for cause" removal provision did not apply to Acting Director DeMarco; and even if plaintiffs were correct, the result would not be to turn the clock back to the time of the Second Amendment, but to unravel every action taken by the conservator.

3. Plaintiffs offer an equally unpersuasive Appointments Clause argument. They recognize that an "inferior officer" may exercise, in an acting capacity, the duties of an officer appointed by the President and confirmed by the Senate. They urge, however, that Acting Director DeMarco served "too long" as Acting Director, Pl.Br.38, and that the Third Amendment was therefore invalid.

As an initial matter, Appointments Clause concerns, like removal concerns, are not implicated when FHFA acts as a conservator. The conservator of a private entity need not be a government official at all, and FHFA did not exercise governmental authority when acting as conservator of the enterprises.

Moreover, the Appointments Clause claim fails on its own terms. Although Congress has included time limitations in other statutes providing for the designation of individuals to serve in an acting capacity, HERA imposes no such limitation. And the Constitution also imposes no express limitation; plaintiffs' attempt to locate such a limitation in the Recess Appointments Clause is wholly with merit. The Supreme Court has never suggested that the Constitution imposes a specified and judicially enforceable time limit on the service of a person exercising duties in an acting capacity. Plaintiffs' claim that Acting Director DeMarco served "indefinitely," Pl.Br.36, is, of course, mistaken. DeMarco served as Acting Director only until Melvin Watt became Director. In any event, even assuming that the question of a time limitation were justiciable, the length of DeMarco's service was reasonable. During DeMarco's tenure, the President took timely steps to replace DeMarco with a permanent Director, but the first nomination failed. The time it took to nominate a second candidate who both met the President's qualifications and could obtain Senate confirmation was entirely reasonable.

As a final matter, plaintiffs waited too long to bring their Appointments Clause challenge. Plaintiffs waited nearly *five years* to challenge an agreement they say violates their constitutional rights and rights as shareholders. That delay permitted the development of significant reliance interests in the interim and created prejudice to the government and numerous third parties.

4. Plaintiffs' non-delegation doctrine arguments are insubstantial. FHFA, as conservator, does not exercise governmental authority. In any event, HERA provides intelligible principles to guide FHFA in its role as conservator, and plaintiffs' argument to the contrary relies on a misreading of this Court's decision in *Saxton*.

STANDARD OF REVIEW

This Court reviews de novo a district court's grant of a motion to dismiss. *Degnan v. Burwell*, 765 F.3d 805, 808 (8th Cir. 2014).

ARGUMENT

I. HERA's Shareholder-Rights Provision Bars Plaintiffs' Claims.

Plaintiffs' claims against Treasury and FHFA are barred by HERA's transfer-of-shareholder-rights provision, 12 U.S.C. § 4617(b)(2)(A)(i) (also referred to as HERA's Succession Clause). Although the district court did not rule on that ground, it provides an independent basis for dismissal of this suit.

The transfer-of-shareholder-rights provision provides that FHFA "shall, as conservator or receiver, and by operation of law, immediately succeed to . . . all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." 12 U.S.C. § 4617(b)(2)(A)(i). This provision "plainly transfers [to the FHFA the] shareholders' ability to bring derivative suits." *Perry Capital*, 864 F.3d at 623 (quoting *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012)). As the Seventh Circuit explained in *Roberts*, 889 F.3d at 409, shareholder claims challenging the adoption of the Third Amendment on the ground that it was the result of "mismanagement" and resulted in a "depletion of corporate assets through overpayment" are derivative claims, and they are therefore barred.

That plaintiffs bring constitutional claims is of no moment: whether a claim is direct or derivative turns on the nature of the plaintiffs' injury and the relief sought; it does not depend on whether the source of the claimed injury is a statutory violation or a constitutional one.

A. Plaintiffs' claims are derivative.

1. "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). Thus, legal harms committed against a corporation give rise to claims belonging to the corporation itself, and shareholder suits seeking to enforce those claims are derivative. *See, e.g.*, *First Annapolis Bancorp, Inc. v. United States*, 644 F.3d 1367, 1373 (Fed. Cir. 2011). In a derivative suit, any recovery flows to the corporate treasury; in a direct suit, it flows to the individual plaintiff-shareholder.

The determination whether a federal-law claim is direct or derivative is governed by federal law. *See* 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1821 (2017); *cf. Rifkin v. Bear Stearns & Co.*, 248 F.3d 628, 631 (7th Cir. 2001) ("[S]tanding to bring a federal claim in federal court is exclusively a question of federal law."). Where standing turns on the "allocation of governing power within [a] corporation," however, federal law often looks to state-law principles. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991); *Starr Int'l Co. v. United States*, 856 F.3d 953, 965-66 (Fed. Cir. 2017).

The principles for distinguishing direct from derivative claims are well established and consistent across federal and state law. In concluding that plaintiff shareholder claims challenging the Third Amendment were derivative, the Seventh Circuit explained that the analysis is governed by two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)[?]" *Roberts*, 889 F.3d at 409 (quoting *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004)); *see also Potthoff v. Morin*, 245 F.3d 710, 716-17 (8th Cir. 2001) ("[A]ctions to enforce corporate rights or redress injuries to the corporation cannot be maintained by a stockholder in his own name . . . even though the injury to the corporation may incidentally result in the depreciation or destruction of the value of the stock. . . . . [A shareholder's] claim can survive only if he has alleged that he personally has suffered a direct, nonderivative injury."). A claim is "direct" when "the duty breached was owed to the stockholder" and the stockholder "can prevail without showing an injury to the corporation." *Tooley*, 845 A.2d at 1039. A claim is "derivative" if the harm to the shareholder is the byproduct of some injury to the corporate body as a whole. *Id; see also, e.g.*, *Arent v. Distribution Scis., Inc.*, 975 F.2d 1370, 1372 (8th Cir. 1992); *Pothoff*, 245 F.3d at 716; *Craig Outdoor Advert., Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1024 (8th Cir. 2008).

2. Plaintiffs ask that the Third Amendment be declared invalid and enjoined, so that future increases in net worth would be retained by the enterprises, and also request that the dividends Treasury has already received be returned to the enterprises. Such an order would not benefit plaintiffs directly. The relief sought would enrich the enterprises and therefore make plaintiffs' rights in the enterprises more valuable. Similarly, the harm that plaintiffs allege—the assertedly improper transfer of the enterprises' net worth to Treasury—was suffered by the corporation. *See, e.g.*, JA.35 (Am. Compl.) ("[T]he Net Worth Sweep had dissipated tens of billions of dollars that *the Companies* could have otherwise retained as capital.") (emphasis added); JA.47 (seeking relief of "[e]njoining Treasury and its officers, employees, and agents to return *to Fannie and Freddie* all dividend payments made pursuant to the Net Worth Sweep or, alternatively, recharacterizing such payments as a pay down of the liquidation preference and a corresponding redemption of Treasury's Government Stock rather than mere dividends.") (emphasis added).

The shareholder claims here parallel in relevant respects those in *Starr International Co.*, in which the Federal Circuit held that a shareholder challenge to the terms of the government's bailout of the American International Group (AIG) asserted a derivative claim belonging to the corporation. 856 F.3d at 963-73. The AIG shareholders argued that the terms of the government's bailout, which required AIG to issue stock to the government in exchange for an $85 billion loan, were unlawful. *See id.* at 959, 961. The Federal Circuit held that the AIG shareholders' claims were "quintessentially" derivative because they were "'dependent on an injury to the corporation' [(the alleged loss in value from the unlawful loan)], and any remedy [(the unwinding of the loan)] would flow to AIG." *Id.* at 967. The same is true here; plaintiffs' claims are "dependent on an injury" to the enterprises and "any remedy would flow" to the enterprises. *Id.*

That the Third Amendment will allegedly cause plaintiffs indirect harm as shareholders, such as a decline in the value of their shares or a reduced likelihood of future dividends or liquidation payouts, does not transform those claims into direct claims. *See, e.g.*, *Potthoff*, 245 F.3d at 716 ("[D]epreciation or destruction of the value of the [shareholder's] stock" is a derivative injury.); *Craig Outdoor Advert.*, 528 F.3d at 1024 ("A shareholder generally may not sue on his own behalf . . . to recover the wrongful diminution in value of his stock or to recoup his share of money taken from the corporation; such claims must generally be pursued in a shareholders derivative action."); *Gaff v. FDIC*, 814 F.2d 311, 318 (6th Cir. 1987) ("[A] diminution in the value of stock is merely indirect harm to a shareholder and does not bestow upon a shareholder the standing to bring a direct cause of action."); *Tooley*, 845 A.2d at 1037 (A claim is derivative where "the *indirect* injury to the stockholders arising out of the harm to the corporation comes about solely by virtue of their stockholdings.").

3. Plaintiffs asserted below that their claims were not derivative because they alleged that FHFA "unlawfully transferr[ed] the right to receive dividends and liquidation preference payments from one shareholder to another," Treasury. Dkt.51, at 18. Plaintiffs appear to be attempting to rely on a narrow exception recognized in Delaware law for cases in which "(1) a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value; and (2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders." *Gentile v. Rossette*, 906 A.2d 91, 100 (Del. 2006). To the extent that "the harm resulting from the overpayment is not confined to an equal dilution of the economic value and voting power of each of the corporation's outstanding shares," those minority shareholders may bring a direct claim to recover for that additional quantum of harm. *Id.* The Delaware Supreme Court has emphasized "that the extraction of solely economic value from the minority by a controlling stockholder" does not alone constitute "direct injury" under *Gentile*; a dilution of voting rights is also required. *El Paso Pipeline GP Co. v. Brinckerhoff*, 152

A.3d 1248, 1264 (Del. 2016). A *Gentile* claim is actionable based on the controlling shareholder's "breach of fiduciary duty" to the plaintiff. 906 A.2d at 99-100, 103.

This argument cannot assist plaintiffs: as the Seventh Circuit explained in rejecting this precise contention, Treasury was not a controlling shareholder and did not owe a fiduciary duty to the enterprises' shareholders. *Roberts*, 889 F.3d at 409 n.1. A controlling shareholder of a corporation either owns a majority of the corporation's voting shares, or it exercises "actual control" over the corporation's affairs. *Starr Int'l Co. v. Federal Reserve Bank*, 906 F. Supp. 2d 202, 221-25 (S.D.N.Y. 2012), *aff'd*, 742 F.3d 37 (2d Cir. 2014). Treasury is not and has never been a majority shareholder, nor does it have voting rights in the enterprises. Its rights as a senior preferred shareholder are entirely contractual. Even "a significant shareholder, who exercises a duly-obtained contractual right that somehow limits or restricts the actions that a corporation otherwise would take, does not become, without more, a controlling shareholder for that particular purpose." *Superior Vision Servs. v. ReliaStar Life Ins. Co.*, No. 1668-N, 2006 WL 2521426, at *5 (Del. Ch. Aug. 25, 2006) (unpublished); *see also Starr Int'l*, 906 F. Supp. 2d at 221-25. Moreover, HERA's requirements that Treasury act to "protect the taxpayer," 12 U.S.C. § 1719(g)(1)(B)(iii), and consider the "need for preferences or priorities regarding payments to the Government," *id.* § 1719(g)(1)(C)(i), negates any suggestion that Treasury owed common-law fiduciary duties to the enterprises' shareholders.

Even if Treasury could be deemed a controlling shareholder, the exception would still be inapplicable, as the Seventh Circuit further recognized. *Roberts*, 889 F.3d at 409 n.1. Plaintiffs assert only that Treasury extracted the economic value of their shares. Plaintiffs do not contend that the Third Amendment diluted their voting rights, and for good reason. Although the Third Amendment altered the way Treasury's dividends are calculated, it did not alter Treasury's voting rights (Treasury has none) or its ownership stake in the enterprises. *Cf. Perry Capital*, 864 F.3d at 629 (concluding that the Third Amendment did not alter the shareholders' voting rights). Because "the extraction of solely economic value from the minority by a controlling stockholder" without a corresponding dilution in voting rights is not sufficient to state a claim under *Gentile*, plaintiffs' reliance on the *Gentile* exception necessarily fails. *See El Paso Pipeline*, 152 A.3d at 1264.

B. The Succession Clause applies to constitutional claims.

Plaintiffs contended below that the transfer-of-shareholder rights provision could not apply because their claims sound in the Constitution. Dkt.51, at 17. But courts have uniformly rejected the contention that the shareholder standing doctrine depends on the nature of the claim asserted. *See, e.g.*, *Gregory v. Mitchell*, 634 F.2d 199, 202 (5th Cir. 1981) (Shareholders do not have standing to pursue constitutional claims on behalf of the corporation in which they own stock.); *Pagán v. Calderón*, 448 F.3d 16, 28-29 (1st Cir. 2006) (Shareholders lacked standing to pursue substantive due process and equal protection claims because they had failed to allege that they "sustained a particularized, nonderivative injury" separate from any injury to the corporation.); *Duran v. City of Corpus Christi*, 240 F. App'x 639, 642-43 (5th Cir. 2007) (per curiam) (concluding that "only the corporation [had] standing to seek redress" for an alleged First Amendment violation). As explained above, whether a claim is direct or derivative turns on the nature of the plaintiffs' injury and the relief sought; it does not depend on whether the source of the claimed injury was a statutory violation or a constitutional one. The injury plaintiffs allege here was to the enterprises (the allegedly improper transfer of the enterprises' net worth to Treasury) and the relief they seek (the unwinding of the Third Amendment) would likewise flow to the enterprises.

Plaintiffs urged below that the government's interpretation of HERA would foreclose all constitutional contentions regarding FHFA's structure. Dkt.51, at 17. But this is plainly not the case. A provision of HERA, 12 U.S.C. § 4617(a), permits challenges to the appointment of FHFA as conservator within a limited time frame—but neither the enterprises nor any shareholders objected to FHFA's appointment. Moreover, suits challenging FHFA's structure may be brought by plaintiffs suffering *direct* injury as a result of FHFA's actions. *See County of Sonoma v. FHFA*, 710 F.3d 987, 993-94 (9th Cir. 2013); *Leon County v. FHFA*, 700 F.3d 1273 (11th Cir. 2012). HERA's transfer-of-shareholder rights provision merely bars shareholders from asserting constitutional claims that belong to Fannie Mae and Freddie Mac. *See Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522 (1947) (In a derivative action, "[t]he cause of action which . . . a plaintiff [stockholder] brings before the court is not his own but the corporation's."); *Seidl v. American Century Cos.*, 799 F.3d 983, 989 (8th Cir. 2015) ("[I]n a derivative action, . . . the substantive claim belongs to the corporation."). Third parties are routinely denied the right to bring claims, including constitutional claims, on behalf of others. *See, e.g.*, *Kowalski v. Tesmer*, 543 U.S. 125, 134 (2004); *Hodak v. City of St. Peters*, 535 F.3d 899, 905 (8th Cir. 2008); *see also supra* pp. 21-22 (citing cases denying shareholders the right to bring constitutional claims on behalf of the corporation).

C. There is no conflict-of-interest exception.

In a further attempt to evade HERA's bar on derivative suits, plaintiffs argued in the district court that there exists an implicit "conflict-of-interest" exception to HERA's transfer-of-shareholder-rights provision that would allow shareholders to bring derivative claims when FHFA, acting as conservator, is allegedly unwilling to bring suit due to a purported conflict of interest. *See* Dkt.51, at 18. As the D.C. Circuit and Seventh Circuit have recognized, there is no implicit "conflict-of-interest" exception to HERA's transfer-of-shareholder-rights provision. The Seventh Circuit explained that HERA's "language is clear and absolute, and HERA itself approves of the Agency's taking actions in its own interests as well as that of the companies." *Roberts*, 889 F.3d at 409. To recognize an atextual exception would, contrary to HERA's express provisions, permit shareholders to challenge "nearly any business judgment of the Agency using a derivative suit, by invoking a conflict-of-interest exception." *Id.* at 410. Moreover, as the D.C. Circuit recognized in *Perry Capital*, creating a judicial conflict-of-interest exception would also be inconsistent with the purpose of HERA's transfer-of-rights provision. *Perry Capital*, 864 F.3d at 625; *Roberts*, 889 F.3d at 409.

The two courts of appeals that have recognized a conflict-of-interest exception to the Financial Institutions Reform, Recovery, and Enforcement Act's (FIRREA) analogous provision did so on the ground that a receiver facing a conflict of interest might be "unable or unwilling to [file suit on a corporation's behalf], despite it being in the best interests of the corporation." *First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279, 1295 (Fed. Cir. 1999); *see also Delta Sav. Bank v. United States*, 265 F.3d 1017, 1021-22 (9th Cir. 2001). But that reasoning would permit the type of suit that Congress expressly barred. The purpose of a derivative action, when it is available, is "to place in the hands of the individual shareholder a means to protect the interests of the corporation from the misfeasance and malfeasance of faithless directors and managers." *Kamen*, 500 U.S. at 95 (quotation marks omitted). In HERA, Congress precluded such actions. As the D.C. Circuit recognized, "it makes little sense to base an exception to the rule against derivative suits in the Succession Clause on the purpose of the derivative suit mechanism." *Perry Capital*, 864 F.3d at 625 (quotation marks omitted).

It would be particularly illogical to conclude that Congress permitted derivative suits challenging FHFA's transactions with Treasury. When it enacted HERA, Congress anticipated that FHFA would turn to Treasury for essential capital and authorized Treasury to invest in the enterprises. If Congress intended FHFA's dealings with Treasury to be subject to challenge by shareholders, it would have expressly granted shareholders that right. Instead, it transferred "*all* rights, titles, powers, and privileges" of the enterprises' shareholders to FHFA. 12 U.S.C. § 4617(b)(2)(A)(i) (emphasis added).

In contrast, HERA provided for shareholders' participation in the statutory claims process in the event of the enterprises' liquidation. 12 U.S.C. § 4617(b)(2)(K)(i). That Congress expressly granted certain rights to shareholders during a receivership underscores that Congress did not intend shareholders to retain any other rights during a conservatorship.

II. THE DISTRICT COURT CORRECTLY REJECTED PLAINTIFFS' CLAIM THAT THE THIRD AMENDMENT MUST BE SET ASIDE BECAUSE THE FHFA DIRECTOR IS REMOVABLE ONLY FOR CAUSE.

The President's executive power "includes, as a general matter, the authority to remove those who assist him in carrying out his duties" to faithfully execute the laws. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 513-14 (2010). "Without such power, the President could not be held fully accountable" for how executive power is exercised, and "[s]uch diffusion of authority 'would greatly diminish the intended and necessary responsibility of the chief magistrate himself.'" *Id.* at 514 (quoting *The Federalist No. 70*, at 478 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)). Thus, as a general rule, the President must have the ability to remove principal officers, like the Director of FHFA, at will. *Id.* at 513-14. In *Humphrey's*

Executor v. United States, 295 U.S. 602 (1935), the Supreme Court recognized a limited exception for agencies headed by multi-member bodies. *Id.* at 628-32.

As discussed below, the exception recognized in *Humphrey's Executor* does not apply in this case because FHFA is headed by a single director. *See infra* pp. 33-37. Nonetheless, the district court correctly rejected plaintiffs' claim that the Third Amendment must be invalidated because the FHFA is unconstitutionally structured.[3]

1. As an initial matter, the question whether HERA's provision limiting the President's authority to remove FHFA's permanent Director violates separation-of-powers principles is not presented here. As the district court explained, "FHFA was not exercising governmental power when it agreed to the Third Amendment." Add.40. When determining whether an agency should be treated as a governmental actor, courts have long recognized the distinction between an agency acting as conservator and an agency acting as regulator. *See United States v. Beszborn*, 21 F.3d 62, 68 (5th Cir. 1994); *see also Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017); *County of Sonoma*, 710 F.3d at 993-94. In *Beszborn*, for example, the Fifth Circuit recognized that the Resolution Trust Corporation (RTC), had a "non-governmental

[3] Although the district court was correct on the merits, it erred in concluding that plaintiffs lacked standing on the ground there was no "reason to believe that increasing Executive Branch influence over FHFA will somehow result in a 'revised' Third Amendment that is less favorable to the Executive Branch." Add.12. As plaintiffs correctly argue (Pl.Br.13), they were not "required to show that FHFA would have made a different decision had it been differently structured" in order to demonstrate standing to raise their claim that FHFA is unconstitutionally structured. *See Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000).

function in the initial stages of reorganization of a financial institution," but also performed regulatory functions. 21 F.3d at 68. When operating as government regulator, RTC was subject to various constitutional constraints; the same was not true when it acted as conservator or receiver.

The weight of court of appeals authority, *see* Add. 40 (collecting cases), indicates that the actions FHFA takes as conservator, unlike its regulatory actions, do not implicate the separation of powers because a conservator does not exercise executive power. FHFA "stands in the shoes of the [enterprise]" and any actions it takes are "private, [and] non-governmental" actions. *Beszborn*, 21 F.3d at 68; *Collins v. Mnuchin*, 896 F.3d 640, 652-53 (5th Cir. 2018) (per curiam), *vacated, pending rehearing en banc* (5th Cir. Nov. 12, 2018). In agreeing to the Third Amendment, FHFA undertook the "quintessential conservatorship tasks" of "[r]enegotiating dividend agreements, managing heavy debt and other financial obligations, and ensuring ongoing access to vital yet hard-to-come-by capital." *Perry Capital*, 864 F.3d at 607. Such tasks are the hallmarks of a private financial manager. They bear no resemblance to the regulatory activities and enforcement actions that characterize the exercise of Executive power. *See Free Enterprise*, 561 U.S. at 508.

Because the actions FHFA takes as conservator are not governmental actions, the President's inability to remove the conservator's top manager except for cause does not sufficiently impinge on "the functioning of the Executive Branch," *Morrison* *v. Olson*, 487 U.S. 654, 691 (1988), to run afoul of Article II of the Constitution, and there is thus no cause to set aside the Third Amendment.

The Federal Circuit's decision in *Slattery v. United States*, 583 F.3d 800, 826-29 (Fed. Cir. 2009) (cited at Pl.Br.51), is not to the contrary. The court in that case emphasized that the challenged action of the Federal Deposit Insurance Corporation (FDIC)—its refusal to turn over the monetary surplus it obtained from a bank liquidation—did not fall within "the standard receivership situation in which the receiver is enforcing the rights or defending claims and paying the bills of the seized bank." *Id.* at 827-28. By contrast, FHFA's negotiation of, and agreement to, the Third Amendment were "quintessential conservatorship tasks." *Perry Capital*, 864 F.3d at 607.

Plaintiffs further err in contending that the conservator could not permissibly act as a private conservator because its actions are not in all respects directly analogous to those of a common law conservator. Pl.Br.52-53. As the district court explained, "[l]egislatures can expand conservatorship and similar powers without transforming conservators into agents of the government." Add.42. Plaintiffs' only response on this point is to contend that FHFA "seize[d] property to enrich the government." Pl.Br.52. But a private conservator could do the same without transforming into a government actor, and this is not a takings challenge; as explained *supra* pp. 15-21, plaintiffs' claims are derivative claims brought on behalf of Fannie Mae and Freddie Mac for dissipation of their assets.

Similarly unpersuasive is plaintiffs' contention that because HERA provides that FHFA may consider the public interest when acting as a conservator, it must be a government agent. Pl.Br.53. Congress can surely direct a private entity to consider a host of interests in discharging its duties as a conservator without converting that private entity into a government actor. Moreover, the enterprises' statutory charters similarly authorize the enterprises to take into account various public purposes, *see* 12 U.S.C. §§ 1451, 1716, and that directive has never been deemed sufficient to render them government actors. *See Herron*, 861 F.3d at 167-68; *Mik v. Federal Home Loan Mortg. Corp.*, 743 F.3d 149, 168 (6th Cir. 2014). Similarly, FHFA's actions are not governmental in nature merely because Congress directed the conservator of an institution whose continuing viability has been made possible by an infusion of taxpayer money to take into account the interests of the enterprises (rather than stockholders) and the interests of the government in promoting a reliable and stable housing finance system.

Plaintiffs also contend that FHFA is a governmental actor because—according to plaintiffs—this Court held in *Saxton v. FHFA*, 901 F.3d 954 (8th Cir. 2018), that FHFA has "the power to suspend the application of provisions of the APA and HERA that would have otherwise restricted Treasury's legal authority to invest in the Companies" and such power is "inherently governmental." Pl.Br.52. Plaintiffs seem to be referring to the conclusion of this Court that HERA's anti-injunction provision, 12 U.S.C. § 4617(f), bars a court from enjoining FHFA's contractual counterparty (here

Treasury) from participating in a contract with FHFA because such an injunction would "restrain or affect" FHFA's actions as a conservator to the same extent as an injunction directed at FHFA would. *Saxton,* 901 F.3d at 959. Contrary to plaintiffs' suggestion, the exercise of "inherently governmental" authority that led to this Court's conclusion in *Saxton* (consistent with the conclusion of every other court of appeals to consider the question, *see, e.g.*, *Roberts*, 889 F.3d at 406) was Congress's choice to enact HERA's anti-injunction provision, not any action on the part of FHFA as conservator.

2. Plaintiffs' separation-of-powers challenge to the Third Amendment fails for another independent reason: When FHFA as conservator agreed to the Third Amendment, it was headed by an Acting Director.

Under 12 U.S.C. § 4512(f), the President may designate one of three deputy directors of FHFA to act as Director "[i]n the event of the death, resignation, sickness, or absence of the Director." *See* 12 U.S.C. § 4512(f). The for-cause removal restriction that plaintiffs challenge here applies by its plain terms only to FHFA's permanent Director, who is "appointed by the President, by and with the advice and consent of the Senate." *Id.* § 4512(b). No such for-cause limitation exists with respect to the Acting Director of the FHFA.

And there is no reason to interpret section 4512(b)(2)'s for-cause removal restriction as applying to a person serving as Acting Director. "[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 purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). Congress established the position of Director of FHFA and provided for an Acting Director in the *same* statutory section. *See* 12 U.S.C. § 4512(a), (f). In doing so, Congress included a for-cause removal restriction for the former, but not the latter. As is plain from the text, the Acting Director does not become the Director, but instead merely exercises the functions and duties of the director without taking on the for-cause removal protection.

Principles of constitutional avoidance also counsel against construing the statute to limit the President's authority to revoke the designation of the Acting Director. As noted above, the provision creating the Acting Director position, section 4512(f), contains no such limitation. But even if that provision were ambiguous, "federal statutes are to be construed so as to avoid serious doubts as to their constitutionality" where "it is fairly possible to interpret the statute in a manner that renders it constitutionally valid." *Communications Workers of Am. v. Beck*, 487 U.S. 735, 762 (1988); *see also Swan v. Clinton*, 100 F.3d 973, 983-88 (D.C. Cir. 1996) (holding that the President could remove at will a National Credit Union Administration Board member serving after his term's expiration pursuant to a holdover provision, notwithstanding any within-term statutory removal restrictions, in part because continued removal protection "might be pushing the constitutional envelope to the edge"). It is more than "fairly possible" to interpret § 4512(f) as allowing the President to revoke the designation of the FHFA's Acting Director at will, thus avoiding any doubt as to its constitutionality.[4]

3. Because plaintiffs challenge an action FHFA took as conservator of the enterprises and because it took that action while headed by an Acting Director, the question whether the for-cause limitation that HERA places on the President's ability to remove a congressionally confirmed director acting in a regulatory capacity is not presented here. Were this Court to reach that question, however, it should hold that FHFA, acting as regulator of the enterprises and Federal Home Loan Banks is unconstitutionally structured.

The President's executive power "includes, as a general matter, the authority to remove those who assist him in carrying out his duties" to faithfully execute the laws. *Free Enterprise Fund*, 561 U.S. at 513-14. The President therefore must have the ability to remove principal officers, like the Director of FHFA, at will. *Id.* HERA's for-cause removal provision "impair[s] the President's ability to fulfill his Article II obligations." *Collins*, 896 F.3d at 674.

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[4] In *Collins*, 896 F.3d at 656, a panel of the Fifth Circuit (in a decision vacated pending en banc review) rejected this argument, failing to heed the canon of constitutional avoidance. In any event, the panel in that case had held that shareholders had standing based on the ongoing actions of FHFA *as regulator*; and any ongoing injuries because of FHFA regulation are the result of actions by the current Director, not Acting Director DeMarco. Plaintiffs here have not alleged any ongoing injuries suffered because of actions taken by Director Watt.

Contrary to the district court's conclusion (Add.15), the exception in *Humphrey's Executor*, 295 U.S. at 629, does not apply to this case. In *Humphrey's Executor*, the Supreme Court created a narrow exception to the general rule in upholding a provision establishing that FTC commissioners could be removed only for "inefficiency, neglect of duty, or malfeasance in office." 295 U.S. at 620 (quoting 15 U.S.C. § 41 (1934)). The Court's conclusion "depend[ed] upon the character of the office"—namely, that, in the Court's view at the time, the FTC commissioners were not "purely executive officers," because they "act[ed] in part quasi legislatively and in part quasi judicially," *id.* at 628, 631-32; *accord Free Enterprise Fund*, 561 U.S. at 493. In particular, the FTC acted as a continuing deliberative body, composed of several members with staggered terms to maintain institutional expertise and promote a measure of stability that would not be immediately undermined by political vicissitudes. *See Humphrey's Executor*, 295 U.S. at 624-25.

As the United States argued in its brief (*available at* 2017 WL 1035617) in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc)—which addressed the similar question whether for-cause removal protection for the single director of the CFPB violates the separation of powers—and in its opposition to rehearing in *Collins v. Mnuchin*, No. 17-20364 (5th Cir. Sept. 13, 2018), the Supreme Court's decision in *Humphrey's Executor* depended fundamentally on the nature of the FTC as a multi-member body. In contrast, a single-headed agency lacks the critical structural attributes as a "quasi-legislative," "quasi-judicial" body that have been thought to justify "independent" status for multi-member regulatory commissions. The difference between multi-member and single-headed agencies is constitutionally significant for several reasons.

First, Humphrey's Executor is a "limited" exception to the "general" rule that the President must have at-will removal authority over principal officers. *Free Enterprise Fund*, 561 U.S. at 495, 513. As the structural rationale for *Humphrey's Executor* does not apply to single-headed agencies, the intrusion into executive power that it countenanced for multi-member agencies cannot be justified. *Second*, because a single agency head is unchecked by the constraints of group decision-making among members appointed by different Presidents, there is a greater risk that an "independent" agency headed by a single person will engage in extreme departures from the President's executive policy. *PHH,* 881 F.3d at 188 (Kavanaugh, J., dissenting). *Third*, unlike multi-member independent commissions, single-headed independent agencies like FHFA are a relatively novel innovation. In the separation-of-powers context, "the lack of historical precedent" for a new structure is "[p]erhaps the most telling indication of [a] severe constitutional problem." *Free Enterprise Fund*, 561 U.S. at 505.

Finally, there would be no rational limiting principle if *Humphrey's Executor* were extended beyond multi-member boards to single-headed agencies like FHFA. The rationale for the continued assumption of constitutionality regarding for-cause removal for multi-headed bodies reflects their structure rather than their purpose. As the Supreme Court noted in *Morrison*, "it is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." *Morrison*, 487 U.S. at 689 n.28; *see also Bowsher v. Synar,* 478 U.S. 714, 749 (1986) (Stevens, J., concurring in the judgment) ("[O]ur cases demonstrate [that] a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned."). Indeed, given "[t]he difficulty of defining such categories of 'executive' or 'quasi-legislative' officials," *Morrison*, 487 U.S. at 689 n.28, extending the narrow *Humphrey's Executor* exception for multi-member commissions to single agency heads like the FHFA Director could threaten to swallow Article II's general rule, even for Cabinet officers like the Secretary of the Treasury or Labor.

4. As explained, because FHFA was not acting in its regulatory capacity when it entered into the Third Amendment, there is no cause to set aside the Third Amendment. In any event, assuming the removal question were properly presented in this case, the appropriate remedy would be to sever the for-cause removal provision from HERA, and not to set aside the Third Amendment. *See Collins*, 896 F.3d at 675-76; *see also Free Enter. Fund*, 561 U.S. at 508-09; *PHH, Corp. v. CFPB*, 839 F.3d 1, 37-38 (D.C. Cir. 2016), *rev'd,* 881 F.3d 75 (2018) (en banc).

Plaintiffs rely (Pl.Br.26-27) on *Bowsher*, 478 U.S. at 736, to argue that every act of the FHFA director must be set aside, but that case is inapposite. In *Bowsher*, plaintiffs challenged the Balanced Budget and Emergency Deficit Control Act of

1985, which provided for certain budget reductions that were accomplished with the assistance of the Comptroller General, *id.* at 717, who could not be removed without the consent of Congress, *id.* at 727-28. On the merits, the Court held that vesting executive functions in an officer whose removal was subject to congressional control was unconstitutional. *Id.* at 726, 732. But, as a remedial matter, the Court held that, rather than converting the Comptroller General into an executive officer removable at will, the Comptroller General should remain subject to congressional control while the executive reporting provisions should be invalidated. *Id.* at 734-35. And recognizing that the statute spoke directly to what should occur if the reporting provisions were invalidated, the Court held that the statute's fallback provisions went into effect, meaning that the Comptroller General's earlier report was no longer required by the statute. *Id.* at 735. The remedial holding in *Bowsher,* therefore, has no direct bearing on this case. Moreover, *Bowsher* did not involve the situation here, where a removal restriction is only impermissible with respect to an official's regulatory actions, but the challenged action is one taken as conservator.

An additional problem with plaintiffs' remedial theory is that it could not be cabined to invalidation of the Third Amendment. If the Third Amendment is invalid because it was entered into by a conservator removable only for cause, so is the original Purchase Agreement and the first two amendments to that agreement. And it cannot seriously be disputed that shareholders directly benefitted from Treasury's purchase of preferred stock in 2008 and the infusion into the enterprises of billions of dollars in capital not available from private investors. *See Perry Capital*, 864 F.3d at 601.

Plaintiffs' attempts (Br.31-33) to limit the impact of their theory fail. That the Third Amendment could be invalidated and "no money would change hands," Pl.Br.32, would not solve the problem, even assuming that description were correct. Plaintiffs obscure the fact that under their preferred remedial approach, Treasury would receive no more dividends and would lose billions of dollars in a liquidation preference. Whether "money changes hands" or not, Treasury would lose valuable financial rights (and, indeed, it is unclear why plaintiffs would seek relief that would *not* transfer valuable rights from Treasury to the enterprises). And plaintiffs have not explained what would happen to Treasury's ongoing commitment in support of the enterprises were the preferred stock to be redeemed. Without Treasury's ongoing commitment, the enterprises do not have enough capital (even under plaintiffs' theory) to function safely. And if the commitment were set at some previous level (though all past decisions regarding the commitment would be tainted by the same removal problems plaintiffs identify here), plaintiffs have not explained how Treasury would be compensated for that significant commitment.

III. THE DISTRICT COURT CORRECTLY REJECTED PLAINTIFFS' CONTENTION THAT THE APPOINTMENTS CLAUSE REQUIRES THAT THE THIRD AMENDMENT BE SET ASIDE.

The Appointments Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the

United States." U.S. Const. art. II, § 2, cl. 2. Congress may, however, "vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.* Both principal and inferior officers exercise "significant authority pursuant to the laws of the United States." *Edmond v. United States,* 520 U.S. 651, 662 (1997). The Supreme Court has not, however, "set forth an exclusive criterion for distinguishing between" the two. *Id.* But all parties in this case recognize that the President may "direct certain officials to temporarily carry out the duties of a vacant PAS [Presidential appointment and Senate confirmation] office in an acting capacity, without Senate confirmation." *NRLB v. SW Gen., Inc.*, 137 S. Ct. 929, 934 (2017).

The district court correctly rejected the merits of plaintiffs' Appointments Clause argument and concluded that the violation of the Appointments Clause alleged by plaintiffs would not require the invalidation of the Third Amendment in any event. *See* Add.31. But plaintiffs' request for the invalidation of the Third Amendment on the ground that Edward DeMarco's appointment was unconstitutional is also flawed for the same reason plaintiffs' separation-of-powers removal claim is flawed: Because FHFA was acting as conservator when it entered into the Third Amendment, it was not carrying out a governmental function, and the remedy for an unlawful appointment—assuming one existed—would not be to undo acts taken in FHFA's conservator capacity.

A. Since its creation in 2008, FHFA has had two permanent Directors, James Lockhart and Melvin Watt, and one Acting Director, Edward DeMarco.

The first Director of FHFA, James Lockhart, resigned in August 2009. Under 12 U.S.C. § 4512(f), the President was authorized to designate one of three deputy directors to serve as Acting Director. Add.25. The President designated Edward DeMarco to fulfill the duties of the director on an acting basis in August 2009. The President sent a nomination for Director to the Senate in November 2010, but that nomination was returned to the President on December 22, 2010. Add.5-6, Add.26. The Third Amendment was signed in August 2012 by Acting Director DeMarco. The President nominated Melvin Watt to serve as FHFA's director in May 2013, and Director Watt was sworn in as the director of FHFA in January 2014. Add.5-6.

B. As explained, *supra* pp. 26-30, when FHFA acts as conservator, it is not taking action as a government actor or exercising executive authority. The head of FHFA is therefore not acting as a principal (or even inferior) officer when FHFA undertakes actions in its conservator capacity, including when FHFA entered into the Third Amendment. Plaintiffs point to nothing in law or logic that would require the head of FHFA, when acting as a conservator, to be subject to Presidential appointment and Senate confirmation. Indeed, Congress could have permitted FHFA to select a private entity to be the enterprises' conservator. *See infra* p. 49.

Even assuming, therefore, that plaintiffs were correct that Acting Director DeMarco's appointment became constitutionally invalid prior to the signing of the

Third Amendment, that would not provide cause to set aside the Third Amendment. That Congress chose to use the same person to act as both the head of FHFA as regulator and as the conservator of Fannie Mae and Freddie Mac does not mean that an invalid appointment for the head of FHFA as regulator renders invalid the actions taken by FHFA as conservator.

The Supreme Court's decision in *Freytag v. Commissioner*, 501 U.S. 868, 882 (1991), is not to the contrary. In that case, the Supreme Court considered whether special trial judges of the Tax Court were inferior officers or merely employees. The Supreme Court rejected the proposition that the special trial judges were "inferior officers for purposes of some of their duties . . . , but mere employees with respect to other responsibilities." *Id.* All the duties at issue in *Freytag* concerned the role of the special trial judges in exercising their judicial authority as government actors. (The Court further held that, in any event, the particular judicial functions at issue could only be exercised by an officer. *Id.* at 882; *see also Lucia v. SEC*, 138 S. Ct. 2044, 2052-53 (2018)). In other words, when individuals are exercising governmental authority, they cannot be officers for the purposes of some governmental functions and mere employees when performing other governmental functions. That reasoning is inapposite here: the conservator exercises no governmental authority. Indeed, the distinction between the two entities—FHFA-regulator and FHFA-conservator—is made plain by the fact that when Congress created FHFA and its Director in 2008, the Director acted only as regulator; it was not until the enterprises were placed in conservatorship that FHFA became conservator, as well.

C. In any event, as the district court correctly recognized, plaintiffs' Appointments Clause challenge fails on its own terms.

Plaintiffs challenge here only the length of time Acting Director DeMarco served, advancing a theory that—at some point in his tenure as Acting Director—DeMarco transmogrified from a lawfully serving Acting Director fulfilling the duties of the Director to a non-confirmed individual unconstitutionally serving as Director. Plaintiffs then proceed to argue that the Third Amendment must be invalidated because Acting Director DeMarco's tenure became unconstitutional before the signing of that amendment. Plaintiffs are wrong on multiple fronts.

1. Plaintiffs' contention that DeMarco had served "too long" as Acting Director when he signed the Third Amendment is without merit. Pl.Br.38.

There is no express statutory time limitation on how long an individual may serve as Acting Director of FHFA, and plaintiffs do not contend otherwise. *See* Pl.Br.39 (recognizing that "Congress chose not to place any *statutory* limit on the tenure of an acting Director" in 12 U.S.C. § 4512(f)). When Congress wants to impose a fixed limit on the tenure of individuals serving in an acting capacity, it has done so expressly. For example, the Federal Vacancies Reform Act (FVRA) places specific time limits on how long an individual may serve in an acting position. *See* 5 U.S.C. §§ 3345, 3346.

Nor does the Appointments Clause or any other provision of the Constitution place any express limit on the length of time during which an individual may be designated to act as Director. Plaintiffs purport to locate such a limitation in the Recess Appointments Clause (Pl.Br.38), but this argument cannot withstand even cursory examination. The temporal limitation for recess appointees flows *directly* from the text of the Constitution, which provides that recess appointments last until the next session of Congress, which, by definition, is less than two years from the time of any recess appointment. *See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2574-79 (2014) (allowing intra-session appointments and thus appointments early in the two-year period, which creates the possibility of recess appointments lasting nearly two years). Because, as the district court recognized (Add. 24), this case does not concern a recess appointment, the two-year effective limitation on recess appointments under the Constitution's express terms simply does not apply here.

To be sure, the Supreme Court has recognized that an acting designation is a "temporary" state. *United States v. Eaton,* 169 U.S. 331, 343 (1898); Pl.Br.35-36. But DeMarco did not act as Director "*indefinitely*," Pl.Br. 36, and plaintiffs have identified no case in which a court has even considered whether the length of time before confirmation of a permanent officer had become "too long," let alone any case in which a court actually held that the length of an acting official's tenure become unconstitutional.

Faced with a lack of both any express time limitation in the text of the Constitution and any precedent on the matter, plaintiffs attempt to rely on two opinions from the Office of Legal Counsel (OLC) to create a standard for this Court to apply in determining whether an acting director's tenure has continued for too long. Pl.Br.40-41 (relying on Designation of Acting Director of OMB, 2003 WL 24151770, at *1 n.2 (June 12, 2003), and *Status of the Acting Director, Office of Management and Budget*, 1 Op. O.L.C. 287, 287 (1977)). But the fact that OLC advised an executive agency that the length of service in an acting role should be "reasonable under the circumstances," *Status of the Acting Director, Office of Management and Budget*, 1 Op. O.L.C. 287, 287 (1977)), hardly provides a sufficient basis for a court to invalidate the tenure of Acting Director DeMarco as constitutionally excessive.

As the district court recognized (Add.22-31), the OLC opinions upon which plaintiffs rely provide no "judicially discoverable and manageable standard" a court could use to determine when an acting director has served too long. *Cf. Baker v. Carr*, 369 U.S. 186, 217 (1962). Determining whether an individual's length of service in an acting role is "reasonable" would require a court to make numerous evaluations of political actions: "Applying that standard would require a judge to assess the functioning of the entire Executive Branch and the changing state of the nation (actually, the world) throughout the length of the acting officer's tenure to determine at what point, if ever, the length of the officer's service became unreasonable." Add.24. As the court observed, "[t]hese assessments are far outside the competency of the judiciary and would require delving into areas [] such as the 'President's ability to devote attention to the matter' and his 'desire to appraise the work of an Acting Director.'" *Id.*

The type of evaluation contemplated by plaintiffs is thus plainly committed to the political branches. The President may take such action as he deems necessary in the face of an extended designation as Acting Director,[5] and Congress—which has the greatest equities in the service of an Acting Director who is not Senate-confirmed—may impose statutory time limitations on the length of time an individual may serve in an acting capacity. For example, in the report accompanying the FVRA, S. Rep. No. 105-250 (1998), the Senate Committee on Governmental Affairs noted that "[m]ost" agency-specific statutes "do not place time restrictions on the length of an acting officer," and suggested that Congress might want to "reexamine whether these positions should continue to be filled through the existing procedure." *Id.* at 17.

The practical consequences of plaintiffs' position should not be overlooked. As the district court explained "none of those who had business before or were being affected by the agency—not private individuals, not businesses, not other governmental agencies, not members of Congress, not even the President himself—would have any way of knowing whether the acting officer who was heading the

[5] Contrary to plaintiffs' assertion, DeMarco did not act without the President's supervision. Pl.Br.41. As explained, DeMarco was both designated by the President at the outset and removable at will by the President throughout the time he was designated Acting Director. *See supra* pp. 30-31.

agency had lost his or her authority to act on the agency's behalf. Instead, they would have to order their affairs with the knowledge that, at some point years later, a judge acting with the benefit of hindsight might pronounce the length of the tenure unreasonable." Add.25.

Finally, even assuming a court may inquire into the reasonableness of that tenure, the length of time DeMarco served as Acting Director was reasonable. DeMarco had served as Acting Director for only roughly one year when the President nominated Joseph Smith to be FHFA's Director. JA.25. After the Senate returned Smith's nomination to the President, DeMarco continued to serve as Acting Director for less than two years before the Third Amendment was signed in August 2012. The President then nominated Melvin Watt to be Director in May 2013, and the Senate confirmed him in December 2013. Add.5-6. Thus, during DeMarco's tenure, the President took steps to replace DeMarco with a permanent Director. Moreover, DeMarco signed the Third Amendment less than two years after the President's initial nomination for a permanent Director failed, and given that failure, it is not surprising that it took time to nominate a second candidate who both met the President's qualifications and could obtain Senate confirmation. And if Congress looked unfavorably upon the length of time FHFA did not have a Senate-confirmed permanent Director, Congress could have amended HERA to limit the tenure of the Acting Director.

2. In any event, the district court also correctly recognized that, even if it "were to agree with plaintiffs that DeMarco's service as acting director was invalid at the time that FHFA entered into the Third Amendment," the remedy for such a violation would not be to invalidate the Third Amendment. Add.35. In arguing to the contrary, plaintiffs contend that the remedy for a violation of the Appointments Clause is, in every circumstance, the invalidation of all the acts performed by the officer, so long as challenged within any statute of limitations. But this is not so. Equitable factors must be considered.

As this Court has explained, for example, the doctrine of laches is "premised" on "the desire to avoid unfairness that can result from the prosecution of stale claims." *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 805 (8th Cir. 1979). Although statutes of limitations similarly protect against stale claims, "the operation of laches departs from that of statutes of limitation in that laches is more flexible." *Id.* And "[w]hile courts may benefit from legislative determinations of when delay becomes unreasonable and prejudice may be presumed, undue deference to this judgment may result in a dereliction of the duty to examine all aspects of the equities affecting each case." *Id.* at 806.

Applying this doctrine, this Court held, for example, in *Citizens and Landowners against the Miles City/New Underwood Powerline v. Secretary U.S. Dep't of Energy,* that the plaintiffs "engaged in unreasonable and inexcusable delay which resulte[d] in undue prejudice to the" government. 683 F.2d 1171, 1175 (8th Cir. 1982). In that case, plaintiffs waited three years to challenge the construction of a powerline, even after they were "continually reminded of its construction," by which time the powerline was complete and operational, and removing it would have "significant effects." *Id.* at 1176-77.

Here, plaintiffs waited nearly *five years* to complain of conduct they say violated both the Constitution and their shareholder rights. Plaintiffs have made no claim that they were unaware of the Third Amendment at the time it was entered into, and, indeed, numerous other shareholders filed suit challenging the Third Amendment in the immediate years following its adoption. As the district court correctly concluded, "plaintiffs' particular challenge to the validity of the Third Amendment—first brought in June 2017—can by no stretch be considered 'timely,'" much less equitable from a broader perspective. Add.39.

And plaintiffs' delay has prejudiced both the government and third parties: "[p]laintiffs are attempting to unwind the actions of an executive agency going back more than five years—actions of national (indeed, international) significance that have been the basis of trillions of dollars' worth of economic activity. There is simply no way to put the parties back into the positions they occupied in August 2012." Add.39. Plaintiffs' failure to challenge the Third Amendment for nearly five years permitted the development of serious third-party reliance interests and allowed the acting director to take additional actions that would be subject to invalidation under plaintiffs' theory.

Plaintiffs express concerns with the "incentives" individuals have to bring constitutional challenges (Pl.Br.28), yet fail to grapple with the incentives and significant turmoil their approach creates. Under plaintiffs' remedial theory, individuals who believe an officer was not properly appointed have every incentive to sit back and wait to see if the officer takes actions the party approves of or thinks, on balance, are to their advantage. Indeed, here plaintiffs seek to invalidate one decision of many, in order that they may benefit from the overall deal between Treasury and FHFA, while excising specific terms they find objectionable. *See supra* pp. 36-37. And, as explained, in the nearly *five years* in which plaintiffs failed to challenge the Third Amendment, numerous entities, including the government, other investors, lenders, and the enterprises themselves, took actions and planned their affairs based on the Third Amendment. Those actions—and the reliance interests that developed—should not be casually set aside on the basis of plaintiffs' belated challenge to the Third Amendment.

IV. PLAINTIFFS' NON-DELEGATION ARGUMENT FAILS.

Plaintiffs contend, as did the plaintiffs in *Saxton*, *See* Pl. Reply Br. 9-10, *Saxton v. FHFA*, No. 17-1727, that the non-delegation doctrine forecloses the interpretation of HERA advanced by the government and adopted by this Court in *Saxton—i.e.*,, namely, that HERA provided broad discretion to FHFA, encompassing the ability to enter into the Third Amendment. Pl.Br.48-53. Plaintiffs err.

As an initial matter, as explained *supra* pp. 26-30, FHFA acting as conservator does not exercise governmental power and instead steps into the shoes of Fannie Mae and Freddie Mac. *See* Add.40. As the district court explained, "[t]he Third Amendment is simply a contractual arrangement that FHFA entered into on behalf of two private entities—Fannie and Freddie—in its capacity as conservator." Add.41. HERA cannot violate the non-delegation doctrine insofar as FHFA as conservator is not exercising governmental authority. Nor is there any basis to conclude that a statute authorizing a conservator for a private entity violates the non-delegation doctrine. Such statutes are consistent with longstanding historical practice. Federal regulators appointed private entities to be conservators and receivers of troubled financial institutions until the advent of the FDIC, and may continue to appoint private entities as receivers for banks that are not federally insured. *See* 12 U.S.C. § 191; 12 C.F.R. § 51.2; *see also* FDIC, *Managing the Crisis*: *The FDIC and RTC Experience* 212-13 (1998), https://go.usa.gov/xPvMs.

Plaintiffs' non-delegation argument is insubstantial on its own terms. Congress may delegate to the executive branch the authority to implement enacted legislation, so long as it provides the agency with an "intelligible principle." *Mistretta v. United States,* 488 U.S. 361, 372 (1989). To provide an intelligible principle, Congress must "clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *American Power & Light Co. v. SEC,* 329 U.S. 90, 105 (1946).

As this Court has explained, "with the exception of two cases in 1935, . . . the Supreme Court has uniformly rejected every nondelegation challenge it has considered." *United States v. Fernandez*, 710 F.3d 847, 849 (8th Cir. 2013). Under precedent from both this Court and the Supreme Court, "broad policy statements . . . [are] sufficient to provide [such] an intelligible principle." *United States v. Kuehl*, 706 F.3d 920, 930 (8th Cir. 2013); *see also, e.g.*, *Yakus v. United States*, 321 U.S. 414, 420 (1944) (upholding delegation to administrator to set prices that "will be generally fair and equitable"); *National Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943) (upholding delegation to agency to regulate broadcast licenses in the "public interest"); *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 799 (8th Cir. 2005) (concluding that "an intelligible principle exists in the statutory phrase 'for the purpose of providing land for Indians'").[6]

[6] Although the Supreme Court is considering a non-delegation challenge to a provision of the Sex Offender Registration and Notification Act (SORNA), 34 U.S.C. 20913(d), *see Gundy v. United States*, No. 17-6086 (oral argument held on Oct. 2, 2018), the outcome of that case has no direct bearing on this case. The question in *Gundy* is whether Congress may delegate to the Attorney General the discretion to specify the applicability of SORNA's registration requirements to pre-SORNA offenders. As the government has explained in that case, Section 20913(d) fully complies with the Supreme Court's precedent. *See* Gov't.Br.14-38, *Gundy*, *supra* (No. 17-6086). In any event, that question is quite different from the question whether Congress validly authorized FHFA, acting as a conservator (and thus not exercising governmental authority), to step into the shoes of the private enterprises, something it has provided with respect to the FDIC (and formerly the RTC) for decades. This case also does not implicate any of the arguments raised in *Gundy* for departing from the Court's ordinary non-delegation standards in that case. *Cf. id.* at 38-56.

HERA easily satisfies this standard, because Congress has therein "delineate[] the general policy, the public agency which is to apply it, and the boundaries of the delegated authority." *Am. Power & Light,* 329 U.S. at 105. HERA establishes that FHFA will apply the policies set forth in the statute; explains that the purpose of appointing a conservator is to "reorganiz[e], rehabilitat[e], or wind[] up the affairs" of the enterprises, 12 U.S.C. § 4617(a)(2); authorizes the conservator to act in "the best interests of the regulated entity or the Agency," *id.* § 4617(b)(2)(J)(ii); and supplies a list of powers that FHFA may use as conservator to achieve the conservatorship's goals, thereby providing additional guidance to and limitations on FHFA's exercise of its discretion. That Congress delegated this authority to FHFA only in the limited circumstance where it is appointed conservator or receiver of one of three entities, *see* 12 U.S.C. § 4502(20), reinforces the validity of that delegation. *See Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 475 (2001) ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."); *see also Fahey* v. *Mallonee*, 332 U.S. 245, 248-50 (opinion for the Court per Jackson, J.) (1947).

Plaintiffs' arguments rely on a misreading of this Court's decision, and the concurring opinion, in *Saxton*. Pl.Br.49-50. That Congress gave FHFA broad discretion does not mean that Congress did not provide an intelligible principle to guide the exercise of FHFA's authority. *See Kuehl*, 706 F.3d at 919-20. In emphasizing the breadth of the powers given to FHFA in HERA, *Saxton*, 901 F.3d at 959 (Stras, J., concurring) (cited at Pl.Br.49-50), the concurrence did not suggest that HERA left FHFA with no guiding principles on how to exercise its authority under HERA. Indeed, the concurrence recognized that, through HERA, Congress "charged the FHFA with ensuring that Fannie and Freddie continue 'to accomplish their public mission[ ]' of 'facilitat[ing] the financing of affordable housing for low- and moderate-income families.'" *Id.* at 961. As the concurrence explained, "[t]he Net Worth Sweep advanced this goal by protecting the entities from future market downturns or full-fledged crises." *Id.* Though broadly formulated to provide FHFA with discretion, HERA's "policy statements," *Kuehl*, 706 F.3d at 920, are more than sufficient to provide FHFA with a guiding principle for exercise of its authority under HERA.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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I hereby certify that on November 13, 2018, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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