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-cv-2185

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

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SUMMARY OF THE CASE

In this case, Plaintiffs challenge the structure and authority of the Federal Housing Finance Agency ("FHFA") under the separation-of-powers doctrine, Appointments Clause, and nondelegation doctrine. After extensive briefing and oral argument, the district court held in a thorough opinion that Plaintiffs lacked Article III standing to bring certain claims and that all of Plaintiffs' theories failed to state a claim on the merits. Those holdings were correct and the court's rejection of Plaintiffs' separation-of-powers claims accords with a recent decision by the *en banc* D.C. Circuit. FHFA agrees with Plaintiffs that 20 minutes per side is appropriate for oral argument.

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INTRODUCTION

In this case, shareholders of Fannie Mae and Freddie Mac, which are financial institutions under the conservatorship of the Federal Housing Finance Agency ("FHFA"), challenge the same preferred stock transaction with the U.S. Treasury Department that this Court recently upheld in *Saxton v. FHFA*, 901 F.3d 954 (8th Cir. 2018). In *Saxton*, this Court joined four other circuits in rejecting shareholder Administrative Procedure Act claims attacking that transaction, known as the Third Amendment. Here, other shareholders seek to have the Third Amendment invalidated not on the merits, but via novel constitutional claims challenging FHFA's structure and the authority of its leadership to agree to the Third Amendment in 2012.

Plaintiffs' claims are without merit and the district court properly dismissed them. Plaintiffs lack Article III standing to bring their primary claim—that FHFA's structure as an independent agency is unconstitutional—for several reasons, not least that prevailing on that claim would not undo the Third Amendment and thus would not redress their purported injury. In any event, FHFA's structure is plainly constitutional under longstanding Supreme Court jurisprudence upholding independent agencies. The Court should reject Plaintiffs' invitation to create new exceptions to that precedent.

Plaintiffs urge this Court instead to follow a recent Fifth Circuit decision in which a split panel held FHFA's structure unconstitutional, though the panel unanimously rejected the shareholders' request to invalidate the Third Amendment. *Collins v. Mnuchin*, 896 F.3d 640 (5th Cir. 2018). On November 12, 2018, the Fifth Circuit ordered that *Collins* will be reheard *en banc* and vacated the panel opinion. The panel's constitutional analysis in *Collins* was wrong, and the district court's decision below, which accords with a recent decision by the *en banc* D.C. Circuit, *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018), is far more persuasive. As in *PHH*, there is "no reason in constitutional precedent, history, or principle to invalidate [FHFA's] independence." 881 F.3d at 100.

Plaintiffs' claims under the Appointments Clause and nondelegation doctrine are equally without merit for multiple reasons. This Court should affirm the district court.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331, except as to the merits of claims that are non-justiciable for reasons discussed below. Plaintiffs timely appealed on July 10, 2018, from a judgment entered July 9, 2018. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether Plaintiffs lack Article III standing to bring their claims that FHFA's structure as an independent agency is unconstitutional because the injury they allege (a) cannot have been caused by FHFA's independence and (b) would not be redressed by a holding that FHFA's structure is unconstitutional. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Warth v. Seldin*, 422 U.S. 490, 508 (1975).

II. If Plaintiffs have Article III standing to bring those claims, whether HERA's provisions vesting leadership of FHFA in a single Director with for-cause protection from removal and otherwise making FHFA an independent agency are unconstitutional. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc).

III.A. Whether the *de facto* officer doctrine bars Plaintiffs from seeking, for the first time in 2017, the vacatur of a 2012 action by an FHFA Acting Director on the ground that he had been serving for too long. *Ryder v. United States*, 515 U.S. 177, 180 (1995); *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 81 (D.C. Cir. 2015), *aff'd on other grounds*, 137 S. Ct. 929 (2017).

III.B. Whether government officials are constitutionally barred from temporarily performing the functions of a vacant senior office for longer than two years, based on an analogy to the combined effect of the Recess Appointments

Clause and the length of congressional sessions under the Twentieth Amendment. U.S. Const. art. II, § 2, cl. 3; *United States v. Eaton*, 169 U.S. 331 (1898); *Designation of Acting Solicitor of Labor*, 2002 WL 34461082 (O.L.C. Nov. 15, 2002).

III.C. Whether Plaintiffs' alternative theory that the vacancy lasted longer than "reasonable under the circumstances" raises a non-justiciable political question due to the lack of judicially discoverable and manageable standards and intrusion on highly sensitive presidential deliberations on personnel matters. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 197 (2012); *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367 (2004).

III.D. If Plaintiffs' Appointments Clause claim is not otherwise precluded, whether the President's efforts to nominate and secure confirmation of a permanent FHFA Director during the period while the Acting Director temporarily performed the functions of the Director were reasonable under the circumstances. *Status of the Acting Director, Office of Management and Budget*, 1 Op. O.L.C. 287, 290 (1977).

IV. Whether Plaintiffs' nondelegation claim fails because the action challenged by Plaintiffs did not constitute an exercise of sovereign legislative power and, in any event, HERA contains sufficient intelligible principles. *Pittston Co. v. United States*, 368 F.3d 385 (4th Cir. 2004); 12 U.S.C. §§ 1455(*l*), 1719(g), 4617.

STATEMENT OF THE CASE

1. Fannie Mae and Freddie Mac (the "Enterprises") are financial institutions chartered by Congress to provide liquidity to the mortgage market by purchasing residential loans. *Saxton*, 901 F.3d at 956; JA11-12. "In 2008, with the mortgage meltdown at full tilt, Congress enacted the Housing and Economic Recovery Act," also known as HERA. *Saxton*, 901 F.3d at 956. HERA created FHFA and gave its Director the power to appoint the agency as conservator or receiver of the Enterprises. *Id.* Anticipating an imminent need for a vast infusion of taxpayer funding into the Enterprises, HERA further authorized the Treasury Department to purchase securities from the Enterprises to "provide stability to the financial markets," "prevent disruptions in the availability of mortgage finance," and "protect the taxpayer." 12 U.S.C. §§ 1455(*l*), 1719(g).

Congress structured FHFA to be headed by a Director appointed by the President and confirmed by the Senate to serve "for a term of 5 years, unless removed before the end of such term for cause by the President." *Id.* § 4512(b). FHFA also has three Deputy Directors. *Id.* § 4512(c)-(e). To ensure continuity of operations during a vacancy in the office of Director, Congress empowered "the President [to] designate [a Deputy Director] to serve as acting Director until...the appointment of a successor pursuant to subsection (b)." *Id.* § 4512(f).

In September 2008, shortly after HERA was enacted, FHFA placed the Enterprises into conservatorships. FHFA, as Conservator, immediately entered into agreements "with the U.S. Department of the Treasury whereby Treasury would acquire specially-created preferred stock and, in exchange, would make hundreds of billions of dollars in capital available to Fannie and Freddie." *Saxton*, 901 F.3d at 956; *see* JA49-77 (copies of agreements); JA79-96 (preferred stock certificates). For their part, the Enterprises would pay Treasury quarterly dividends equal to 10% annually of the cumulative amount of funding, give it warrants to purchase 79.9% of the Enterprises' common stock at a nominal price, and pay Treasury a periodic fee intended to compensate Treasury for its one-of-a-kind commitment. JA55, 69, 80, 89. Common and junior preferred stock of the Enterprises continued to exist, but in light of the conservatorships has had little to no value and has been ineligible for dividends since 2008.

In August 2009, the original FHFA Director, James B. Lockhart III, resigned. JA24. Career civil servant Edward DeMarco was serving as one of FHFA's Deputy Directors. JA24-25. On August 25, 2009, President Obama designated Deputy Director DeMarco to serve as Acting Director pursuant to 12 U.S.C. § 4512(f). *Id.*

On November 12, 2010, the President nominated Joseph Smith as FHFA Director. JA25; 156 Cong. Rec. S7911 (Nov. 15, 2010). Although the Senate

Banking Committee approved the nomination, opposition blocked a vote in the full Senate, eventually forcing the President to withdraw the nomination. JA25; 156 Cong. Rec. S11071 (Dec. 22, 2010). Plaintiffs allege that in 2011 and 2012, the Obama Administration "desire[d]…new leadership at FHFA" and "pressure[d]" Acting Director DeMarco to resign because he "resisted some of the Obama Administration's most significant housing finance policies." JA26-27.

Meanwhile, FHFA, as Conservator for the Enterprises, and Treasury amended the preferred stock agreements several times. *Saxton*, 901 F.3d at 957. By 2012, the cumulative amount of Treasury funding neared $200 billion, requiring the Enterprises to pay almost $20 billion per year in dividends, which exceeded the Enterprises' average earnings per year historically. JA28. The Enterprises drew still more money from Treasury to cover the dividends owed to Treasury. *Id.*

In August 2012, the parties amended the preferred stock purchase agreements for a third time—hence, the "Third Amendment"—to adjust the various forms of consideration paid to Treasury in exchange for its extraordinary funding commitment. The Third Amendment modified the formula for the dividend on Treasury's preferred stock from a fixed dividend to a variable dividend equal to each Enterprise's net worth at the end of each quarter (less a buffer), and suspended the Enterprises' obligation to pay Treasury a periodic commitment fee. JA97-113; *see Saxton*, 901 F.3d at 957. Thus, unless an Enterprise's total net worth in a given quarter exceeds the amount of the buffer (currently $3 billion), it owes no dividend; if an Enterprise's net worth exceeds the $3 billion buffer, it pays the amount of that excess as a dividend, whether greater or less than the prior fixed-percentage dividend obligation. On August 17, 2012, Acting Director DeMarco signed for FHFA as the Enterprises' Conservator. JA105, 113.

On May 1, 2013, President Obama nominated Rep. Melvin L. Watt as FHFA Director. JA25. The Senate Banking Committee approved the nomination, 159 Cong. Rec. S5799 (July 18, 2013), but it was filibustered in the full Senate, 159 Cong. Rec. S7706 (Oct. 31, 2013). Rep. Watt was confirmed only after the Senate abolished the filibuster for certain executive nominees. 159 Cong. Rec. S8417 at 8417-18 (Nov. 21, 2013); 159 Cong. Rec. S8593 (Dec. 10, 2013). Over eight months after being nominated, Mr. Watt was sworn in as FHFA Director on January 6, 2014 for a five-year term, which automatically ended Mr. DeMarco's tenure as Acting Director. JA25.

2. Enterprise shareholders Atif Bhatti, Tyler Whitney, and Michael Carmody filed this suit in June 2017, nearly five years after the Third Amendment. Plaintiffs do not challenge the conservatorships or the original stock purchase agreements, but claim that the subsequent Third Amendment "[e]xpropriate[d]

[their] [i]nvestments," thereby "depriving the Companies' private shareholders of all of their economic rights." Br. 7.

This suit is not the first to challenge the Third Amendment. Beginning in 2013, Enterprise shareholders brought numerous such challenges in various courts. In the first wave of suits, plaintiffs primarily sued under the Administrative Procedure Act ("APA"). This Court and others uniformly rejected these claims. *See Saxton*, 901 F.3d at 957 (citing cases).

Here, Plaintiffs claimed the same injury as the prior cases, and continued to allege that the Third Amendment was a "massive financial windfall" for Treasury, JA26, but swapped the failed APA claims for theories challenging the constitutionality of FHFA's structure and Mr. DeMarco's service as acting director. Count I alleged that FHFA's structure violates the separation of powers because it has a single Director removable by the President only for cause. JA37-40. In Count II, Plaintiffs argued that FHFA's independence from the President violates the Constitution "when combined with other aspects of HERA" that insulate FHFA from control by the Legislative and Judicial Branches. JA40-42. Count III alleged that Mr. DeMarco had served as acting director for longer than permitted by the Appointments Clause when he approved the Third Amendment. JA42-43. In Counts IV and V, Plaintiffs brought nondelegation and private nondelegation claims, respectively. JA43-47. As relief, Plaintiffs asked the Court to vacate and set aside the Third Amendment. JA47.

Defendants moved to dismiss and Plaintiffs moved for summary judgment. After extensive briefing and a four-hour hearing, the district court dismissed Plaintiffs' claims in a meticulous opinion. As to Counts I and II, the court held that "plaintiffs cannot show either causation or redressability and therefore cannot establish standing," and that even "if plaintiffs had standing to assert these claims, the Court would reject the claims on the merits." Add. 13, 15. The court found that FHFA's structure was covered by *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and its progeny upholding the constitutionality of independent agencies, and agreed with the D.C. Circuit's decision rejecting a similar challenge to the structure of the Consumer Financial Protection Bureau ("CFPB"). Add. 16 (citing *PHH*, 881 F.3d 75).

The district court rejected Plaintiffs' Appointments Clause claim (Count III) on a number of grounds, including that it presented non-justiciable political questions (to the extent Plaintiffs argued the test for permissible duration of an acting official's service is what is "reasonable under the circumstances"); that Plaintiffs' theory that the Court should impose a two-year limit on an acting official's service via analogy to the *Recess* Appointments Clause had no legal basis; and that Count III is barred by the *de facto* officer doctrine. Add. 21-39.

The court also rejected Plaintiffs' nondelegation claims on the grounds that (a) FHFA was not exercising governmental power when it agreed to the Third Amendment and (b) HERA provides standards sufficient to meet the "intelligible principle" standard. Add. 40-46. This appeal followed.

SUMMARY OF THE ARGUMENT

I. Plaintiffs lack Article III standing to challenge the constitutionality of FHFA's structure. Plaintiffs cannot meet Article III's causation requirement. The Third Amendment was a transaction with and supported by Treasury, which is part of the Administration, and it makes no sense to posit that the transaction might not have occurred if FHFA was also under plenary presidential control. In addition, FHFA was headed at the time of the Third Amendment by an *Acting* Director not covered by the for-cause removal protection Plaintiffs challenge. Plaintiffs also cannot meet Article III's redressability requirement because a judicial declaration that the for-cause removal protection is unconstitutional would not result in invalidation of the Third Amendment or redress the injuries they allege stemming from the Third Amendment.

II. If Plaintiffs nevertheless have standing, FHFA's structure falls within a long tradition of independent federal financial regulators and is constitutional. Independent agencies headed by officers removable by the President only for cause are constitutional under longstanding Supreme Court precedent beginning in 1935 with *Humphrey's Executor*. Whether an agency is headed by a single individual or many is not a relevant factor under that precedent, and Plaintiffs fail to establish that leadership by a single individual results in any diminution of presidential control as compared to multi-member leadership. The various other aspects of FHFA's structure upon which Plaintiffs rely are common agency design features that raise no constitutional issues, individually or combined.

III. Plaintiffs' Appointments Clause claim fails because that Clause permits acting officers, and the FHFA Acting Director's service violated no constitutional requirements. As a threshold matter, the *de facto* officer doctrine bars the claim. Plaintiffs cannot seek in 2017 to invalidate an action taken in 2012 on the ground that the officer who took it was improperly serving. Plaintiffs' novel theory that the Recess Appointments Clause supports, by analogy, a two-year ceiling on the time acting officers can serve finds no basis in constitutional text, structure, or purpose. Indeed, acting heads of other regulatory agencies have served for well over two years, including periods exceeding the duration at issue here. Plaintiffs' alternative contention that the vacancy that necessitated the Acting Director's service persisted longer than "reasonable" raises non-justiciable political questions. There are no judicially discoverable and manageable standards for adjudicating a President's diligence in appointments, and any such inquiry would raise intractable separation-of-powers problems of its own. If the Court nevertheless finds that claim justiciable and not precluded by the *de facto* officer doctrine, the record supports a finding of reasonableness given the surrounding circumstances.

IV. Plaintiffs' nondelegation claims also fail. FHFA was not exercising legislative power when it entered into the Third Amendment in its capacity as Conservator. Moreover, HERA supplies ample intelligible principles to meet the minimal standard under Supreme Court precedent.

STANDARD OF REVIEW

This Court reviews the district court's grant of a motion to dismiss *de novo*. *Vadnais v. Fed. Nat'l Mortg. Ass'n*, 754 F.3d 524, 526 (8th Cir. 2014).

ARGUMENT

I. PLAINTIFFS LACK STANDING TO CHALLENGE THE CONSTITUTIONALITY OF FHFA'S STRUCTURE AS AN INDEPENDENT AGENCY

The district court correctly held that Plaintiffs lack Article III standing to challenge FHFA's structure as an independent agency. "To satisfy the 'irreducible constitutional minimum' of Article III standing, a plaintiff must establish that he or she has suffered an 'injury in fact'…that there is 'a causal connection between the injury and the conduct complained of'; and that it is 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Constitution Party of S.D. v. Nelson*, 639 F.3d 417, 420 (8th Cir. 2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

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These bedrock requirements apply to constitutional challenges to agencies' structure with the same force with which they apply to any other kind of claim. *See, e.g.*, *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 264 (1991); *Comm. for Monetary Reform v. Bd. of Gov. of Fed. Res. Sys.*, 766 F.2d 538, 542-43 (D.C. Cir. 1985). After all, "[t]he law of Article III standing" is itself "built on separation-of-powers principles." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).[1]

In the context of the separation-of-powers claims here, the causation requirement for Article III standing thus requires Plaintiffs to show a "causal connection" between their injury—the Third Amendment's alleged negative effect on their stock—and FHFA's independence from the President. Redressability requires that Plaintiffs show the same purported injury is likely to be redressed if they are successful in persuading the Court that FHFA's structure is

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[1] Some courts have held that regulated entities may have standing to raise Appointments Clause challenges to the structure of an agency that regulates them on an ongoing basis without specifically showing that an agency with constitutionally appointed officers would have acted differently. *See, e.g.*, *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 824 (D.C. Cir. 1993); *Comm. for Monetary Reform*, 766 F.2d at 543. Assuming *arguendo* that this principle could be extended to claims that an agency is unconstitutionally insulated from presidential control, it would not support standing here because Plaintiffs are not regulated by FHFA. *Id.* (this form of standing applies "only where [plaintiffs] are directly subject" to the regulatory, administrative, or adjudicative "authority of the agency").

unconstitutional. As the district court correctly concluded (Add. 11-14), Plaintiffs did not and cannot make either showing.

A. Plaintiffs Cannot Show Any Causal Link Between FHFA's Independence from the President and the Third Amendment

1. The crux of Plaintiffs' claim is that HERA's for-cause removal provision, together with other provisions promoting FHFA's independence, makes FHFA "less accountable to the President" than constitutionally required and places undue "limitation[s] on the President's ability to influence FHFA." Br. 17. Thus, the causation element of Article III standing requires Plaintiffs to offer a coherent theory for how, if FHFA had been *more accountable* to the President and the President had *no limitations* on his ability to influence FHFA, the Third Amendment might not have come about.

Plaintiffs have no such coherent theory. The Third Amendment is a contract between FHFA and Treasury, whose Secretary is indisputably removable by the President at will and subject to plenary presidential control. JA29. The President always had total control over whether to enter into the Third Amendment, because he could have directed Treasury not to enter into it. Increasing the President's influence over FHFA would not have added to that power. If anything, for the President to have had plenary control over both sides of the transaction, rather than just one, would have eliminated the arms-length nature of the transaction and thereby *facilitated* adoption of the Third Amendment—not made it less likely.

Plaintiffs' own allegations, moreover, portray the Third Amendment as supported by Treasury, which Plaintiffs claim received a "massive financial windfall." JA34; *see Saxton*, 901 F.3d at 959 n.6 (addressing shareholder claims that FHFA "agreed to the net worth sweep at Treasury's direction"). Plaintiffs cannot explain why *greater* Administration control over FHFA would have made such a transaction *less* likely to happen. It is no wonder the district court found this problem to be "glaring." Add. 12.

Plaintiffs argue (Br. 11, 13-14) that a footnote in *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), essentially dispenses with Article III causation for removal-restriction claims. *See id.* at 512 n.12 ("We cannot assume…that the Chairman would have made the same appointments acting alone; and petitioners' standing does not require precise proof of what the Board's policies might have been in that counterfactual world."). However, the Court need not "assume" an FHFA under plenary presidential control would not have rejected the Third Amendment; Plaintiffs' own allegations and theory of what happened establish that proposition. The problem is not that the proof that their counterfactual world would have produced a different outcome is not "precise" enough, it is that it is self-defeating.

Plaintiffs alternatively argue that causation could be deemed satisfied based on their speculation that if Treasury had "not been able to hide behind an independent FHFA's support," it might not have taken the "political risk" of approving the Third Amendment. Br. 14-15. Plaintiffs never argued this theory to the district court, and it contradicts their own allegations in the Complaint. Far from perceiving "political risk" or "hid[ing] behind" FHFA, Plaintiffs allege that Treasury—an agency indisputably under the President's unfettered control—publicly endorsed the Third Amendment, announcing on the very day of adoption that "'every dollar of earnings that Fannie Mae and Freddie Mac generate will be used to benefit taxpayers.'" JA31 (quoting Treasury press release). If the Court considers this argument at all, *but see, e.g.*, *Blake Marine Group v. CarVal Investors LLC*, 829 F.3d 592, 597 (8th Cir. 2016) (issues not raised below are waived), it should reject Plaintiffs' inverted logic, in which *greater* Administration control translates into a *lesser* likelihood that the President pursues his chosen policies.

2. Although not reached by the district court, there is an additional reason causation is lacking here. Plaintiffs' challenge to FHFA's independence focuses primarily on the protection from removal without cause that HERA affords to permanent FHFA Directors upon being appointed by the President and confirmed by the Senate. *See* 12 U.S.C. § 4512(b)(2) (FHFA Directors serve "for a term of 5 years, unless removed before the end of such term for cause by the President."). However, the decision to enter into the Third Amendment was made

by an FHFA deputy director, Edward DeMarco, who was temporarily *acting* as FHFA Director under a separate provision, § 4512(f), that neither sets a fixed term nor limits the President's power to withdraw such a designation for cause or otherwise. "Where 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). Because § 4512(b)(2)'s cause requirement for removal was inoperative at the relevant time, and the President could freely have designated a different acting director at will and thereby replaced Mr. DeMarco, there cannot have been any connection between the for-cause removal provision and FHFA's execution of the Third Amendment.

B. Redressability Is Lacking Because Success on Plaintiffs' Constitutional Challenge Would Not Invalidate the Third Amendment

1. Plaintiffs also cannot satisfy the redressability requirement for standing because a holding that FHFA's independent structure violates the separation of powers would not undo the Third Amendment—much less authorize the wholesale revision of the Enterprises' capital structures that Plaintiffs ask the Court to implement (Br. 31-33).

The Supreme Court made clear in *Free Enterprise Fund* that when a limitation on the President's removal authority crosses constitutional lines, the

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remedy is simply to declare that limitation prospectively inoperative, not to void past actions by the official who was protected from removal. *See* 561 U.S. at 508 ("reject[ing]" the thesis that the removal restrictions rendered "all power and authority exercised by [the Board] in violation of the Constitution"). "Putting to one side petitioners' Appointments Clause challenge," it was not "the existence of the Board," but "the substantive removal restrictions," that "violate[d] the separation of powers." *Id.* at 508-09. The plaintiffs thus were denied the injunction they sought against the Board's exercise of enforcement power against them. *Id.* at 487.

That holding applies with full force here, where the for-cause removal provision in HERA is plainly severable for the same reasons as the provision in *Free Enterprise Fund*. *Id.* at 509. In fact, the nature of the action challenged here provides even greater reason why vacatur of that action is not an available remedy. The doctrinal basis for Plaintiffs' claims is the constitutional mandate that the President retain "general administrative control of those *executing the laws*," including "some power of removing those for whom he cannot continue to be responsible." *Id.* at 492-93 (emphasis added; internal quotation marks omitted). Those animating concerns have no application to functions, like the Third Amendment, that are not "Executive" in nature and thus not constitutionally reserved for presidential supervision.

When FHFA as Conservator approved the Third Amendment, it was not enforcing the laws in a sovereign executive sense, but carrying out "broad operational authority" to "renegotiate an existing lending agreement"—a sort of action "within the heartland of powers vested in the officers or board of directors of any corporation." *Saxton*, 901 F.3d at 960-61 (Stras, J., concurring). Indeed, when government agencies like FHFA serve as conservators or receivers for financial institutions, they are deemed to "step into the shoes" of those institutions and are not acting as a Government entity. *See, e.g.*, *Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017); *Meridian Investments, Inc. v. Fed. Home Loan Mortg. Corp.*, 855 F.3d 573, 579 (4th Cir. 2017). Article II does not mandate that the President have final authority over the business operations of financial institutions in conservatorship.

Thus, if Plaintiffs were to succeed on their constitutional claim, the result would 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. Such an advisory opinion would leave the action that Plaintiffs claim "[e]xpropriates [their] [i]nvestments" (Br. 7) intact, providing no redress for the asserted injury.

2. The vacated Fifth Circuit panel decision in *Collins* exemplifies this limitation. Despite holding (over a dissent) that FHFA's structure was

unconstitutional, the panel unanimously rejected the plaintiffs' argument that this outcome required vacating the Third Amendment. *Collins*, 896 F.3d at 675-76. In accordance with the blueprint in *Free Enterprise Fund*, the *Collins* panel held that "severing the removal restriction from HERA," thereby "restoring Executive Branch oversight to the FHFA," was the sole available remedy. *Id.* The panel left "intact the remainder of HERA and the FHFA's past actions—including the Third Amendment." *Id.* at 676.

While the *Collins* panel did not follow that correct remedial holding through to its necessary logical implication—that redressability and standing are lacking—that conclusion is unavoidable, as FHFA urged the full Fifth Circuit in its recently granted petition for rehearing *en banc*. Redressability hinges on whether a plaintiff "*personally* would benefit *in a tangible way* from the court's intervention." *Warth v. Seldin*, 422 U.S. 490, 508 (1975) (emphases added). "[S]trik[ing] the language providing for good-cause removal" and "restoring Executive Branch oversight to the FHFA," *Collins*, 896 F.3d at 676, do not benefit Plaintiffs personally or tangibly because they leave in place the source of Plaintiffs' alleged injury, which affects the *Collins* plaintiffs today in exactly the same way it did before or without the decision. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998).

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The *Collins* panel found that regardless of the survival of the Third Amendment, the plaintiffs had standing on the basis of a separate, "*ongoing* injury" altogether distinct from the Third Amendment—"being subjected to enforcement or regulation by an unconstitutionally constituted body." 896 F.3d at 657-59. On the basis of a trail of "bread crumbs" it found in "relatively sparse case law," the panel analogized the *Collins* plaintiffs to the accounting firm in *Free Enterprise Fund*, which was assumed to have standing to "ensur[e] that the PCAOB met constitutional requirements." *Id.* at 658.

But that analogy is flawed; the accounting firm in *Free Enterprise Fund* and Enterprise shareholders could not be more dissimilar. The accounting firm was entitled to "declaratory relief sufficient to ensure that the reporting requirements and auditing standards to which they are subject will be enforced only by a constitutional agency accountable to the Executive" precisely because that firm "was registered with the PCAOB and subject to its continuing jurisdiction, regulation, and investigation." *Id.*; *see also Free Enter. Fund*, 561 U.S. at 485 (PCAOB regulated "every detail of [firm's] practice"). Plaintiffs here, remote shareholders of publicly traded, widely held corporations, are not registered with FHFA, are not subject to continuing jurisdiction, regulation, and investigation by FHFA, and do not identify any future FHFA reporting requirements or standards to which they will be subject. They make no effort to hide that their grievance is not with the prospect of future regulation, but with a single, historical action. *See, e.g.*, Br. 7 (Third Amendment "nationalize[d] the Companies, "expropriated…their retained capital," and "depriv[ed] the Companies' private shareholders of all of their economic rights").

3. In their effort to overcome the holding in *Free Enterprise Fund* and justify vacatur of the Third Amendment as a potential remedy, Plaintiffs rely heavily on *Bowsher v. Synar*, 478 U.S. 714 (1986), where the Supreme Court struck down a deficit-reduction statute that assigned core executive functions to the Comptroller General (an agent of Congress), and the lower court vacated budget actions taken as part of that unconstitutional process. For a host of reasons, the remedy in *Bowsher* is inapposite here.

The constitutional violation in *Bowsher* was not the Comptroller General's independence from the President, but the operation of an automatic deficit-reduction process in which "an officer controlled by Congress…execut[ed] the laws," creating what amounted to a "congressional veto." 478 U.S. at 726. Thus, upon finding that "the automatic deficit reduction process" requiring the President to defer to the Comptroller General was "unconstitutional," the court naturally held that orders issued "pursuant to the unconstitutional automatic deficit reduction process" were "without legal force and effect." *Synar v. United States*, 626 F. Supp. 1374, 1404 (D.D.C. 1986), *aff'd*, 478 U.S. 714.

That is far different from this case. Plaintiffs' theory here is not that a specific unconstitutional process caused the Third Amendment, but rather that *any* action FHFA takes "at a time when it was unlawfully insulated" is "*ultra vires* and subject to vacatur"—regardless of the lack of any connection between the independence and the action. Br. 26, 29. *Bowsher* offers no support for that sweeping proposition.

In fact, the *Bowsher* court observed that the Comptroller General performed a vast array of functions "as a legislative aid, in the performance of which he cannot in any proper sense be characterized as an arm or an eye of the executive." 626 F. Supp. at 1399 n.29 (internal quotation marks omitted). There was no suggestion those actions were rendered invalid, only the specific functions conferred on him by the deficit-reduction statute—and as to those, only after searching analysis established their "executive nature." 478 U.S. at 733. Here, as already discussed, the Conservator's entry into the Third Amendment was *not* of an executive nature. *See supra* at 19-20.

Nor does *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018), help Plaintiffs. Like *Bowsher*, *Lucia* did not address relief for removal-restriction claims; the Court specifically declined to grant certiorari on "whether the statutory restrictions on removing the Commission's ALJs are constitutional." *Id.* at 2050 n.1. Rather, the issue was whether certain SEC ALJs were constitutionally appointed under the

Appointments Clause. The Court reiterated that "'one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief" consisting of "a new 'hearing before a properly appointed' official." *Id.* at 2055 (quoting *Ryder v. United States*, 515 U.S. 177, 182-83 (1995)).

That principle is inapplicable to Plaintiffs' claims, which do not challenge the appointment of any officer adjudicating any case against them. When an appointment is determined in a timely challenge to have been invalid, that means the individual altogether lacked power to take official action. An individual who has not been properly appointed as an Article III judge, for example, cannot preside over a federal criminal trial, and if he purports to do so, the judgment will be null and void. *Cf. Nguyen v. United States*, 539 U.S. 69 (2003). Similarly, "in the absence of a lawfully appointed quorum," a multi-member regulatory board simply "cannot exercise its powers." *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2557 (2014).

In contrast, if an official is determined to have greater protection from removal than the Constitution permits, that in no way deprives the official of the power to act or calls into question past actions taken while the removal protection was in effect. *Free Enterprise Fund* itself makes that distinction clear. While the Court rejected the claim that PCAOB members were unconstitutionally appointed, it explained that had that claim succeeded, it would have justified "broad injunctive relief against the Board's continued operations." 561 U.S. at 513. In contrast, the relief for the unconstitutional removal restrictions was limited to striking the problematic provisions to make the agency "accountable to the Executive." *Id.* Because such relief would not redress the injury Plaintiffs claim here, redressability and Article III standing are lacking.

II. FHFA'S STRUCTURE AS AN INDEPENDENT AGENCY IS CONSTITUTIONAL

If the Court finds that Plaintiffs have Article III standing to bring their separation-of-powers claims, it should affirm the district court's rejection of those claims on the merits.

A. Independent Agencies and For-Cause Removal Provisions Do Not Violate the Constitution

The Supreme Court held long ago in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), 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 483. 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 Executor*, 295 U.S. at 629).

The Court has repeatedly reaffirmed this central principle, most recently in *Free Enterprise Fund* in 2010. *See PHH*, 881 F.3d at 84-91 (citing cases). "The Supreme Court has never struck down a statute conferring the standard for-cause protection at issue here." *Id.* at 78. The only occasions on which it has invalidated restrictions on presidential removal power involved "extreme variation[s]" where Congress either "arrogat[ed] to itself a role in removing the relevant executive officials," *id.* at 88-89; *see Myers v. United States*, 272 U.S. 52, 161 (1926), or erected highly unusual double layers of removal protection, *PHH*, 881 F.3d at 89; *see Free Enter. Fund*, 561 U.S. at 505. In the modern era, Congress has created dozens of independent agencies, performing a wide range of critical functions, based on judicial approval of for-cause removal provisions. *PHH*, 881 F.3d at 77, 91-92; *see also CFPB v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 899 (S.D. Ind. 2015).

HERA, in particular, carries forward a longstanding model that Congress has used for financial regulatory agencies since the 1800s. *PHH*, 881 F.3d at 91-92. The independence conferred by such removal protection "shields the nation's economy from manipulation or self-dealing by political incumbents and enables such agencies to pursue the general public interest in the nation's longer-term economic stability and success, even where doing so might require action that is politically unpopular in the short term." *Id.* at 78.

Plaintiffs concede, as they must, that under *Humphrey's Executor* the FHFA Director's protection from removal without cause does not, by itself, violate the separation of powers. Br. 17. But, they argue, for-cause removal results in a separation-of-powers violation when "considered alongside other statutory provisions that further enhance FHFA's independence." *Id*. That is wrong. The other statutory provisions upon which Plaintiffs rely are common agency design features that do not, in fact, impair presidential control.[2]

B. FHFA's Leadership by a Single Director, Rather Than a Multi-Member Board, Does Not Create a Constitutional Problem

The principal other feature on which Plaintiffs rely is the leadership of FHFA by a single Director rather than "a bipartisan commission or board." Br. 18-20. But that distinction is "untenable" and "finds no footing in precedent,

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[2] Plaintiffs characterize the FHFA Director's for-cause removal protection as "particularly potent" because if the President removes a Director, HERA's acting-director provision requires him to choose an acting director from among FHFA's three deputy directors. Br. 18. However, that represents *greater* selection authority than the President has under most agency-specific acting-officer statutes, which "tend to designate only one official to serve as acting officer," leaving the President no choice whatsoever in the matter. Valerie C. Brannon, CONG. RESEARCH SERV., R44997, *The Vacancies Act: A Legal Overview* at 15 (July 20, 2018), https://fas.org/sgp/crs/misc/R44997.pdf. Plaintiffs' argument that the President's choices are unduly constrained also assumes a lack of concurrent authority under the Vacancies Act to designate an acting FHFA director who is not one of the deputies. *See Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 556 (9th Cir. 2016) (holding that "the President is permitted to elect" between the Vacancies Act and agency-specific acting official provisions as "two statutory alternatives to designate an Acting General Counsel" of the NLRB).

historical practice, constitutional principle, or the logic of presidential removal power." *PHH*, 881 F.3d at 79-80.

Indeed, the Supreme Court upheld the constitutionality of for-cause removal protection for an individual agency head with substantial executive authority in *Morrison*, where "[t]he fact that the independent counsel was a solo actor played no role in either the Court's decision for an eight-member majority or Justice Scalia's dissent; neither saw that fact as a ground of distinction from the multi-member agencies sustained in *Humphrey's Executor* and *Wiener*." *Id*. at 96. And while *Humphrey's Executor* involved a multi-member commission (the FTC), the number of commissioners played no part in the Court's constitutional analysis in that case. *See* 295 U.S. at 626-32.

"[T]he real question" is whether removal restrictions and other features alleged to limit presidential oversight "are of such a nature that they impede the President's ability to perform his constitutional duty." *Morrison*, 487 U.S. at 691; *accord PHH*, 881 F.3d at 90. Because Plaintiffs do not claim that for-cause removal is problematic by itself, but only when combined with FHFA's single-director structure, Plaintiffs must show that having a single leader "makes a difference" and "transforms" an agency's independence from the President beyond that of a multi-member board. *Free Enterprise Fund*, 561 U.S. at 495, 496. Plaintiffs cannot make that showing.

As the district court reasoned, Add. 18, the thesis that a President would find it more difficult to supervise a *single* individual removable for cause than a body composed of *numerous* individuals who are each removable for cause defies logic. "If anything, the President's for-cause removal prerogative may allow *more* efficient control over a solo head than a multi-member directorate." *PHH*, 881 F.3d at 98 (emphasis added). To influence the direction of a multi-member commission, a President must influence multiple members, and if he seeks to change the composition, sufficient cause must independently exist to remove each member. By contrast, with an agency headed by a single individual, if there are any issues a President wishes to address, "he knows exactly where to turn." *Id.* If there is sufficient cause to remove that single individual, the President can in one stroke effect a 100% transformation of the leadership. In this way, "Congress's creation of an independent agency led by a single Director would appear to *facilitate* the agency's accountability to the President," rather than vice versa. *Id.* (emphasis added).

Equally backwards is Plaintiffs' argument that commissions with statutory bipartisanship requirements are more responsive and accountable to the President. Paradoxically, Plaintiffs consider it troubling that for a time, a President of one political party may coexist with an FHFA Director appointed by a President of a different political party, Br. 19, but ignore that the same effect is magnified with

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bipartisan boards. With FHFA, such coexistence is merely *possible*, and not a permanent feature; bipartisanship statutes, in contrast, typically *guarantee* that members of the President's political party can *never* comprise more than a bare majority of the body. *See, e.g.*, 15 U.S.C. § 41 ("Not more than three of the [five FTC] Commissioners shall be members of the same political party."). The significant limitation that multi-member bipartisanship requirements place on the President's appointing authority may itself "raise serious constitutional questions." *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 824 (D.C. Cir. 1993). Plaintiffs' position thus creates an anomalous regime in which for-cause removal is constitutional only if coupled with limitation of the President's appointment power.

Plaintiffs contend that presidential control over multi-member boards is enhanced because the President has "unilateral authority to select the chair of most independent commissions." Br. 18. But in 1935 when the Supreme Court decided *Humphrey's Executor*, the FTC statute provided that "[t]he commission shall choose a chairman from its own membership." 15 U.S.C. § 41 (1934). So it is impossible for presidential control over chairmanship to have formed any part of the rationale underlying that seminal decision approving independent agencies. In fact, the President's degree of power over chairmanships varies widely across the spectrum of multi-member agencies.[3] *See PHH*, 881 F.3d at 100 ("We are not aware of any court that has viewed the existence, strength, or particular term of agency chairs to be relevant to the constitutionality of an independent agency.").

Multi-member commissions do not "inevitably" give the President greater "ability to influence" the agency by "appointing one or more members" with staggered terms, as Plaintiffs assert. Br. 18. Rather, it depends how long it takes for the President "to make enough appointments to influence the decisions of the agency." Datla & Revesz, 98 CORNELL L. REV. at 795. That question implicates a variety of parameters: how many commission members, the lengths of their terms, whether they serve out their full terms, how those terms are staggered, and where those dates fall in the presidential election cycle. While Plaintiffs consider it unacceptable that an FHFA Director might stay in office for the duration of a four-year presidential term, Br. 19, the same possibility would exist with a board of multiple members selected more than four years apart. A single-director, five-year term structure like FHFA's "actually permit[s] more presidential control over the

[3] *See, e.g.*, 52 U.S.C. § 30106(a)(2) (Federal Election Commission; chair rotates among members annually); 45 U.S.C. § 154 (National Mediation Board; no presidential authority to select chair); 39 U.S.C. § 202(a)(1) (Postal Service Board of Governors; same); 19 U.S.C. § 1330(c) (International Trade Commission; chair, while selected by President, must alternate biennially between opposite political parties); *see generally* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 797 (2013) ("Congress can constrain the President's ability to influence a multimember agency through the agency's chair.").

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agency's direction" than a multi-member commission like the FTC, because "80 percent of presidential terms will permit the appointment of [the single] director, whereas only 57 percent of presidential terms will permit a president to appoint a controlling majority [of the FTC]." Add. 19 (citing *CFPB v. Navient Corp.*, 2017 WL 3380530, at *17 (M.D. Pa. Aug. 4, 2017)).

Lacking any sound reasons why a single-director independent agency is more insulated from presidential control than a multi-member one, Plaintiffs fall back on the purported "lack of historical precedent" for FHFA's structure. Br. 17, 18, 22. On the contrary, the historical precedents are robust. As Plaintiffs acknowledge, in addition to the CFPB, the Office of Special Counsel and Social Security Administration are headed by single officials protected from removal without cause. Br. 20, 22-23. Moreover, the Office of the Comptroller of the Currency ("OCC"), dating to "the dawn of the modern-day federal banking system" in 1864, was an independent agency headed by a single individual long before the multi-member independent commissions relied on by Plaintiffs were conceived of. *PHH*, 881 F.3d at 91-92; *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). "This longstanding tradition provides historical pedigree to the

[FHFA], and refutes the contention that the [FHFA's] single-director structure is anything new." *PHH*, 881 F.3d at 104.

In any event even if FHFA's structure lacked historical precedents, "[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). "Novelty is not necessarily fatal; there is a first time for everything." *PHH*, 881 F.3d at 102 (internal quotation marks and citation omitted).

Plaintiffs rely heavily on dissenting opinions in *PHH*. This Court should follow the *PHH* majority, which is solidly anchored in precedent and far more persuasive. But FHFA's structure would be constitutional even under the *PHH* dissent's analysis. For the *PHH* dissent, the outcome turned on the "massive" and "enormous" scope of executive law enforcement power vested in the CFPB, including enforcement of 19 consumer protection statutes against a vast swath of industry and "impos[ing] fines and penalties on private citizens," making the CFPB Director in the dissent's view "the single most powerful official in the entire U.S. Government, other than the President." 881 F.3d at 165, 172, 175 (Kavanaugh, J., dissenting). FHFA regulates several named institutions for safety and soundness, without comparably sweeping law-enforcement powers over general commerce. The conservatorship transaction at issue here, for example, has nothing in common with the executive law enforcement powers that the *PHH* dissenters were concerned about vesting in an individual with protection from removal. FHFA's structure is constitutional under any analysis.

C. The Other Features Relied on by Plaintiffs Are Not Constitutionally Problematic

The other issues Plaintiffs raise concerning FHFA's structure do not change the outcome. Plaintiffs simultaneously criticize FHFA for having features that numerous other independent agencies have, and for *not having* features that no other agency has. These other issues raise no constitutional concerns, individually or collectively.

1. Congress's decision to fund FHFA through assessments on regulated entities, rather than appropriations, follows its longstanding template for financial regulatory agencies including the OCC, Federal Reserve, FDIC, NCUA, Farm Credit Administration, and CFPB. *PHH*, 881 F.3d at 95 ("Congress has consistently exempted financial regulators from appropriations."). Other than the panel majority in *Collins*, no court has ever perceived any Article II problem with that widespread model, and in their briefs below Plaintiffs solely argued that FHFA's funding mechanism insulated FHFA from *Congress's Article I* oversight—a theory of a totally different stripe. Indeed, "budgetary independence primarily affects Congress, which has the power of the purse; it does not intensify any effect on the President of the removal constraint." *Id.* at 96.

In any event, there simply is no constitutional issue under either article of the Constitution: nothing prohibits Congress "from enacting funding structures for agencies that differ from the procedures prescribed by the ordinary appropriations process." *ITT*, 219 F. Supp. 3d at 896; *accord CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1089 (C.D. Cal. 2014). "Congress itself may choose, however, to loosen its own reins on public expenditure….Congress may also decide not to finance a federal entity with appropriations." *Am. Fed'n of Gov't Employees, AFL-CIO, Local 1647 v. FLRA*, 388 F.3d 405, 409 (3d Cir. 2004).

2. Nor does FHFA's independent litigating authority present any constitutional problem. Plaintiffs did not raise this issue below and cite no relevant authority in their brief to this Court. The issue is waived. *See, e.g.*, *Blake Marine Grp. v. CarVal Inv'rs LLC*, 829 F.3d 592, 597 (8th Cir. 2016). In any event, "Congress has carved out numerous exceptions to the centralized control of litigation in the DOJ." Datla & Revesz, 98 CORNELL L. REV. at 801; *see, e.g.*, *id.* at 800 & nn.167-68. Dozens of agencies have independent litigating authority, including the OCC and CFPB (each of which has a single head), and no court has suggested that this is problematic.

3. Plaintiffs also suggest FHFA is rendered unconstitutional by not having a "board of other Executive Branch officials with authority to veto its decisions." Br. 20. But neither do other independent agencies have such a board

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with general veto authority, which after all would defeat the purpose of independence. Neither the FTC upheld in *Humphrey's Executor* nor the independent counsel upheld in *Morrison* had a board with veto power over them. Contrary to Plaintiffs' suggestion regarding the CFPB, the Financial Stability Oversight Council only has authority to override final CFPB regulations found to threaten the "safety and soundness" or "stability" of the U.S. banking system, a small sliver of what the CPFB does. 12 U.S.C. § 5513(a).

4. Finally, Plaintiffs impute constitutional significance to certain "provisions that restrict judicial review of FHFA's actions." Br. 24-25. However, Plaintiffs exaggerate the limitations on judicial review. This Court has held that 12 U.S.C. § 4617(f), the main provision cited by Plaintiffs, "bars only equitable relief, and only does so if the challenged action is within the powers given FHFA by HERA." *Saxton*, 901 F.3d at 957. The U.S. Code is replete with statutes limiting judicial review of various agency actions. *See United States v. Bozarov*, 974 F.2d 1037, 1041 (9th Cir. 1992) ("The Supreme Court has upheld a number of statutes that precluded judicial review."). Reflecting the widespread nature of such provisions, the APA expressly withdraws jurisdiction over actions as to which "statutes preclude judicial review." 5 U.S.C. § 701(a)(1). In any event, limitations on judicial review in no way "intensify any effect on the President of the removal constraint." *PHH*, 881 F.3d at 96. The judicial review issue adds nothing to

Plaintiffs' separation-of-powers claims, and the Court should affirm the dismissal of those claims.

III. PLAINTIFFS' APPOINTMENTS CLAUSE CLAIM FAILS

The district court also correctly rejected Plaintiffs' novel Appointments Clause claim challenging Mr. DeMarco's service as FHFA Acting Director.

The President designated Mr. DeMarco, a Deputy Director of FHFA, to serve as Acting Director under 12 U.S.C. § 4512(f) upon the resignation of the prior Director. That designation was fully consistent with HERA and the Appointments Clause. While that Clause requires Senate confirmation of principal officers, it is well-settled that the President may "direct certain officials to temporarily carry out the duties of a vacant [principal] office in an acting capacity, without Senate confirmation." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 934 (2017). Such designations are critical to prevent important responsibilities from "go[ing] unperformed if a vacancy arises and the President and Senate cannot promptly agree on a replacement." *Id.* The Supreme Court upheld the constitutionality of this common practice in *United States v. Eaton*, 169 U.S. 331 (1898). "Because the subordinate officer is charged with the performance of the duty of the superior for a limited time, and under special and temporary conditions, he is not thereby transformed into the superior and permanent official." *Id.* at 343.

On appeal, Plaintiffs do not dispute that Mr. DeMarco was properly designated to serve as Acting Director under HERA.[4] Rather, Plaintiffs contend that by the time he approved the Third Amendment, Mr. DeMarco had stayed longer than the Constitution permits and that the Third Amendment must be vacated as a result.

That claim is unprecedented. Despite acting officers being widespread in the federal government throughout the nation's history, *SW Gen.*, 137 S. Ct. at 935-36, no court has ever held that the length of an acting official's service violated the Appointments Clause, let alone invalidated past actions by such officials.

Notably, Congress can and sometimes does limit the duration of acting officials' service by statute. *See*, *e.g.*, Federal Vacancies Reform Act of 1998 ("Vacancies Act"), 5 U.S.C. § 3346 (providing general, non-exclusive authority for the designation of acting officials across the Government, subject to a 210-day time limit, which may be renewed twice for a total of 630 days and is tolled while a nomination is pending). In many other statutes, however, Congress has declined to impose a time limit. *See* S. Rep. No. 105-250, at 16-17 (1998) (listing 40 agency-specific, acting-officer statutes, most of which "do not place time

[4] Plaintiffs raised certain issues regarding the designation below, Add. 32-35, but do not press them on appeal, so they are abandoned. *United States v. Barnum*, 564 F.3d 964, 968 n.4 (8th Cir. 2009).

restrictions on the length of an acting officer”). HERA falls in the latter category. No court has held that the Constitution overrides such congressional judgments not to impose a specific time limit on the duration of an acting official’s service.

Undeterred, Plaintiffs offer two alternative theories why Mr. DeMarco allegedly had served longer than permitted by the Constitution when he approved the Third Amendment. They argue primarily that the Court should infer a *per se* two-year ceiling based on an analogy to the Recess Appointments Clause, and secondarily that Mr. DeMarco served longer than “reasonable under the circumstances.” Both arguments are meritless under both the law and widespread practice.

A. The *De Facto* Officer Doctrine Bars Plaintiffs’ Appointments Clause Claim

As a threshold matter, whether the proposed limit is two years or whatever is “reasonable under the circumstances,” the *de facto* officer doctrine bars this claim. That doctrine “confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person’s appointment or election to office is deficient.” *Ryder v. United States*, 515 U.S. 177, 180 (1995). Such protection helps avoid the risk of “chaos” and “multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question.” *Id.* (citation omitted).

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The *de facto* officer doctrine is a common "cure[]" for "potential infirmities in the authority" of acting officers. *Acting Officers*, 6 Op. O.L.C. 119, 122 (1982); *see Department of Energy—Appointment of Interim Officers—Department of Energy Organization Act*, 2 Op. O.L.C. 405, 411 (1978) (*de facto* officer doctrine covers claims that an "initially valid designation of an acting official" not subject to any fixed term nevertheless was "vitiated by an excessive delay in the submission of a nomination"). To be sure, the *de facto* officer doctrine is not absolute. An important exception allows plaintiffs to challenge government action taken by an individual alleged not to be properly serving if (1) the action is brought "at or around the time that the challenged government action is taken," and (2) the agency "has had reasonable notice under all the circumstances of the claimed defect in the official's title to office." *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 81-82 (D.C. Cir. 2015) (citation omitted), *aff'd on other grounds*, 137 S. Ct. 929.

That exception, however, does not cover Plaintiffs' Appointments Clause claim here. Plaintiffs did not bring their claim until June 2017, nearly five years after the challenged action, and over three years after Mr. DeMarco left the agency. Indeed, none of the many prior lawsuits challenging the Third Amendment since 2013, *see supra* at 9, questioned Mr. DeMarco's power to act as Director.

Plaintiffs contend, as they did below, that the *de facto* officer doctrine "has no application" to constitutional challenges, only to "technical defect[s] in…title to the office." Br. 46-48. But the decisions Plaintiffs rely on did not exempt constitutional claims. They simply held that appellate courts could consider whether lower court judges were improperly appointed or sitting and therefore lacked jurisdiction. *Nguyen*, 539 U.S. at 77; *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (plurality). These unremarkable holdings are consistent with the *de facto* officer doctrine, whic allows challenges to an officer's authority brought "at or around the time that the challenged government action is taken." *SW Gen.*, 796 F.3d at 81. When the challenged government action is a lower court judgment, an appeal or certiorari petition—which generally must be filed within one to three months—naturally satisfies that condition. A delay *nineteen times* as long, like the one here, does not.

Moreover, the Supreme Court "accorded de facto validity" to the "past acts" of the Federal Election Commission in a constitutional challenge to that agency under the Appointments Clause. *Buckley v. Valeo*, 424 U.S. 1, 142 (1976); *see FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708 (D.C. Cir. 1996). Plaintiffs insist (Br. 48) that *Buckley*'s approach was "limited" by *Ryder*, but *Ryder* simply declined to extend *Buckley*'s doctrine "validat[ing] the past acts of public officials" beyond "civil cases." 515 U.S. at 184. This is a civil case. As the district court observed, "the facts of *Buckley*—which concerned the activities of an executive agency with a wide range of regulatory responsibilities—are much more similar to the facts of this case than they are to the facts of *Ryder* and *Nguyen*." Add. 38. This is a paradigmatic case for application of the *de facto* officer doctrine.

B. The Recess Appointments Clause Does Not Apply to Acting Officials

Even if Plaintiffs' Appointments Clause claim were not barred at this late date by the *de facto* officer doctrine, it lacks any merit. Plaintiffs primarily urge the Court to limit an FHFA Acting Director's tenure with an absolute two-year ceiling they claim "derives from the Recess Appointments Clause." Br. 38-40. Under that Clause, U.S. Const. art. II, § 2, cl. 3, the President may appoint officers to fill vacancies during Senate recesses without Senate confirmation, and such officers may serve until "the End of [the Senate's] next Session." When that phrase is read together with the Twentieth Amendment (which states that Congress must assemble at least once a year), the combined practical result is that two years is the longest a recess appointee can potentially serve.

This analysis has no application to Mr. DeMarco, who was not a recess appointee. The constitutional recess-appointment power, on the one hand, and the statutory designation of subordinate officials to temporarily act in senior roles, on the other, are two entirely distinct sources of authority, and recess appointees stand in a very different position than subordinate officials temporarily performing the functions of a higher office. As the district court remarked, when the Senate takes a recess within the meaning of the Clause, the President's appointing power is absolute (including even Article III judges) and "[t]he *sole* limit on this extraordinary authority over two of the three branches of government is temporal." Add. 30.

In contrast, the power to designate acting Executive Branch officials is conferred by statute and subject to plenary control by Congress, including whatever time limit Congress deems appropriate. Neither constitutional text, jurisprudence, nor the respective policies animating the Recess Appointments Clause, on the one hand, and the necessity for acting officers recognized in cases like *Eaton* and *SW General*, on the other, provides any basis for transplanting limitations between the two very different contexts.

Indeed, rejecting a similar argument, the Department of Justice's Office of Legal Counsel explained that "the constitutionally mandated limit of 'the End of [the Senate's] next Session'" for recess appointees has no application to an individual designated under the Vacancies Reform Act to perform the duties of a Senate-confirmed office in an acting capacity. *Designation of Acting Solicitor of Labor*, 2002 WL 34461082, at *3 (O.L.C. Nov. 15, 2002) (citation omitted). Plaintiffs' approach "ignore[s] the differences between holding an office and acting in it." *Id.* "An acting official does not hold the office, but only performs the functions and duties of the office," in contrast to a recess appointee, who "is appointed by one of the methods specified in the Constitution itself; he holds the office; and he receives its pay." *Id.* (internal quotation marks, citation, and alteration omitted).

Plaintiffs cite no authority for their proposed analogy, only scattered passages from *Noel Canning* addressed solely to the subject of *recess* appointments. Plaintiffs' *per se* two-year ceiling is particularly untenable because it would have the effect of invalidating not only HERA's acting-director provision, but a bevy of provisions throughout the U.S. Code, including the Vacancies Act itself, that authorize acting officials to serve longer. *See* 5 U.S.C. § 3346 (permitting acting officials to serve over two years if a nomination (which tolls the 630-day time limit) is pending for at least 100 days); S. Rep. No. 105-250, at 17 ("most" agency-specific acting-officer statutes "do not place time restrictions" on the service).

Indeed, there have been many examples of acting officials leading agencies and performing functions associated with offices requiring Senate confirmation for over two years. *See, e.g.*, https://www.ssa.gov/history/commissioners.html (Social Security Administration had one Acting Administrator for nearly four years (Feb. 2013-Jan. 2017) and another for nearly three years (Sept. 1983-June 1986)); *Doolin Sec. Sav. Bank v. OTS*, 139 F.3d 203, 205 (D.C. Cir. 1998) (Acting Director of Office of Thrift Supervision Jonathan Fiechter served nearly four years); https://www.cpsc.gov/About-CPSC/Commissioners (Consumer Product Safety

Commission had Acting Chair for two-and-a-half years (July 2006-May 2009)); https://www.atf.gov/about/executive-staff (Acting Director of ATF has served three-and-a-half years, since April 2015).

Plaintiffs' theory would mean all of these instances (and more) were out-and-out violations of an absolute two-year limit that no one—including Congress, the President, or the Judiciary—realized existed until Plaintiffs discovered it lurking in the shadows of the Recess Appointments Clause and the Twentieth Amendment. The Court should reject Plaintiffs' untenable and implausible argument based on the constitutional text, *Eaton*, and the longstanding consensus of the political branches.

C. Plaintiffs' Alternative "Reasonable Under the Circumstances" Standard Raises a Non-Justiciable Political Question

In the alternative, Plaintiffs argue that Mr. DeMarco could serve as Acting Director only for "as long as reasonable under the circumstances," and that the three years he had served at the time of the Third Amendment violated that *ad hoc* standard. Br. 40-43. However, as the district court correctly held, the very "circumstances" that would bear on such a reasonableness determination are non-justiciable because they revolve around presidential personnel decisions. Add. 22-29.

No court has adopted, or even suggested, Plaintiffs' "reasonable under the circumstances" standard. Rather, it is derived from OLC opinions providing legal advice to the Executive Branch. Br. 40 (citing *Designation of Acting Director of OMB*, 2003 WL 24151770, at *1 n.2 (O.L.C. June 12, 2003); *Status of the Acting Director, OMB*, 1 Op. O.L.C. 287, 287 (1977)). Those opinions simply advise that an acting official may not serve "indefinitely," even absent an express statutory time limit, and "the President should submit a nomination" within a "reasonable time after the occurrence of a vacancy." 1 Op. O.L.C. at 287. Plaintiffs offer no basis for converting this internal advice into an actionable "reasonableness" limitation to be policed through private litigation and judicial fact-finding.

Indeed, the "circumstances" OLC identified as relevant are "far outside the competency of the judiciary." Add. 24. As Plaintiffs acknowledge, that question turns on, *inter alia*, "'particular factors affecting the President's choice'" of a permanent nominee, whether the President has "a desire to appraise the work of an Acting Director," and "'the President's ability to devote attention to the matter.'" Br. 41 (quoting *Status of the Acting Director, OMB*, 1 Op. O.L.C. at 290); *see also Department of Energy*, 2 Op. O.L.C. at 410 (identifying the "difficulty of finding suitable candidates" for "complex and responsible positions" as an additional factor).

Those matters are outside the judicial ken—hence, why Plaintiffs are unable to identify any judicial precedent for this most novel of claims. As the district court correctly observed, Plaintiffs' 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. Here, for example, it took two nominations and the abolition of the filibuster for executive nominees to secure Representative Watt's confirmation. A President's deliberations regarding his personnel choices, balancing of competing demands on his attention, and navigation of obstacles to Senate confirmation of his nominees are among the most delicate and privileged matters in government.

These are precisely the types of issues left to the political branches because of the lack of "judicially discoverable and manageable standards" for resolving them. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 197 (2012). Judicial inquiry into a President's processes and deliberations for considering candidates and making nominations would raise profound separation-of-powers concerns of its own. *See, e.g.*, *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 381-82 (2004).

Plaintiffs insist that courts have "long adjudicated similar questions." Br. 44. But the cases they cite—*Morrison*, *Edmond*, and *Eaton*—are not "similar" except in the generalized sense that they related to the Appointments Clause. The justiciability problem here stems not from the fact that the challenge is under the Appointments Clause or involves an element of timing, but from the unsuitability of retrospective judicial exploration of the reasonableness of the President's and Senate's nomination and confirmation efforts in a particular situation. Nor is *Noel Canning* a precedent for the type of judicial intervention Plaintiffs seek; Plaintiffs have no response to the district court's point that "[u]nlike the reasonableness of DeMarco's tenure,…the meaning of 'recess' is a static question of law that is capable of prospective determination." Add. 27.

Plaintiffs inveigh that the opinion below "frustrat[es] the Senate's constitutional role" by enabling Presidents to "introduce permanent, unilateral appointments to the most powerful offices in the Executive Branch." Br. 37. But that concern is both manufactured and self-contradictory: elsewhere in their brief, Plaintiffs call HERA's provision for acting directors "impotent" as a means of presidential control because the President must select from FHFA's deputy directors and cannot have "the Director of his choice until the Senate confirms a permanent successor." Br. 18. Many other acting-officer statutes "designate only one official to serve as acting officer," minimizing the potential for the type of abuse Plaintiffs fear. Valerie C. Brannon, CONG. RESEARCH SERV., R44997, *The Vacancies Act: A Legal Overview* at 15 (July 20, 2018). Here, Plaintiffs insist that the Obama Administration and Acting Director DeMarco clashed over policy and the Administration "pressure[d] [him] to resign," JA26-27, belying any notion the

President was scheming to keep a handpicked ally in power for as long as possible while shutting the Senate out.

Moreover, the Legislative and Executive branches are well-equipped to address any possible overreaches. "[A] number of practical and political reasons" discourage the use of acting officers "as a substitute for appointment by and with the advice and consent of the Senate." *Acting Officers*, 6 Op. O.L.C. at 119. For instance, "[a]n attempt to circumvent the right of the Senate to participate in the appointment process is likely to result in political reprisals and repercussions," and acting officials are often regarded as "caretaker[s] without a mandate to take far-reaching measures." *Id.* at 121. The tenure of most acting officers is already statutorily limited, *see* 5 U.S.C. § 3346, and "if Congress perceives that the President is abusing his limited authority to appoint acting officers" under office-specific, acting-officer provisions that are not time-limited, "Congress has the ability to address the problem through legislation." Add. 30. In the face of these political checks and balances, and practical realities, there is no need for courts to disregard justiciability limits and fashion a new implied right of action to police perceived abuses.

D. The FHFA Acting Director's Service Did Not Violate the Appointments Clause

Should this Court reach whether the President's nomination efforts and the corollary duration of Mr. DeMarco's service were "reasonable under the circumstances," the Court should find that they were. As shown above, *supra* at 45-46, the amount of time Mr. DeMarco had served as Acting Director as of the Third Amendment, moreover, is neither unprecedented nor unusual. The very rationale for acting officials is that "[t]he constitutional process of Presidential appointment and Senate confirmation…can take time: The President may not promptly settle on a nominee to fill an office; the Senate may be unable, or unwilling, to speedily confirm the nominee once submitted." *SW Gen.*, 137 S. Ct. at 935. The relevant factors, including "whether the President has sent a nomination to the Senate," Br. 41 (citing 1 Op. O.L.C. at 290), "particular factors affecting the President's choice…or the President's ability to devote attention to the matter," *id.*, and "the difficulty of finding suitable candidates" for "complex and responsible positions" in the face of legislative uncertainties, 2 Op. O.L.C. at 410, all point toward a finding of reasonableness in this case.

When the vacancy arose in late 2009, the country was reeling from recession and the Enterprises' futures were uncertain, with numerous legislative proposals swirling that addressed the fate of the Enterprises. Despite the challenges of finding suitable candidates in such a fraught setting, President Obama was able to select and nominate an FHFA Director the following year, only to see that nomination rejected by the Senate in a highly polarized political environment. When the President later submitted the nomination of the current FHFA Director, then a sitting Member of Congress, it took seven months and the historic abolition of the filibuster for that nomination to be approved by the narrowest of party-line margins. Given this fractious climate, and Plaintiffs' own allegations that the President sparred with Mr. DeMarco over policy and "desire[d]…new leadership at FHFA," JA26, there is no basis to suspect the amount of time it took to fill the office was attributable to factors within the President's control. This Court could therefore affirm the judgment below on the ground that the President's appointment efforts and Mr. DeMarco's service were reasonable under the totality of the circumstances.

IV. PLAINTIFFS' NONDELEGATION CLAIMS FAIL

Finally, the district court correctly rejected Plaintiffs' nondelegation claims. The nondelegation doctrine is not implicated here because FHFA "was not exercising governmental power," Add. 43—and certainly not *legislative* power—when it agreed to the Third Amendment, *id.* at 40. In any event, HERA provides more than ample "intelligible principles" to satisfy the undemanding bar set by controlling Supreme Court precedent. Add. 45-46.

The nondelegation doctrine restricts Congress from delegating legislative power to another branch of government. *Mistretta v. United States*, 488 U.S. 361, 371 (1989). Cases holding that Congress violated the nondelegation principle are extremely rare. "The Supreme Court has struck down statutes on delegation grounds on only two occasions," and this Court has never done so, save for one occasion that was later vacated. *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 793, 795 (8th Cir. 2005). The test for nondelegation claims is simply whether Congress has provided an "intelligible principle" to guide the agency's exercise of discretion; "[t]he Supreme Court has given Congress wide latitude" in meeting that requirement. *Id.* at 795.

But in order for the nondelegation doctrine to apply, the powers at issue must be sovereign and governmental in nature. For example, in *Pittston Co. v. United States*, 368 F.3d 385 (4th Cir. 2004), the Fourth Circuit confronted a nondelegation challenge to a statute conferring broad authority on a coal industry pension fund to invest premiums received from coal companies. The "central inquiry" was "whether the *function* of the Combined Fund in preserving and investing money assessed by statute is governmental in nature." *Id.* at 398. Because that function was "not essentially governmental," there simply was no nondelegation issue. *Id.* at 397. While *Pittston* involved a private nondelegation claim, the same analysis is dispositive of a claim that Congress improperly delegated its legislative powers to another part of the Government: if the functions at issue are not governmental in nature, *a fortiori* they cannot be legislative in nature.

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FHFA's entry into the Third Amendment, which "in essence" simply "renegotiat[ed] an existing lending agreement," *Saxton*, 901 F.3d at 960 (Stras, J., concurring), was "not essentially governmental," *Pittston*, 368 F.3d at 397. "Fannie and Freddie owed money" and the Third Amendment "changed the payment schedule and terms," an action "within the heartland of powers vested in the officers or board of directors of any corporation." *Saxton*, 901 F.3d at 960-61 (Stras, J., concurring). That action was an exercise of "FHFA's business judgment," not the type of legislative or executive function the Constitution commits to Congress or the President. *Perry Capital, LLC v. Mnuchin*, 864 F.3d 591, 615 (D.C. Cir. 2017).

Plaintiffs' rejoinder that "expropriations of private property to benefit the public fisc" are always governmental (Br. 51) substitutes rhetoric for analysis. The issue is whether FHFA improperly exercised "legislative Powers…vested in [the] Congress." U.S. Const. art. I, § 1. That depends on whether FHFA acted in a sovereign legislative capacity in changing a payment schedule and terms, not whether the outcome included a benefit to taxpayers. *Slattery v. United States*, 583 F.3d 800 (Fed. Cir. 2009), is inapposite; it involved a takings claim, which is not asserted here and implicates entirely different constitutional principles than nondelegation.

Plaintiffs also argue that the Third Amendment must be considered an exercise of legislative power because courts have held FHFA "suspend[ed] the application of provisions of the APA and HERA" to Treasury. Br. 52 (citing *Saxton*, 901 F.3d at 959). As the district court explained, Plaintiffs "mischaracteriz[e]" the decisions on which they base this assertion. Add. 43. Those decisions "simply held that the plaintiffs could not circumvent FHFA's statutory protection from judicial review by seeking declaratory and injunctive relief against FHFA's contractual counterparty." *Id.* The fact that courts properly applied an anti-injunction provision does not mean FHFA engaged in impermissible legislation.

In any event, to the extent the nondelegation doctrine applies, HERA provides sufficient "intelligible principles" to guide FHFA in the performance of its conservatorship functions. Add. 45-46. Congress empowered FHFA as Conservator to "take such action as may be…appropriate to carry on the business of the [Enterprises] and preserve and conserve the[ir] assets and property." 12 U.S.C. § 4617(b)(2)(D). The "purpose" of FHFA's appointment as conservator is to "reorganiz[e], rehabilitat[e], or wind[] up the [Enterprises'] affairs." *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. Congress also provided a roadmap in HERA's amendments to the Enterprises' statutory charters, authorizing securities transactions between the Enterprises and Treasury in order to "provide stability to the financial markets," "prevent disruptions in the availability of mortgage finance," and "protect the taxpayer." 12 U.S.C. §§ 1455(*l*)(1)(B), 1719(g)(1)(B). These provisions—which Plaintiffs do not discuss—convey far more detail than statutes previously upheld against nondelegation challenges. *See, e.g.*, *South Dakota*, 423 F.3d at 795 ("general directives" such as "public interest" or other "[b]road phrases of purpose" suffice).

Rather than confront HERA's statutory detail, Plaintiffs rest their nondelegation claim entirely on this Court's holding in *Saxton* that 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." *Saxton*, 901 F.3d at 958 (citation omitted). But Plaintiffs cite no authority that statutory language must be construed the way they want it to be in order to provide an intelligible principle.

Finally, Plaintiffs' emphasis on "the statute's restrictions on judicial review" (Br. 50) once again exaggerates the provisions they cite, which leave ample outlets for judicial review. *See supra* at 37-38. Plaintiffs also distort the case law on which they rely. They cite language in one of this Court's decisions that "the *availability* of judicial review 'is a factor weighing in favor of *upholding a statute*.'" Br. 50 (quoting *United States v. Garfinckel*, 29 F.3d 451, 459 (8th Cir.

1994)) (emphasis added). But *Garfinckel* borrowed that language from another case, which emphasized (immediately following the quoted language) that judicial review was *not* "constitutionally required," and rejected a nondelegation challenge notwithstanding a total bar on judicial review. *Bozarov*, 974 F.2d at 1042. The judicial review issue adds no more to Plaintiffs' nondelegation claims than it does to their separation-of-powers claims. *See supra* at 37-38.

In the court below, Plaintiffs asserted a distinct claim under the *private* nondelegation doctrine, which disfavors delegations of "regulatory authority to private persons whose interests may be and often are adverse to the interests of others in the same business." *Pittston*, 368 F.3d at 394. The district court properly dismissed that claim because, as already discussed, regardless of whether the Conservator is treated as a private entity, it did not exercise regulatory or legislative power in entering into the Third Amendment. Add. 44. On appeal, Plaintiffs devote only three sentences to this claim, arguing that FHFA did exercise governmental power. Br. 53. That argument is wrong for the reasons discussed above. In addition, the fact pattern in this case bears no resemblance to the unfair competition situation in the minuscule number of cases where improper private delegations have been found. *See Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (statute authorized private business to impose legally binding requirements on its competitors).

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V. HERA'S SHAREHOLDER-RIGHTS PROVISION BARS PLAINTIFFS' CLAIMS

FHFA adopts and incorporates by reference Treasury's arguments that Plaintiffs' claims are barred by HERA's transfer-of-shareholder-rights provision, 12 U.S.C. § 4617(b)(2)(A)(i), because they are derivative in character and there is no conflict-of-interest exception to HERA's bar on shareholder derivative suits. *See* Treasury Br. 14-25.

CONCLUSION

This Court should affirm the judgment below.

Dated: November 13, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 12,995 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionately spaced typeface in 14-point Times New Roman font.

As required by Eighth Circuit Rule 28A(h), this brief have been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November, 2018, I filed the foregoing Brief of Defendants-Appellees Federal Housing Finance Agency and Melvin L. Watt with the Clerk of the Court using the CM/ECF System. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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