No. 19-422

In the Supreme Court of the United States

PATRICK J. COLLINS, ET AL., PETITIONERS

v.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
MARK B. STERN
ABBY C. WRIGHT
GERARD SINZDAK
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 12 U.S.C. 4512(b)(2) violates the separation of powers by prohibiting the President from removing the Director of the Federal Housing Finance Agency (FHFA) except "for cause."

2. Whether a declaration that 12 U.S.C. 4512(b)(2)'s removal restriction is unconstitutional constitutes an inadequate remedy for the asserted constitutional defect in FHFA's structure.

ADDITIONAL RELATED PROCEEDING

Supreme Court of the United States:

Mnuchin v. *Collins*, 19-563 (filed Oct. 25, 2019)

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement:
A. Factual background 1
B. Proceedings below 6
Argument 13
A. The court of appeals' constitutional holding does not warrant this Court's review 14
B. The court of appeals' remedial holding does not warrant this Court's review 19
Conclusion 27

TABLE OF AUTHORITIES

Cases:

Abbott Labs. v. *Gardner*, 387 U.S. 136 (1967) 22
Arizonans for Official English v. *Arizona*, 520 U.S. 43 (1997) 15
Ayotte v. *Planned Parenthood of N. New England*, 546 U.S. 320 (2006) 24
Bond v. *United States*, 564 U.S. 211 (2011) 17
Bowsher v. *Synar*, 478 U.S. 714 (1986) 22
Buckley v. *Valeo*, 424 U.S. 1 (1976) 23
Camreta v. *Greene*, 563 U.S. 692 (2011) 15
Chapman v. *California*, 386 U.S. 18 (1967) 20
County of Sonoma v. *Federal Hous. Fin. Agency*, 710 F.3d 987 (9th Cir. 2013) 17
Davis v. *United States*, 564 U.S. 229 (2011) 23
Flagg Bros. v. *Brooks*, 436 U.S. 149 (1978) 18
Free Enterprise Fund v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) 24, 25
Gregory v. *Mitchell*, 634 F.2d 199 (5th Cir. 1981) 17

Cases—Continued: Page

Herron v. *Fannie Mae*, 861 F.3d 160 (D.C. Cir. 2017) 17, 18
Humphrey's Executor v. *United States*, 295 U.S. 602 (1935) 11
Jacobs v. *Federal Hous. Fin. Agency*, 908 F.3d 884 (3d Cir. 2018) 2, 5
Kowalski v. *Tesmer*, 543 U.S. 125 (2004) 17
Lucia v. *SEC*, 138 S. Ct. 2044 (2018) 22
Murphy v. *NCAA*, 138 S. Ct. 1461 (2018) 25
NLRB v. *Noel Canning*, 134 S. Ct. 2550 (2014) 22
North Carolina v. *Covington*, 137 S. Ct. 1624 (2017) 19
Pagán v. *Calderón*, 448 F.3d 16 (1st Cir. 2006) 17
Perry Capital LLC v. *Mnuchin*, 864 F.3d 591 (D.C. Cir. 2017), cert. denied, 138 S. Ct. 978 (2018) 2, 4, 6, 18
Reynoldsville Casket Co. v. *Hyde*, 514 U.S. 749 (1995) 23
Roberts v. *Federal Hous. Fin. Agency*, 889 F.3d 397 (7th Cir. 2018) 6
Russello v. *United States*, 464 U.S. 16 (1983) 16
SCA Hygiene Prods. Aktiebolag v. *First Quality Baby Prods., LLC*, 137 S. Ct. 954 (2017) 21
Swan v. *Clinton*, 100 F.3d 973 (D.C. Cir. 1996) 16
The Hecht Co. v. *Bowels*, 321 U.S. 321 (1944) 22
United States ex rel. Adams v. *Aurora Loan Servs., Inc.*, 813 F.3d 1259 (9th Cir. 2016) 18
United States ex rel. Petras v. *Simparel, Inc.*, 857 F.3d 497 (3d Cir. 2017) 18
United States v. *Beszborn*, 21 F.3d 62 (5th Cir.), cert. denied, 513 U.S. 934 (1994) 17, 18
Ward, *Ex parte,* 173 U.S. 452 (1899) 23
Weinberger v. *Romero-Barcelo*, 456 U.S. 305 (1982) 22

Case—Continued: Page

Winter v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008) 19

Constitution and statutes:

U.S. Const.:
Art. II 18
Art. III 15
Administrative Procedure Act, 5 U.S.C. 702 ..... 7, 22
5 U.S.C. 706 ..... 20, 21
Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 3
12 U.S.C. 1455(*l*) 7
12 U.S.C. 1455(*l*)(1)(A) 4
12 U.S.C. 1455(*l*)(2)(A) 4
12 U.S.C. 1455(*l*)(2)(D) 4
12 U.S.C. 1719(g)(1)(A)-(B) 4
12 U.S.C. 4501(2) 25
12 U.S.C. 4511 3
12 U.S.C. 4512(a) 3
12 U.S.C. 4512(b)(1) 3
12 U.S.C. 4512(b)(2) 3, 16
12 U.S.C. 4512(f) 3, 16
12 U.S.C. 4516(f)(2) 24
12 U.S.C. 4617 ..... 4, 25
12 U.S.C. 4617(a)(2) 3
12 U.S.C. 4617(a)(5)(A) 4
12 U.S.C. 4617(b) 3
12 U.S.C. 4617(b)(2)(A) 3, 9
12 U.S.C. 4617(b)(2)(B)(i) 3
12 U.S.C. 4617(b)(2)(D) 4
12 U.S.C. 4617(b)(2)(G) 3

Statutes—Continued: Page

12 U.S.C. 4617(b)(2)(J)(ii) 4, 24
12 U.S.C. 4617(f) 4, 7, 9

Miscellaneous:

Restatement (Second) of Contracts (1981) 21

In the Supreme Court of the United States

No. 19-422

PATRICK J. COLLINS, ET AL., PETITIONERS

v.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-160) is reported at 938 F.3d 553. The opinion of the court of appeals panel (Pet. App. 166-280) is reported at 896 F.3d 640. The memorandum and order of the district court (Pet. App. 283-297) are reported at 254 F. Supp. 3d 841.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 2019. The petition for a writ of certiorari was filed on September 25, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Factual Background

1. Congress created the Federal National Mortgage Association (Fannie Mae or Fannie) in 1938 and the

Federal Home Loan Mortgage Corporation (Freddie Mac or Freddie) in 1970. See Pet. App. 7. Those enterprises operate in the secondary mortgage market primarily by buying home loans from private lenders, pooling some of those loans into mortgage-backed securities, guaranteeing timely payment on those securities, and selling those securities to private investors. See *ibid.* By buying loans from lenders, the enterprises provide funds to those lenders that the lenders can then use to make additional loans. And by bundling loans into securities backed by the enterprises' credit guarantees, the enterprises attract investors who might not otherwise have invested in mortgages, thereby expanding the pool of funds available for housing loans. The enterprises are publicly traded companies with private shareholders, but they operate under congressional charters and have long benefited from the perception that the federal government would intervene to support their obligations if they were to experience financial difficulties. See *Jacobs* v. *Federal Hous. Fin. Agency*, 908 F.3d 884, 887 (3d Cir. 2018).

In 2008, Fannie and Freddie suffered overwhelming losses because of a marked decline in home prices and a sharp increase in defaults on home loans. *Perry Capital LLC* v. *Mnuchin*, 864 F.3d 591, 599 (D.C. Cir. 2017), cert. denied, 138 S. Ct. 978 (2018). The enterprises lost more in 2008 ($108 billion) than they had earned in the previous 37 years combined ($95 billion). Pet. App. 7-8. The enterprises needed to raise more capital in order to stay in business—but private investors were unwilling to provide that capital. *Perry Capital*, 864 F.3d at 601. At the time, the enterprises' mortgage portfolios were worth approximately $5 trillion, or nearly half the national mortgage market. Pet. App. 7. The enterprises'

failure would have had catastrophic effects for the national housing market and the economy.

2. In July 2008, Congress enacted the Housing and Economic Recovery Act of 2008 (Recovery Act or Act), Pub. L. No. 110-289, 122 Stat. 2654. Through the Act, Congress created the Federal Housing Finance Agency (FHFA or Agency) to regulate Fannie and Freddie. 12 U.S.C. 4511. FHFA is headed by a single Director, appointed by the President with the advice and consent of the Senate. 12 U.S.C. 4512(a) and (b)(1). The Director serves a five-year term, but the President may remove him sooner for cause. 12 U.S.C. 4512(b)(2). If the office of Director is vacant, the President may designate one of FHFA's three Deputy Directors to serve as Acting Director. 12 U.S.C. 4512(f).

The Recovery Act provides that FHFA may, "at the discretion of the Director," appoint itself as "conservator or receiver" for Fannie and Freddie "for the purpose of reorganizing, rehabilitating, or winding up the affairs" of those enterprises. 12 U.S.C. 4617(a)(2). By appointing itself as conservator, FHFA obtains broad powers over the enterprises. 12 U.S.C. 4617(b). For example, it "immediately succeed[s] to * * * all rights, titles, powers, and privileges of the [enterprises] and of any stockholder, officer, or director of such [enterprises] with respect to the [enterprises] and the[ir] assets." 12 U.S.C. 4617(b)(2)(A). It may "take over the assets of and operate the [enterprises]," "conduct all business of the [enterprises]," and "transfer or sell any asset or liability of the [enterprises]." 12 U.S.C. 4617(b)(2)(B)(i) and (G). The Act further provides that the "Agency may, as conservator, 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]." 12 U.S.C. 4617(b)(2)(D). FHFA may act "in the best interests of the [enterprises] or the Agency." 12 U.S.C. 4617(b)(2)(J)(ii).

The Recovery Act separately grants the Department of the Treasury "temporary" authority to "purchase any obligations and other securities issued by" Fannie and Freddie—though only on terms that "protect the taxpayer" and "provide stability to the financial markets"—as well as the authority to "exercise any rights received in connection with such purchases." 12 U.S.C. 1455(*l*)(1)(A), (2)(A), (D), and 1719(g)(1)(A)-(B) (capitalization and emphasis omitted). That authorization "made it possible for Treasury to buy large amounts of Fannie and Freddie stock, and thereby infuse them with massive amounts of capital to ensure their continued liquidity and stability." *Perry Capital*, 864 F.3d at 600.

Finally, the Recovery Act limits judicial review of FHFA's exercise of its powers. It provides that the enterprises may sue to challenge FHFA's initial decision to appoint itself as conservator or receiver (if they do so within 30 days of the appointment), and that a court may order FHFA to "remove itself as conservator or receiver." 12 U.S.C. 4617(a)(5)(A). The Act further provides that, "[e]xcept as otherwise provided in [Section 4617] or at the request of the Director, no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver." 12 U.S.C. 4617(f).

3. On September 6, 2008, FHFA appointed itself as conservator of both Fannie and Freddie. Pet. App. 180. One day later, FHFA, in its capacity as conservator of the enterprises, entered into agreements with Treasury

under which Treasury committed to buy up to $100 billion in stock in each enterprise. *Ibid.* In return for its commitment, Treasury received various forms of compensation—including priority over other stockholders in getting its investment back if the enterprises were later liquidated, periodic fees, and dividends at a fixed rate. *Ibid.* Critically, the size of the dividends each enterprise owed was tied to the amount of money Treasury had invested in the enterprise; it did not vary with the enterprise's profits. *Ibid.*

Treasury's initial commitment to provide up to $100 billion to each enterprise soon proved to be inadequate. In May 2009, FHFA and Treasury amended the purchase agreements to increase Treasury's investment commitment to $200 billion for each enterprise. Pet. App. 181. Then, in December 2009, FHFA and Treasury amended the agreements again to make the investment commitment unlimited through the end of 2012, at which point the size of the commitment would become fixed. *Ibid.*

Between 2009 and 2011, the dividends that the enterprises owed to Treasury repeatedly exceeded their quarterly earnings by billions of dollars. Resp. C.A. ROA 952-953. The enterprises therefore had to draw more money from Treasury just to pay Treasury's dividends. *Jacobs*, 908 F.3d at 888. Under the dividend formula established by the agreements with Treasury, however, drawing more money from Treasury meant increasing the size of future dividends. *Ibid.* That vicious cycle—drawing money to pay dividends, in turn enlarging the dividends—was particularly troubling because the size of Treasury's commitment was scheduled to become fixed, and therefore finite, at the end of 2012. By early 2012, the dividends that the enterprises owed

Treasury had reached nearly $19 billion a year, exceeding their projected income and threatening their solvency. Resp. C.A. ROA 952-953.

Accordingly, in August 2012, Treasury and FHFA (led at the time by Acting Director Edward DeMarco) amended the purchase agreements a third time. The Third Amendment replaced the previous fixed dividend (tied to the size of Treasury's investment) with a variable dividend (tied to the enterprises' net worth). Pet. App. 16. Under the new formula, Treasury's dividend each quarter would equal the amount, if any, by which the enterprises' net worth exceeded a specified capital reserve. *Ibid.* "In simple terms, the Third Amendment requires Fannie and Freddie to pay quarterly to Treasury a dividend equal to their net worth—however much or little that might be. Through that new dividend formula, Fannie and Freddie would never again incur more debt just to make their quarterly dividend payments, thereby precluding any dividend-driven downward debt spiral. But neither would Fannie or Freddie be able to accrue capital [above the reserve allowed by the agreement] in good quarters." *Perry Capital*, 864 F.3d at 602. In the Third Amendment, Treasury also agreed to suspend the periodic fees that it was owed under the original agreements. See *Roberts* v. *Federal Hous. Fin. Agency*, 889 F.3d 397, 404-405 (7th Cir. 2018).

B. Proceedings Below

1. In October 2016, over four years after Treasury and FHFA agreed to the Third Amendment, three shareholders (petitioners here) challenged the Amendment in federal district court. The shareholders raised three statutory claims challenging the Third Amendment: that FHFA had exceeded its authority under

12 U.S.C. 4617(f) as conservator, that Treasury had exceeded its authority under 12 U.S.C. 1455(*l*) to buy securities, and that Treasury had acted arbitrarily and capriciously in violation of the Administrative Procedure Act (APA), 5 U.S.C. 702. The shareholders also claimed that FHFA's structure—a single head removable only for cause—violates the Constitution.

2. The district court dismissed the statutory claims, granted the government's motion for summary judgment on the constitutional claim, and denied the shareholders' cross-motion for summary judgment on the constitutional claim. See Pet. App. 283-297. The court first held that the Recovery Act's anti-injunction clause barred the statutory claims, reasoning that the "adoption of the Third Amendment falls within FHFA's statutory conservatorship powers." *Id.* at 291 (citation omitted). The court also rejected the shareholders' constitutional claims, reasoning that "a 'for cause' removal provision" complies with the Constitution even where the provision protects "a single director" rather than "a multimember board." *Id.* at 296.

3. A fractured panel of the court of appeals affirmed in part and reversed in part. Pet. App. 166-280. In a per curiam opinion, the court first affirmed the district court's dismissal of the shareholders' statutory claims. *Id.* at 185-186. The court explained that "the D.C., Sixth, and Seventh Circuits ha[d] all rejected" statutory challenges to the Third Amendment, and it adopted "the same well-reasoned basis common to those courts' opinions." *Id.* at 185. Turning to the constitutional claim, the court concluded that the Recovery Act violated the Constitution by making FHFA's single Director removable only for cause, but that the proper remedy was to

declare unconstitutional the statutory provision addressing removal, not to invalidate the Third Amendment. *Id.* at 186-240.

Judge Haynes joined the panel's opinion in full. Pet. App. 167 n.1. Chief Judge Stewart joined the panel's statutory holding, but dissented from its constitutional holding. *Id.* at 241-245. Judge Willett joined the panel's constitutional holding, but dissented from its statutory holding. *Id.* at 246-280.

4. The court of appeals, rehearing the case en banc, affirmed in part and reversed in part. Pet. App. 1-160. A majority of the en banc court reversed the dismissal of the statutory claim against FHFA, while affirming the dismissal of the statutory claims against Treasury. *Id.* at 20-58. A different majority held that FHFA's structure violated the Constitution. *Id.* at 58-71, 73 n.1. A third majority held that the appropriate remedy for the constitutional violation was to declare unconstitutional the removal provision, not to invalidate the Third Amendment. *Id.* at 73-81.

a. The court of appeals addressed the shareholders' statutory claims by a vote of 9-7, in an opinion by Judge Willett. Pet. App. 20-58. The court reversed the dismissal of the shareholders' statutory claim against FHFA, remanding the case so that the district court could determine "if fact issues require trial or if summary judgment should be granted." *Id.* at 57. At the same time, the court of appeals affirmed the district court's dismissal of the shareholders' statutory claims against Treasury. *Id.* at 36-37.

The court of appeals first rejected the government's contention that the Recovery Act's anti-injunction clause—which forbids a court from taking "any action to restrain or affect the exercise of powers or functions

of the Agency as a conservator or a receiver," 12 U.S.C. 4617(f)—forecloses the shareholders' statutory claims. See Pet. App. 20-28. The court asserted that the clause "distinguishes improperly exercising a power (not restrainable) from exercising one that was never authorized (restrainable)." *Id.* at 21. The court thus concluded that "whether the anti-injunction provision bars relief * * * depends entirely on whether the [Third Amendment] exceeded FHFA's statutory conservatorship powers." *Id.* at 28. Turning to that question, the court of appeals held that the shareholders "stated a plausible claim that the Third Amendment exceeded statutory authority." *Id.* at 51. Relying on the shareholders' allegations, the court concluded that, in adopting the Third Amendment, FHFA improperly "abandoned rehabilitation in favor of 'winding down'" the enterprises, a function that could be performed only by a receiver, not by a conservator. *Id.* at 52.

The court of appeals also rejected the government's alternative argument that the shareholders' statutory claims were independently foreclosed by the Recovery Act's succession provision—under which FHFA, as conservator, "immediately succeed[s] to * * * all rights * * * of any stockholder * * * with respect to the [enterprises] and assets of the [enterprises]," 12 U.S.C. 4617(b)(2)(A). See Pet. App. 28-37. The court acknowledged that the succession provision prohibits shareholders from bringing derivative claims on behalf of the enterprises while the enterprises remain in conservatorship. *Id.* at 29-30. The court concluded, however, that the succession clause did not preclude the shareholders from bringing direct claims against FHFA, and that the shareholders' challenge to the Third Amendment was a direct claim, not a derivative one. *Id.* at 30-35. The court emphasized that

FHFA's acts had allegedly injured the shareholders as "residual claimants of [the enterprises'] value" and that the shareholders had brought their claims under the APA. *Id.* at 33.

Finally, the court of appeals affirmed the district court's dismissal of the shareholders' claims that the Third Amendment exceeded Treasury's authority and was otherwise arbitrary and capricious. Pet. App. 32-33. The court concluded that the shareholders were outside the zone of interests protected by the statutory provisions they invoked, and that their claims under those provisions were accordingly barred. *Ibid.*

Judge Haynes, writing for seven judges, dissented from the court of appeals' reversal of the dismissal of the statutory claim against FHFA. Pet. App. 118-123. The dissenters agreed with the "five other circuits" that have rejected statutory challenges to the Third Amendment. *Id.* at 118. Given the Recovery Act's "extensive" grant of authority, the dissenters concluded that FHFA "acted within its statutory powers when it adopted" the Third Amendment. *Ibid.*

b. In an opinion by Judge Willett, writing for the same nine judges who reversed the dismissal of the statutory claim against FHFA, the court of appeals held that the shareholders were entitled to summary judgment on their claim that the structure of FHFA violated the Constitution. Pet. App. 90-117. The court first concluded that the shareholders had standing to challenge the structure of FHFA, reasoning that the shareholders had suffered an injury in fact ("pumping large profits to Treasury instead of restoring the [enterprises'] capital structure") that was "traceable to the removal protection" and that was redressable by "vacatur" of the Third Amendment. *Id.* at 59-61. The court also concluded that

the succession clause did not bar the constitutional challenge, reasoning that the clause did not speak with the clarity needed to foreclose judicial review of a constitutional claim. *Id.* at 61-62. Turning to the merits, the court held that the Act's "for-cause removal protection infringes Article II" because it "limits the President's removal power." *Id.* at 63. The court acknowledged that this Court had upheld a for-cause removal provision in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), but reasoned that the "exception" to the removal power recognized in that case "applie[s] only to multi-member bodies of experts," not to FHFA's single Director. Pet. App. 63.

Judges Southwick, Haynes, and Graves concurred in that judgment. Pet. App. 73. In a joint opinion concurring in part and dissenting in part, Judges Oldham and Ho explained that the constitutional holding accorded with the original meaning of the Constitution and with this Court's precedents. *Id.* at 85-111. Judge Higginson, writing for four judges, dissented from the constitutional holding on the merits. *Id.* at 124-138. Judge Costa, writing for two judges, dissented from the constitutional holding on the additional ground that the shareholders lacked standing to challenge the constitutionality of FHFA's structure. *Id.* at 139-151.

c. In an opinion by Judge Haynes and by a vote of 9-7, a different majority of the court of appeals held that the appropriate remedy for the constitutional violation was to sever and declare unconstitutional the provision governing the removal of FHFA's Director, not to invalidate the Third Amendment. Pet. App. 73-81. The court emphasized that "the President had adequate oversight" of the adoption of the Amendment: The Secretary of the Treasury "was subject to at will removal

by the President," meaning that the President "had plenary authority to stop the adoption of the [Third Amendment]" if he wanted to do so. *Id.* at 78. The court concluded: "This is thus a unique situation where we need not speculate about whether appropriate presidential oversight would have stopped the [Third Amendment]. We know that the President, acting through the Secretary of the Treasury, could have stopped it but did not." *Ibid.*

The court of appeals also observed that, although the shareholders sought invalidation of the Third Amendment, they did not seek invalidation of any other parts of the agreements. Pet. App. 75. That, the court continued, was "because the rest of the deal [wa]s a pretty good one for them: who would not want a virtually unlimited line of credit from the Treasury?" *Ibid.* The court concluded that the shareholders were not entitled to "pick and choose among remedies based on their preferences," unwinding the parts of the agreements that they dislike but not the parts that they prefer. *Ibid.*

Judge Duncan, writing for two judges, concurred in that remedial holding. Pet. App. 82. Judge Willett, writing for seven judges, dissented from the remedial holding. *Id.* at 152-160. In their joint opinion concurring in part and dissenting in part, Judges Oldham and Ho asserted that the court of appeals' remedial holding violated the Constitution. *Id.* at 111-117.

3. On October 25, 2019, the government filed a petition for a writ of certiorari seeking review of the court of appeals' statutory holding. See *Mnuchin* v. *Collins* (No. 19-563).

ARGUMENT

Although this Court should grant review of the government's petition for a writ of certiorari in *Mnuchin* v. *Collins*, No. 19-563 (filed Oct. 25, 2019), which seeks review of the court of appeals' statutory holding, it should deny review of the shareholders' petition for a writ of certiorari, which seeks review of the court of appeals' constitutional and remedial holdings. Unlike the statutory holding, the constitutional and remedial holdings do not meet this Court's criteria for review.

The shareholders principally contend (Pet. 16-23) that FHFA's structure—a single head removable only for cause—violates the separation of powers. But this Court has already granted review of substantially the same issue in *Seila Law* v. *CFPB*, No. 19-7 (Oct. 18, 2019). And this case would in any event be a poor vehicle for reviewing that question. Most notably, the shareholders *prevailed* on that issue in the court of appeals, and thus have no basis for seeking this Court's review of that decision. In addition, multiple threshold obstacles would prevent the Court from reaching the constitutional question in the unusual circumstances of this case.

The shareholders also argue (Pet. 23-37) that the court of appeals awarded an inadequate remedy for the constitutional violation. But the court's remedial holding was correct and does not conflict with any decision of this Court or of any other court of appeals. And the threshold obstacles that prevent the Court from reaching the constitutional question also make this case a poor vehicle for considering the remedial question. Further review of the court of appeals' constitutional and remedial holdings is not warranted.

A. The Court Of Appeals' Constitutional Holding Does Not Warrant This Court's Review

A writ of certiorari is not warranted to review the shareholders' first question presented, which asks whether FHFA's structure—a single head removable only for cause—violates the separation of powers.

1. The court of appeals erred in reaching the merits of the shareholders' constitutional claim. See pp. 15-19, *infra*. Having reached the merits, the court accepted the shareholders' argument that the Recovery Act's restriction on the President's power to remove the Director of FHFA violates the Constitution. In previous briefs in this Court, the United States has taken the position that Congress may not make the single head of the Consumer Financial Protection Bureau removable only for cause. See, *e.g.*, Gov't Br. in Resp. to Pet., *Seila Law* v. *CFPB* (No. 19-7); Gov't Br. in Opp., *State Nat'l Bank of Big Spring* v. *Mnuchin* (No. 18-307). In this case, Treasury likewise argued before the court of appeals that the Recovery Act's restriction on the removal of FHFA's single Director violates the Constitution. See Gov't C.A. Br. 20-23. FHFA, however, defended the constitutionality of the removal restriction in the court of appeals. See FHFA C.A. Letter (July 9, 2019).

2. On October 18, 2019, this Court granted review in *Seila Law*, which involves the constitutionality of the single Director of the Consumer Financial Protection Bureau. See *Seila Law*, *supra*. The shareholders accept (Pet. 22) that "both this case and *Seila Law*" raise essentially the same "important separation of powers question"—namely, the constitutionality of a statute that makes the single head of an executive agency removable only for cause. The Court's decision to hear

Seila Law makes it unnecessary to grant review of essentially the same issue in this case.

3. Even setting aside the grant of review in *Seila Law*, this case would be a poor vehicle for deciding the constitutional question. There are multiple independent obstacles to reaching that question here.

First, the shareholders *prevailed* on the constitutional question in the court of appeals, and thus have no basis for seeking review of the constitutional holding in this Court. Under Article III, the requirement of standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64 (1997). The shareholders lack standing to seek review of the court of appeals' resolution of the constitutional question in their favor, because that portion of the decision does not presently injure them in any way. Quite apart from Article III, moreover, this Court has "generally declined to consider cases at the request of a prevailing party, even when the Constitution allowed [it] to do so." *Camreta* v. *Greene*, 563 U.S. 692, 703-704 (2011). No sound basis exists for the Court to depart from that settled practice in this case.

Second, the constitutional question that the shareholders raise is not properly presented on the facts of this case, because the officer who took the action that the shareholders challenge did not enjoy statutory protection from removal in the first place. The challenged action, the adoption of the Third Amendment, was taken by Acting Director Edward DeMarco. Pet. App. 65. Unlike a Senate-confirmed Director, an Acting Director enjoys no statutory protection from removal. The court of appeals concluded otherwise, see *id.* at 65-68, but the

statute does not support that conclusion. The Recovery Act provides: "The Director shall be appointed for a term of 5 years, unless removed before the end of such term for cause by the President." 12 U.S.C. 4512(b)(2). The term "Director" can refer only to FHFA's permanent Director; the Acting Director does not serve "a term of 5 years." *Ibid.* Moreover, another clause provides that, if a vacancy arises, "the President shall designate [one of three Deputy Directors] to serve as acting Director"—but includes no limitation on the President's power of removal. 12 U.S.C. 4512(f). The presence of a restriction on removal in the provision dealing with the Director, combined with the absence of a similar restriction in the provision dealing with the Acting Director, suggests that no such restriction applies to the Acting Director. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983). The principle of constitutional avoidance also counsels against extending the Act's removal protections for Senate-confirmed Directors to Acting Directors. See *Swan* v. *Clinton*, 100 F.3d 973, 983-988 (D.C. Cir. 1996) (invoking constitutional avoidance to refuse to extend removal protections to officers remaining in office under holdover provisions after the expiration of their terms).

Third, the Recovery Act's succession clause bars the shareholders' constitutional challenge. As the court of appeals accepted, the succession clause, at a minimum, precludes shareholders from bringing derivative actions on behalf of the enterprises during a conservatorship. See Pet. App. 29; see also Pet. at 20-23, *Mnuchin* v. *Collins* (No. 19-563). The court held that the succession clause did not apply to the shareholders' constitutional challenge solely because that challenge concerned the separation of powers. Pet. App. 61-62.

The court explained that, "[i]f the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object." *Id.* at 62 (quoting *Bond* v. *United States*, 564 U.S. 211, 223 (2011)). The court also asserted that a statute should be read to "preclude judicial review of constitutional claims" only where the statute makes Congress's intention to do so "clear." *Ibid.* (citation omitted). Those rationales are mistaken. In a derivative action, the shareholder sues to redress a harm to the corporation, rather than a harm to the shareholder as an individual. It is well settled that a person has no general right to seek redress for violations of the rights—even the constitutional rights—of third parties. See, *e.g.*, *Kowalski* v. *Tesmer*, 543 U.S. 125, 134 (2004). As a result, the restrictions that otherwise apply to derivative actions continue to apply even where a shareholder raises a constitutional claim. See, *e.g.*, *Pagán* v. *Calderón*, 448 F.3d 16, 28-29 (1st Cir. 2006); *Gregory* v. *Mitchell*, 634 F.2d 199, 202 (5th Cir. 1981). The constitutional stature of the shareholders' derivative claim accordingly provides no basis for disregarding the succession clause.

Finally, FHFA agreed to the Third Amendment in its capacity as conservator, not as regulator. Many courts have distinguished between an agency's actions as conservator and its actions as regulator. See *Herron* v. *Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017); *County of Sonoma* v. *Federal Hous. Fin. Agency*, 710 F.3d 987, 993-994 (9th Cir. 2013); *United States* v. *Beszborn*, 21 F.3d 62, 68 (5th Cir.), cert. denied, 513 U.S. 934 (1994). Those courts have explained that, when an agency acts as conservator, it "stands in the shoes of the [enterprise],"

making the actions it takes "private" rather than executive. *Beszborn*, 21 F.3d at 68; see *United States ex rel. Petras* v. *Simparel, Inc.*, 857 F.3d 497, 502-503 (3d Cir. 2017); *United States ex rel. Adams* v. *Aurora Loan Servs., Inc.*, 813 F.3d 1259, 1261 (9th Cir. 2016); *Herron*, 861 F.3d at 169. On that view, FHFA's adoption of the Third Amendment—which was an exercise of "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 LLC* v. *Mnuchin*, 864 F.3d 591, 607 (D.C. Cir. 2017), cert. denied, 138 S. Ct. 978 (2018)—did not involve any exercise of the executive power of the United States. And any inability of the President to remove the head of an entity that performs non-executive tasks would not violate Article II. The court of appeals concluded otherwise because the conservator exercised powers granted by a federal statute. See Pet. App. 69. But this Court has held that the exercise of authority granted by a statute does not suffice even to make an entity's actions governmental (let alone executive). See *Flagg Bros.* v. *Brooks*, 436 U.S. 149, 164-166 (1978).

In sum, before reaching the constitutional question that the shareholders raise, this Court would have to consider whether the shareholders have appellate standing, whether to grant review at the behest of a prevailing party, whether FHFA's Acting Director enjoys statutory protection from removal in the first place, whether the succession provision bars the shareholders' constitutional claim, and whether the adoption of the Third Amendment involved an exercise of executive power. For all of those reasons, this case would be a

poor vehicle for addressing the constitutional question. Further review of that question is not warranted.

B. The Court Of Appeals' Remedial Holding Does Not Warrant This Court's Review

The shareholders also contend that the court of appeals' remedy for the asserted constitutional violation—declaring unconstitutional the Recovery Act's removal provision—was inadequate. In the shareholders' view, the court should have invalidated the Third Amendment and also should have invalidated additional provisions of the Recovery Act (although they do not specify in the petition which other provisions they have in mind). The shareholders allege no conflict among the courts of appeals on that question, and none exists. The shareholders thus request pure error correction. But the court of appeals' remedial decision was correct, and turns on the specific facts of this case. Pet. App. 78. Moreover, the same threshold obstacles to reaching the constitutional question, see pp. 15-19, *supra*, also stand in the way of reaching the remedial question. Further review of the remedial question thus is not warranted either.

1. The court of appeals properly concluded that the constitutional violation that it had found did not require it to invalidate the Third Amendment.

a. Equitable relief "does not follow from success on the merits as a matter of course." *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008). Courts must instead weigh "the balance of equities" and "the public interest" in deciding what relief to award. *Ibid.* They must consider "what is necessary, what is fair, and what is workable." *North Carolina* v. *Covington*, 137 S. Ct. 1624, 1625 (2017) (per curiam) (citation omitted). Under those traditional equitable principles, the court of appeals correctly declined to invalidate the Third Amendment.

First, as the court of appeals correctly recognized, the Recovery Act's removal provision did not have a prejudicial effect on the President's ability to control the adoption of the Third Amendment. That is so because the Third Amendment was approved and signed by the Secretary of the Treasury—whom the President has the power to remove at will. Pet. App. 78. "This is thus a unique situation where we need not speculate about whether appropriate presidential oversight would have stopped the [Third Amendment]. We know that the President, acting through the Secretary of the Treasury, could have stopped it but did not." *Ibid.* Any constitutional defect in the Recovery Act's removal provision was thus harmless error on the facts of this case. See 5 U.S.C. 706 (requiring courts to take "due account * * * of the rule of prejudicial error" in actions under the APA); *Chapman* v. *California*, 386 U.S. 18, 24 (1967) (holding that constitutional defects are amenable to harmless-error review).

Second, as the court of appeals further recognized, FHFA's agreements with Treasury consisted of more than just the dividend provisions of the Third Amendment. See Pet. App. 74-75. Under other parts of the agreements, Treasury committed to investing hundreds of billions of dollars in the enterprises in order to ensure that those enterprises remained in business. The shareholders, however, seek to invalidate the Third Amendment, but to keep the rest of the agreements with Treasury intact. *Id.* at 75. The shareholders' proposal, under which the shareholders get to "pick and choose" which parts of the agreements to invalidate, has no sound basis in traditional principles of equity. *Ibid.* It is also in significant tension, if not outright conflict, with the black-letter rule of contract law that a party that

seeks to avoid a contract "must ordinarily avoid the entire contract," and "cannot disaffirm part of the contract that is particularly disadvantageous to himself while affirming a more advantageous part." *Id.* at 75-76 (quoting Restatement (Second) of Contracts § 383 (1981)).

Third, under the equitable doctrine of laches, a litigant's "unreasonable, prejudicial delay in commencing suit" can justify withholding a remedy. *SCA Hygiene Prods. Aktiebolag* v. *First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017) (citation omitted). The shareholders waited over four years after the adoption of the Third Amendment to file this lawsuit challenging it, an unwarranted delay that has enabled the shareholders to determine how the Third Amendment's rebalancing of financial risk played out before filing suit. Having already benefited from the heightened risk Treasury took in the Third Amendment—Treasury stood to lose billions of dollars in forgone fixed dividends in the event the enterprises' finances failed to improve—the shareholders now seek to capitalize on the benefits of hindsight by disclaiming the Amendment's rebalancing of risk. In the interim, moreover, the enterprises, FHFA, and participants in the national housing finance market have conducted their affairs in reliance on the Third Amendment. Any judicial remedy that might invalidate or modify the Amendment could frustrate those reliance interests and would work a substantial inequity.

b. The shareholders' contrary arguments lack merit. The shareholders first assert (Pet. 29) that the APA, which requires courts to "hold unlawful and set aside agency action" found to be unlawful, 5 U.S.C. 706, leaves the courts with no choice but to invalidate the Third Amendment. Even assuming for the sake of argument

that the actions of a conservator qualify as agency action under the APA, that argument is incorrect. This Court has held that a "court of equity" retains its "usual discretion" over remedies "'in the absence of a clear and valid legislative command'" to the contrary. *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982) (citation omitted). For example, a few years before Congress enacted the APA, the Court held that a statute that provided that a court "'shall'" enjoin violations was not sufficiently clear to displace a court's discretion, under "equity practice with a background of several hundred years of history," to decline to grant an injunction. *The Hecht Co.* v. *Bowles*, 321 U.S. 321, 327, 329 (1944) (citation omitted). The APA contains no clear command displacing a court's equitable discretion over remedies. Quite the contrary, the APA expressly provides that "[n]othing [t]herein * * * affects * * * the power or duty of the court to * * * deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702. And this Court has held that, even in an APA case, "equitable defenses may be interposed." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 155 (1967).

The shareholders also assert that this Court has previously vacated actions taken by officers whose mechanisms for removal violated the Constitution. See Pet. 24-26 (citing *Bowsher* v. *Synar*, 478 U.S. 714 (1986)). They likewise assert that the Court has set aside actions taken by officers holding unconstitutional appointments. See Pet. 29 (citing *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055 (2018); *NLRB* v. *Noel Canning*, 134 S. Ct. 2550 (2014)). But those cases show at most that the invalidation of the official's actions may be a *permissible* remedy in an appropriate case, not that it is a *mandatory* remedy in every case. In other cases, this Court has

invoked other remedial principles, such as the *de facto* officer doctrine, to decline to set aside acts taken by those who have held office in violation of the Constitution. See, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 142 (1976) (per curiam); *Ex parte Ward*, 173 U.S. 452, 454 (1899). The Court's cases thus provide little support for the shareholders' proposed per se rule of invalidation, let alone for invalidation in these unique factual circumstances.

Finally, the shareholders contend (Pet. 30-32) that this Court's jurisprudence on the retroactivity of judicial decisions entitles them to the remedy they seek. But the retroactivity cases establish only that a court must interpret the Constitution the same way looking backward that it does going forward. Those cases do not foreclose a court's equitable discretion to grant or deny particular remedies. As the Court has explained: "Retroactive application does not * * * determine what 'appropriate remedy' (if any) the defendant should obtain. * * * Remedy is a separate, analytically distinct issue. 'The Court has never equated its retroactivity principles with remedial principles.'" *Davis* v. *United States*, 564 U.S. 229, 243 (2011) (brackets and citations omitted); see *Reynoldsville Casket Co.* v. *Hyde*, 514 U.S. 749, 754-755 (1995).

2. The shareholders separately contend (Pet. 34-37) that the court of appeals erred by severing the removal provision from the rest of the Recovery Act and holding only that provision unconstitutional. That argument is incorrect.

As an initial matter, the scope of the shareholders' argument regarding severability is not clear. Below, the shareholders conceded that the en banc court "could reasonably follow the panel's approach to this issue and sever only the Director's for-cause removal protection,"

allowing the rest of the statute to stand. Pet. C.A. Supp. Br. 37. The shareholders nonetheless urged the en banc court to invalidate two other provisions of the Recovery Act—one addressing FHFA's funding, 12 U.S.C. 4516(f)(2), and the other empowering FHFA to act in its own best interests when serving as conservator, 12 U.S.C. 4617(b)(2)(J)(ii). See Pet. C.A. Supp. Br. 38-40. In their petition, the shareholders contend that the en banc court's analysis of severability was incorrect, but they neither meaningfully renew their argument that the court should also have invalidated Sections 4516(f)(2) and 4617(b)(2)(J)(ii), nor specify which additional provisions they believe should be invalidated. To the extent that the shareholders seek the invalidation of Sections 4516(f)(2) and 4617(b)(2)(J)(ii), they have not adequately raised that argument in their petition; to the extent they seek the invalidation of any additional provisions, they have neither adequately raised that argument in their petition nor preserved it below.

In any event, the court of appeals correctly applied this Court's precedents on severability. "[W]hen confronting a constitutional flaw in a statute, [courts] try to limit the solution to the problem." *Ayotte* v. *Planned Parenthood of N. New England*, 546 U.S. 320, 328-329 (2006). A court thus "must sustain [a statute's] remaining provisions 'unless it is evident that the Legislature would not have enacted those provisions . . . independently of that which is invalid.'" *Free Enterprise Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010) (brackets and citation omitted). In this case, as in *Free Enterprise Fund*, "[t]he remaining provisions [of the Recovery Act] are not 'incapable of functioning independently.'" *Ibid.* (citation omitted). And nothing in the Recovery Act's text or context "makes it

'evident' that Congress * * * would have preferred no [FHFA] at all to [an FHFA] whose [Director is] removable at will." *Ibid.* (citation omitted). Congress created FHFA during the 2008 financial crisis after finding that "more effective Federal regulation [was] needed to reduce the risk of failure of [the enterprises]." 12 U.S.C. 4501(2). And it authorized FHFA to act as the enterprises' conservator to help rehabilitate their financial condition. 12 U.S.C. 4617. Nothing in the Act suggests that Congress would have preferred to leave the enterprises without any dedicated regulator or conservator at all—the very problem it sought to address—simply because FHFA's Director cannot have protection from removal by the President.

Petitioners invoke (Pet. 36) Justice Thomas's concurrence in *Murphy* v. *NCAA*, 138 S. Ct. 1461 (2018), but that opinion undermines rather than supports their argument. In that concurrence, Justice Thomas explained that "when early American courts determined that a statute was unconstitutional, they would simply decline to enforce it in the case before them." *Id.* at 1486. Under that approach, the remedy for the constitutional violation asserted by the shareholders would be, at most, a refusal to enforce the Recovery Act's restriction on removal—the very remedy the court of appeals ordered. The remedy would not be an order setting aside other provisions of the Act, much less an order invalidating the Third Amendment.

3. In all events, the same threshold obstacles to this Court's review of the court of appeals' constitutional holding also stand in the way of the Court's review of the remedial holding. First, the constitutional defect in the removal provision did not affect the Third Amendment, because that Amendment was adopted by FHFA's

Acting Director, to whom the removal provision does not apply. See pp. 15-16, *supra*. Second, because the Recovery Act's succession clause forecloses the shareholders' constitutional challenge, it also means that the Court has no occasion to address the proper scope of relief on that challenge. See pp. 16-17, *supra*. Finally, the constitutional defect in the removal provision could not justify invalidating the Third Amendment to the extent adoption of the Amendment did not involve an exercise of executive power. See pp. 17-18, *supra*.

At a minimum, further percolation of the remedial question is warranted. The court below is the only court of appeals that has addressed that question. No other court of appeals has held that the Act's removal restriction violates the Constitution, let alone addressed the proper remedy for that asserted violation. And another case raising the constitutional and remedial issues is now pending before the Eighth Circuit. See *Bhatti* v. *Federal Hous. Fin. Agency*, No. 18-2506 (argued Oct. 15, 2019). Review at this time would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL*
Acting Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
MARK B. STERN
ABBY C. WRIGHT
GERARD SINZDAK
Attorneys

OCTOBER 2019

* The Solicitor General is recused in this case.