Nos. 19-422, 19-563

In the Supreme Court of the United States

PATRICK J. COLLINS, ET AL.,
Petitioners,
v.
STEVEN T. MNUCHIN, SECRETARY OF THE TREASURY, ET AL.,
Respondents.

STEVEN T. MNUCHIN, SECRETARY OF THE TREASURY, ET AL.,
Petitioners,
v.
PATRICK J. COLLINS, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* THOMAS P. VARTANIAN IN SUPPORT OF PETITIONERS IN NO. 19-422 AND RESPONDENTS IN NO. 19-563

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INTERESTS OF THE *AMICUS*[1]

Amicus Thomas P. Vartanian has deep and broad experience in executing and challenging the authorities of federal receivers and conservators of insured depository institutions under the statutes on which the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 ("HERA") is based. That experience began when he served as a staff attorney at the Office of the Comptroller of the Currency from 1976 to 1981, where he worked on some of the largest bank failures of that era. Later, as General Counsel of the Federal Home Loan Bank Board from 1981 to 1983, he oversaw the preservation, conservatorship, receivership, and liquidation of more than four hundred troubled savings and loan associations during that decade's savings and loan crisis, as well as the many litigations related to the closing of those institutions.[2]

After he left government service and reentered private practice, *Amicus* spent thirty-seven years as counsel to troubled insured depository institutions, entities that acquired or sought to acquire such

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[1] Under Supreme Court Rule 37.6, *Amicus* affirms that no counsel for a party authored this *amicus curiae* brief in whole or in part. No party to this case has made a monetary contribution to the preparation or submission of this brief, which has been funded by Abrams Capital Management, L.P. The parties have filed blanket consents to the submission of *amicus curiae* briefs.

[2] *See* Hearing Before the H. Comm. on Banking, Fin. and Urban Affairs, 101st Cong. 8 (1990) (statement by Richard T. Pratt, Chairman, Federal Home Loan Bank).

institutions, and clients filing receivership claims. During the 2008 financial crisis, he worked on the acquisition of many failed banks from the FDIC and in its aftermath, he advised the senior bondholders of Washington Mutual Bank, the largest bank failure in United States history. As was publicly reported in 2017, *Amicus* also was on the list of finalists for the position of the first Vice Chairman for Supervision of the Board of Governors of the Federal Reserve System.[3]

Currently, *Amicus* is the Executive Director of the Program on Financial Regulation & Technology at George Mason University's Antonin Scalia Law School, where he is also a Professor of Law.[4] Previously, he taught classes in bank regulation at Georgetown University Law Center, The George Washington University Law School, and Boston University School of Law, and guest lectured on the subject at Harvard Law School. Over the course of his distinguished career, *Amicus* has authored or co-authored more than 400 articles and four books on bank regulatory issues.[5] Publications such as *The*

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[3] Davidson, Kate and Timiraos, Nick, "Thomas Vartanian in Running to be Fed Vice Chair for Supervision," *The Wall Street Journal*, Mar. 13, 2017, https://on.wsj.com/2Eltfvn.

[4] *Amicus* submits this brief in his individual capacity and not on behalf of George Mason University or Scalia Law School.

[5] *See*, *e.g.*, Vartanian, Thomas P, *et al., The Volcker Rule: Commentary and Analysis* (Thomson Reuters 2014); Thomas P. Vartanian, *et al.*, *Contracting with the RTC and FDIC* (Prentice Hall Law and Business 1991).

Wall Street Journal, The Hill, *Bloomberg News*, *The American Banker* and others frequently call upon *Amicus* for his expertise on such subjects.[6] His latest book, *200 Years of American Financial Panics*, will be published in early-2021.

To *Amicus*' knowledge, very few private sector lawyers have comparable experience with the legal regime that is the source of the law now governing the Federal Housing Finance Agency's ("FHFA") conservatorships of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation (together, the "Companies").[7] His abiding interest in the proper interpretation of federal laws regulating financial institutions springs naturally from his life's work.

SUMMARY OF ARGUMENT

It speaks volumes that, notwithstanding the passage of almost nine decades since the creation of the Federal Deposit Insurance Corporation ("FDIC") and the Federal Savings and Loan Insurance Corporation ("FSLIC") and more than 4,000 conservatorships and receiverships of federally insured banks and savings and loan institutions under

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[6] *See*, *e.g.*, Vartanian, Thomas P., "Why Would Anyone Sane Be a Bank Director?" *The Wall Street Journal*, Op-Ed (Aug. 28, 2017), https://on.wsj.com/3cg7ERG.

[7] *Amicus* continues to practice law as a partner at Vartanian & Ledig PLLC, co-counsel on this *amicus curiae* brief, where his clients include certain shareholders of the Companies.

the authority of the statutes on which HERA was modeled, Defendants cannot identify a single instance where a conservator claimed the authority to extinguish shareholders' rights, as FHFA has done here.[8] Notwithstanding his decades of experience with troubled financial institutions during his government service and in the private sector, *Amicus* is not aware of any such precedent and cannot identify any valid legal basis for Defendants' assertion that conservators possess such power.

In all relevant respects, HERA's conservatorship and receivership provisions are identical to the parallel provisions of its predecessor statutes, the Federal Deposit Insurance Act (the "FDIA"), the National Housing Act of 1934, the Financial Institutions Supervisory Act of 1966 ("FISA") and the Financial Institutions Recovery Reform and Enforcement Act of 1989 ("FIRREA") that governed thousands of conservatorships and receiverships of troubled financial institutions. In the words of the Fifth Circuit, "[i]f FIRREA is HERA's parent, FISA is a grandparent." *Collins v. Mnuchin*, 938 F.3d 553, 570 (5th Cir. 2019) (en banc). All of those statutory provisions, as administered by the FDIC, FSLIC, and the Resolution Trust Corporation ("RTC") through various banking and savings and

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8 *See* FDIC, BankFind Suite: Bank Failures & Assistance Data (identifying 4,102 bank failures and assistance transactions of FDIC-insured institutions from 1934 to September 20, 2020), https://bit.ly/2ZUjRqc.

loan crises, draw a bright line between (i) a conservatorship, which preserves and conserves the assets of an existing business for its shareholders and (ii) a receivership, which terminates that business's existence and leaves shareholders with a residual financial interest in a liquidation.

As a result of this entrenched statutory framework, until the actions taken in this case, federal financial regulators hewed to a common understanding that the goal of conservator of a troubled financial institution was to rehabilitate the company and return it to the control of its board of directors and shareholders in a relatively short period of time. Since 1934, *Amicus* knows of no situation where that goal was not paramount. Only if the conservator failed to meet that goal would the institution be handed off to a receiver for liquidation.

FHFA's actions here not only fail to further the goals of preservation and rehabilitation and the concomitant obligation to return the Companies to ***all*** of their shareholders; they are engineered to make them impossible. Under the pretense of operating with the authority, powers, and protections available to legitimate conservatorship operations, in 2012 FHFA entered into the Third Amendment of the Senior Preferred Stock Purchase Agreements between the Companies and the Department of the Treasury. This amendment stripped all shareholders (except the Treasury Department) of their economic interests in the Companies by creating a variable dividend (payable only to the Treasury Department) that would perpetually sweep all of the Companies' net worth except for a capital reserve (the "Net Worth Sweep").

The Net Worth Sweep is utterly at odds with the statutory parameters of the conservatorship authority that Congress conferred on FHFA for two fundamental reasons.

First, as Congress recognized, a conservator is supposed to "preserve and conserve [the] assets and property" of the Companies. 12 U.S.C. § 4617(b)(2)(D). But a Net Worth Sweep effects a permanent and fundamental rearrangement of the Companies' capital structure, depriving their shareholders of the very ownership interests that a conservator is supposed to "preserve and conserve."

Second, the unprecedented Net Worth Sweep thwarts the possibility of restoring the Companies to "a sound and solvent condition" that could result in returning them to their shareholders, the hallmark of a conservatorship. *See* 12 U.S.C. § 4617(b)(2)(D). Rather than restoring the Companies to financial health, the Net Worth Sweep systematically drains the Companies of the capital resources critical to that restoration.

HERA's predecessor statutes do not authorize conservators to effect such a sweeping deprivation of shareholder rights while a financial institution continues its normal operations in a conservatorship.

Neither does HERA. As under FIRREA, FDIA, and FISA, Congress authorized FHFA to extinguish shareholder rights only by placing the Companies into receivership because receiverships—unlike conservatorships—provide shareholders with the legal protections of an administrative claims process and *de novo* judicial review.

Over thirty years ago, in *Coit Independence Joint Venture v. Federal Savings and Loan Insurance Corp.*, 489 U.S. 561 (1989), this Court held that regulators exercising statutory authority over a troubled financial institution have a fundamental duty to protect the due process rights of the institution's stakeholders. There, the creditor of a savings and loan institution in receivership was not required to exhaust an administrative claims process that did not provide a "reasonable time limit on FSLIC's consideration of claims," relegating the creditor "to a 'black hole' from which it may not emerge before the statute of limitations on [its] state law claims has run." *Coit*, 489 U.S. at 586–87.

Here, by purporting to transfer the Companies' entire ongoing earning power to the Treasury Department through a Net Worth Sweep executed in its role of conservator, FHFA has ignored the command of *Coit* and relegated the Companies' shareholders to a "black hole" like the one condemned by this Court in that case. By terminating any financial participation by the non-government shareholders in the economics of the Companies and then seeking to block any avenue of challenge to those actions, FHFA has sought to evade the statutory obligations of a conservator and deny the preferred shareholders (other than the Treasury Department) due process. With indifference to the law and its well-established distinction between conservators and receivers, FHFA has created an end-run around private property rights and the Companies' capital structure.

The Fifth Circuit properly held that the Companies' shareholders have stated a plausible claim that FHFA exceeded its statutory authority as conservator when it entered into the Net Worth Sweep. Defendants cannot seek refuge under the anti-injunction provision of HERA from essential judicial review of their action in executing the Third Amendment.

ARGUMENT

I. The Unprecedented Net Worth Sweep Exceeds the Statutory Powers of a Conservator to Rehabilitate Troubled Financial Institutions.

Congress established federal deposit insurance during the Great Depression to rebuild confidence in the banking system, and it chartered the FDIC and the FSLIC to insure deposits and to act as federal receivers or conservators for failed banks and savings institutions.[9] In 1989, the RTC was granted powers and authorities much like those of the FDIC and FSLIC.[10].

Eighty-seven years of FDIC, FSLIC, and RTC history demonstrate that conservators are caretakers who are not meant to operate an institution indefinitely. A conservatorship is supposed to be a "temporary measure" leading either to rehabilitation or to a receivership and ultimately payment of creditors and shareholders. *See* Michael Krimminger & Mark A. Calabria, *The Conservatorships of Fannie Mae and Freddie Mac: Actions Violate HERA and Established Insolvency Principles*, (CATO Institute, Working Paper No. 26) at 36 (Feb. 9, 2015) ("Krimminger & Calabria"), https://bit.ly/3bO8bdg. Nor do federal conservators or receivers act for the benefit of a single preferred shareholder (the government) to the detriment of all of the institution's other shareholders. Such "unprecedented deviations from settled insolvency practices and creditor protections undercut one of the critical foundations of a market economy, and could call into question the

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9 The FDIC was established by the Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162. It currently operates under the FDIA, which was enacted in 1950. Pub. L. No. 81-797, 64 Stat. 873. FSLIC was established by the National Housing Act of 1934, Pub. L. No. 73-479, 48 Stat. 847.

10 With the enactment of FIRREA in 1989, the FSLIC was effectively merged with the FDIC and the RTC was established as a temporary receiver or conservator of failed thrifts in the savings and loan crisis.

reliability of the government as a resolution authority." *Id.* at 7. In accordance with these principles, this Court has underscored that federal receivers assume the fiduciary duties that directors and officers owe shareholders. *O'Melveny & Meyers v. FDIC*, 512 U.S. 79, 85–88 (1994). The due process rights belonging to the shareholders of institutions in conservatorship must be at least as strong as the due process rights of claimants in a receivership.

Consistent with the prior history and practice of conservatorships, before entering into the Net Worth Sweep and before this litigation, FHFA itself acknowledged that the goal of a conservatorship is rehabilitation. "[A] conservator's goal is to continue the operations of a regulated entity, rehabilitate it and return it to a safe, sound and solvent condition." Conservatorship and Receivership, Final Rule, FHFA, 76 Fed. Reg. 35,724, 35,730 (June 20, 2011). So too did FHFA's previous directors. In 2008, then-FHFA Director James Lockhart III agreed that conservatorship "is a statutory process designed to stabilize a troubled institution with the objective of maintaining normal business operations and restoring its safety and soundness." *Turmoil in U.S. Credit Markets: Recent Actions Regarding Government-Sponsored Entities, Investment Banks, and Other Financial Institutions: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 110th Cong. 15 (2008) (prepared statement). In 2011, then-FHFA Director Edward DeMarco stated that when appointed, a conservator "stands in the place of each company's shareholders, boards, and management, with the responsibility to 'preserve and conserve the assets and property' of the companies" and to "take such action as may be . . . appropriate to carry on the business of the regulated entity." *Oversight of the Federal Housing Finance Agency*: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs, 112th Cong. 3 (2011).

FHFA also understood that depleting the Companies' assets in the manner it later endorsed in the Net Worth Sweep would be incompatible with the statutory objective of rehabilitation:

> [A]llowing capital distributions to deplete the entity's conservatorship assets *would be inconsistent with the [conservator's] statutory goals*, as they would result in the removing of capital at a time when the Conservator is charged with rehabilitating the regulated entity.

Conservatorship and Receivership, Final Rule, FHFA, 76 Fed. Reg. at 35,727 (emphasis added). On its face, the Net Worth Sweep is incompatible with the rehabilitation of the Companies and the conservation and preservation of their assets. Indeed, it does just the opposite. To the extent the Net Worth Sweep is designed to keep the Companies' net worth and regulatory capital levels at *de minimis* levels, it is not a viable way to restore the Companies to financial stability, is not a path to ending the conservatorships, and frustrates the goal of returning the Companies to their shareholders.

The historical record and the common understanding of the role of a conservator are important guideposts here because well-tested FDIC and FSLIC laws, rules, and precedents were purposefully imported into HERA by Congress to apply to the Companies. Nothing about HERA suggests that Congress meant to deviate from the regimes governing the stabilization of other financial institutions. In crafting the relevant provisions of HERA, the drafters "quite literally 'marked-up' Sections 11 and 13 of the [FDIA]." *See* Mark Calabria, *The Resolution Of Systemically Important Financial Institutions: Lessons From Fannie And Freddie* (CATO Institute, Working Paper No. 25) (Jan. 13, 2015). Importantly, "[it] was also intended that the existing body of law, including court decisions, surrounding the FDIC's exercise of its conservatorship and receivership powers be incorporated into that governing the" Companies. *Id.* And even without the first-person account of HERA's origins from Mr. Calabria—who is now FHFA's Director—Congress is presumed to know about prior statutory construction of related provisions when it drafted HERA. *Lorillard v. Pons,* 434 U.S. 575, 581 (1978).

The most powerful proof that FHFA cannot claim novel conservatorship superpowers for itself is in the words of HERA. The conservatorship powers that Congress bestowed upon FHFA do not merely draw upon those of the FDIC; they are identical to them. *See* 12 U.S.C § 4617(b)(2)(D):

> (D) POWERS AS CONSERVATOR.—
> The Agency may, as conservator, take such action as may be—
>
> (i) necessary to put the regulated entity in a sound and solvent condition; and
>
> (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.

Compare with 12 U.S.C. § 1821(d)(2)(D):

> **(D) Powers as conservator** The Corporation may, as conservator, take such action as may be—
>
> (i) necessary to put the insured depository institution in a sound and solvent condition; and
>
> (ii) appropriate to carry on the business of the institution and preserve and conserve the assets and property of the institution.

These provisions set out the same powers and the same limitations for FHFA and FDIC conservatorships. There is no textual hook to contend that FHFA's conservatorship authority is somehow different in kind from the conservatorship authority of the FDIC. Nor is there a meaningful contextual distinction between the operations of banks (subject to FDIC conservatorship), and the Companies (subject to FHFA conservatorship) that would authorize expansion of FHFA's conservatorship authority. All are companies with shareholders, creditors, counterparties, and prudential regulators, and all operate with and through federal and state government charters. The Companies are also subject to state corporation laws (Delaware for Fannie Mae and Virginia for Freddie Mac), as are many banks and savings associations. The securities of both Companies still trade publicly. If Congress had thought there was something unique about the Companies that would allow FHFA to deviate from the established principles governing federal conservatorships and receiverships, it had ample opportunity to provide FHFA with greater authority in HERA. It did not.

Defendants' argument that under HERA, FHFA succeeds to "all the powers" of the Companies' shareholders, directors and officers, Br. of Federal Parties at 34, cannot mean that those powers may be used to achieve ends beyond FHFA's statutory authority. In its role as conservator, the FDIC similarly succeeds to "all the powers" of a bank's members, shareholders, officers and directors. *See* 12 U.S.C. § 1821(d)(2)(B). The FDIC has never purported to use those "powers" to achieve goals beyond a conservator's statutory authority of restoring banks' soundness and solvency and preserving and conserving their assets and property. *See* Krimminger

& Calabria at 50 (concluding that the Net Worth Sweep "violates the past FDIC practice" of conservatorships).

II. Enforcement of the Anti-Injunction Provision to Insulate the Net Worth Sweep from Judicial Review Would Violate Due Process.

The shareholders of a bank or savings association do not as a matter of law forfeit their property rights when a conservator is appointed. Even though the rights to operate a company, vote its shares, and otherwise manage its affairs are temporarily assumed by a conservator while the reason for the appointment is resolved, the underlying ownership rights of the shareholders remain extant. *See* 12 U.S.C. § 1821(d)(2)(i), § 4617(b)(2)(i). When a conservator steps into the shoes of the Companies' board of directors, management, and shareholders, it assumes the duties and obligations that boards, officers, and shareholders owe each other. *See* Steven Davidoff Solomon & David T. Zaring, *After the Deal: Fannie, Freddie and the Financial Crisis Aftermath*, 95 B.U. L. Rev. 371, 390–94 (2015); *see O'Melveny & Meyers*, 512 U.S. at 85–88.

Accordingly, in a FHFA conservatorship, shareholders' property and common law rights continue. Before concocting the Net Worth Sweep, FHFA acknowledged as much to Congress: "The shareholders are still in place; both the preferred and common shareholders have an economic interest in the companies." *Oversight Hearing To Examine Recent Treasury and FHFA Actions Regarding the Housing GSEs: Hearing Before the H. Comm. on Fin. Services*, 110th Cong. 29–30 (2008) (Statement of James B. Lockhart III, Director, FHFA). It is only upon "the appointment of the Agency as receiver" that "all rights and claims that the stockholders and creditors of the regulated entity may have" are terminated. 12 U.S.C. § 4617(b)(2)(k)(i). At that time, shareholders and other stakeholders can assert claims against the receivership, in a specified order of claims priority, in lieu of their former suite of rights. *Id.* § 4617(b)–(c). The termination of those rights by a government entity without an opportunity to assert claims related to such termination would violate the shareholders' rights under the Due Process clause of the Fifth Amendment.

Due Process concerns were the centerpiece of *Coit*, where this Court stated that certain causes of action "involve 'private rights' which are at the 'core' of 'matters normally reserved to Article III courts.'" 489 U.S. at 578–79. In response, Congress expressly revised the administrative receivership claims process and its related *de novo* judicial review to provide further protections for claimants. *See* Comm. on Banking, Fin. and Urban Affairs, Financial Institutions Reform, Recovery, and Enforcement Act of 1989, H.R. Doc. No. 101-54 part 1, at 419 (1st Sess. 1989). Since then, the Courts of Appeal have repeatedly recognized that the administrative claim and judicial review process are essential requirements for the protection of the Constitutional due process rights of receivership claimants. *See*, *e.g.*, *Freeman v. FDIC*, 56 F.3d 1394, 1399 (D.C. Cir. 1995) ("[S]erious due process concerns would be implicated if parties aggrieved by the FDIC's actions as receiver were left entirely without remedies.") (citing *National Trust for Hist. Preserv. v. FDIC*, 21 F.3d 469, 472 (D.C. Cir. 1994) (Wald, J. concurring)); *Elmco Properties, Inc. v. Second Nat'l Fed. Sav. Ass'n*, 94 F.3d 914, 920 (2d Cir. 1996) (RTC's denial of a claim as untimely where the claimant had not been given constitutionally sufficient notice of the deadline "violates due process"); *Placida Prof. Ctr., LLC v. FDIC*, 512 Fed. Appx. 938, 949 (11th Cir. 2013) (stating that precluding judicial review of the FDIC's denial of a receivership claim "does not comport with due process").

In conservatorships, by contrast, Congress provided no claims process or an opportunity for administrative redress with *de novo* judicial review for very rational reasons. There should be no need for such a process in a properly executed conservatorship because the stakeholders continue to hold their valid corporate interests in the institution. By effectively extinguishing the economic rights of the Companies' shareholders in the context of a conservatorship, rather than a receivership, those shareholders do not have access to an administrative claims process and the related *de novo* judicial review.

Compounding the due process problem here, eight years have elapsed since FHFA imposed the Net

Worth Sweep, four years after the conservatorships began, even though conservatorships are supposed to be resolved quickly, usually within a matter of months. As a consequence, if the Companies' shareholders cannot challenge FHFA's statutory authority to implement the Net Worth Sweep in court, they will have been deprived of their property rights without ***any*** process. When, as here, a conservator acts in violation of its statutory limitations and deprives shareholders of their existing property rights, the government cannot use the anti-injunction provisions of the law to deny the shareholders their constitutional due process rights.

Such a result would be inconsistent with this Court's acknowledgment in *Coit* that receivership claimants cannot be deprived of their property rights through relegation to a "black hole" of procedural limbo.[11] FHFA's exploitation of the Companies' conservatorships effectively nationalizes them without due process, an authority that Congress has not bestowed upon any agency. It is inconceivable that

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[11] In *Coit* the Court held that FSLIC's administrative process was inadequate in part because it "may enable FSLIC to coerce claimants to enter into unfair settlements by virtue of the fact that the receiver's assets may be depleted by interim distributions to other claimants by the time a claimant finally has access to the courts," a concern that was "only exacerbated by the fact that FSLIC itself is often the main creditor against the assets of a failed savings and loan association. . . ." *Coit*, 489 U.S. at 587. Here too, there is a conflict of interest because the Defendants are favoring the interests of the Treasury Department when they deprive all of the Companies' other shareholders of their ownership rights.

Congress intended that claimants in a receivership—which comes into being only after the corporate life of a company has been extinguished—should have more rights to due process than the shareholders of institutions in conservatorship, who remain the Companies' rightful owners under their existing capital structure.

CONCLUSION

For the foregoing reasons, this Court should affirm the Fifth Circuit's rulings that the shareholders have plausibly alleged that the Net Worth Sweep is not within FHFA's authority as a conservator and that the statutory claim of the Companies' shareholders is therefore not barred by HERA's anti-injunction provision.

Respectfully submitted,

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