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.

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

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

## REPLY BRIEF OF PATRICK J. COLLINS, ET AL.


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## ARGUMENT

No one would bring a separation of powers lawsuit if the only remedy were a judicial declaration years after the fact that the Constitution was violated. That might not be troubling if the separation of powers were nothing more than a matter of inter-branch etiquette, but the Constitution's structural features are its principal means for safeguarding liberty and keeping the government accountable to the People. In the face of these points, Defendants offer only a tepid apology for the Fifth Circuit's remedial ruling. Indeed, they cite no case in which any court outside the Net Worth Sweep litigation has ever held a separation of powers violation to be harmless error. Even assuming that the harmless error rule applies in separation of powers cases, Defendants make no attempt to demonstrate that the constellation of political and policy considerations that led to the Net Worth Sweep would have been the same had FHFA been headed by someone who agreed with the President about housing finance issues over the preceding four years.

Rather than a robust defense of the Fifth Circuit's reasoning, Defendants raise a kitchen sink of other issues that the lower court resolved in Plaintiffs' favor. No party petitioned for certiorari on those issues, and they were correctly decided by lopsided majorities of the en banc Fifth Circuit. In the end, Defendants' desperate search for something—anything—to justify withholding a meaningful remedy fails. FHFA is unconstitutionally structured, and its decision to impose the Net Worth Sweep must be set aside.

## I. FHFA'S STRUCTURE VIOLATES THE SEPARATION OF POWERS

Plaintiffs agree with much of what Defendants say in response to the Court-Appointed Amicus about the constitutionality of FHFA's structure. Without retreading ground covered by this Court in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), Plaintiffs offer two observations about Amicus's argument.

First, a premise of Amicus's position is that cases like this one should be decided on a "sliding scale," Amicus Br. 40, with the extent of the officer's powers and the scope of the President's removal authority providing the grounds for ad hoc, case-by-case decisions about whether a particular removal restriction is constitutional. That approach would give Congress almost no guidance in a context in which it is essential to establish "high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995).

Second, much of Amicus's argument turns on the claim that FHFA exercises little if any "coercive power." Amicus Br. 30. FHFA seized two of the Nation's largest private financial institutions and later nationalized them. Short of throwing someone in prison, it is difficult to imagine anything more coercive than that.

## II. NEITHER THE HARMLESS ERROR RULE NOR LACHES JUSTIFIES DENYING PLAINTIFFS A MEANINGFUL REMEDY

### A. Separation of Powers Claims Are Not Subject to the Harmless Error Rule, and the Constitutional Violation in this Case Was Not Harmless.

Defendants tacitly acknowledge that this Court has *never* found that a violation of the separation of powers was harmless error. Indeed, the Court has routinely awarded meaningful remedies when the argument for harmless error was *stronger* than it is here. *See, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018). Article II's Vesting Clause and the Take Care Clause guarantee, among other things, the President's accountability for exercises of Executive Power. A violation of those structural provisions is a structural error categorically excluded from the harmless error rule.

But even if the Court disagrees, in a separation of powers case harmless error should not be found if there is "any uncertainty at all" about the consequences of the constitutional violation. *See* Plfs.' Br. 71 (quoting *Sugar Cane Growers Co-op v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002)). Defendants do not argue otherwise, and they offer no answer to Plaintiffs' discussion of the various political and policy dynamics that could have prompted the Obama Administration to make a different decision had the "independent" FHFA not opposed the President's housing finance policies. Plfs.' Br. 73. In failing to respond, Defendants all but concede that the Fifth Circuit was

wrong to treat the constitutional violation in this case as harmless.[1]

**B. Laches Does Not Defeat Plaintiffs' Claims.**

Our previous brief demonstrated that it is *mathematically impossible* for Treasury to receive less from the Companies on a net basis because of the Net Worth Sweep. Plfs.' Br. 52–53. Without directly responding, Defendants persist in claiming that Treasury took on new "risks" with the Net Worth Sweep that justify denying Plaintiffs relief under the equitable doctrine of laches. SG Reply 46–47. Being allowed to collect billions of dollars in unlawful dividends over the last eight years has worked to Treasury's "benefit, not [its] detriment," and that defeats Defendants' laches argument. *Costello v. United States*, 365 U.S. 265, 282–83 (1961). Defendants also assert that a "host of entities" have acted in reliance on the Net Worth Sweep, SG Reply 47, but they cite no evidence and never explain how any third party detrimentally relied on an action that benefitted no one but Treasury.

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[1] Professor Harrison's amicus brief focuses on the largely semantic question whether remedies for violations of the President's removal power should be awarded as a matter of *constitutional* or *administrative* law. Irrespective of which label is used, Plaintiffs are entitled to a meaningful remedy. "Presidents, Congresses, and officials in independent agencies work under the real-world understanding that the heads of the 'independent' agencies possess some degree of congressionally conferred substantive autonomy from the President." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 702 (D.C. Cir. 2008) (Kavanaugh, J., dissenting). That understanding has real-world consequences, including in this case.

Regardless, Plaintiffs sued within the statute of limitations, and courts cannot use laches "to jettison Congress' judgment on the timeliness of suit." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960, 961 n.4 (2017). To be sure, fifty years ago the Court suggested in dicta that laches might be an available defense in APA cases. *Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967). But that case was decided a decade before a consensus emerged that APA claims are subject to the six-year statute of limitations that appears in 28 U.S.C. § 2401(a). *See Walters v. Sec'y of Def.*, 725 F.2d 107, 111–12 (D.C. Cir. 1983). The only remedies available under the APA are equitable. Despite Defendants' argument to the contrary, the equitable nature of the relief Plaintiffs seek does not provide a basis for discarding the statute of limitations Congress adopted. "Laches is a gap-filling doctrine, and where there is a statute of limitations, there is no gap to fill." *SCA Hygiene Prods. Aktiebolag*, 137 S. Ct. at 961.

## III. DEFENDANTS' REMAINING ARGUMENTS ARE NOT PROPERLY BEFORE THE COURT AND FAIL IN ANY EVENT

Defendants present several additional arguments that they now cast as alternative grounds for affirming the Fifth Circuit's judgment, which included a declaratory judgment in Plaintiffs' favor on the merits of the constitutional claim. But Defendants described those same arguments in their brief in opposition as reasons why "the court of appeals erred in reaching the merits of the shareholders' constitutional claim." SG BIO 14. "If the *rationale* of an argument would

give the satisfied party more than the judgment below, even though the party is not asking for more, the Court has held that a cross-petition or cross-appeal must be filed." R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 490–91 (9th ed. 2007); *see Nw. Airlines, Inc. v. Cnty. of Kent*, 510 U.S. 355, 364 (1994). Defendants failed to cross-petition on these issues, and at the certiorari stage Defendants pointed to them as reasons why the Fifth Circuit erred in ordering the entry of a declaratory judgment in Plaintiffs' favor. They are not properly before the Court.

Nor can Defendants escape the concession in their brief in opposition by arguing that the additional issues they raise are fairly included within Plaintiffs' first question presented. Plaintiffs asked the Court to decide "[w]hether FHFA's structure violates the separation of powers"—not whether the Succession Clause applies to constitutional claims, when the President may remove FHFA's acting Director, or whether FHFA is the government. The Court often rules on the merits of one element of a claim without considering others. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 487 (2010) (assuming without deciding that SEC Commissioners enjoy for-cause removal protection). That is what Plaintiffs asked the Court to do, and the Court should limit itself to the questions on which it granted certiorari. *See Izumi Seimitsu v. United States Philips Corp.*, 510 U.S. 27, 33–34 (1993) (per curiam).

### A. The Succession Clause Does Not Bar Plaintiffs' Constitutional Claim.

1. The Succession Clause poses no obstacle to Plaintiffs' constitutional claim for many of the same reasons Plaintiffs' statutory claim can go forward.

*First*, Plaintiffs' separation of powers claim is cognizable under the APA, which instructs courts to set aside agency action that is "contrary to constitutional right." 5 U.S.C. § 706(2)(B). The APA replaces the ordinary standard for distinguishing direct from derivative claims with the generous zone-of-interests test. *See* Plfs.' Br. 16–24. Plaintiffs fall within the zone of interests protected by the constitutional provisions they invoke. *See Bond v. United States*, 564 U.S. 211, 222 (2011) (an individual who has suffered "injury that is concrete, particular, and redressable" "has a *direct* interest in objecting to laws that upset the constitutional balance" (emphasis added)). No more is required for Plaintiffs to press their constitutional claim under the APA.

The year before the APA was enacted, this Court interpreted a statute with language that closely tracks 5 U.S.C. § 702 to displace "the usual criteria of standing to sue" in cases brought by shareholders. *American Power & Light Co. v. SEC*, 325 U.S. 385, 390 (1945). Defendants argue that *American Power* applied the traditional standard for distinguishing direct from derivative claims, but they offer no plausible explanation for how the claims in that case could have been direct if Plaintiffs' claims are derivative.

Defendants counter *American Power* by pointing to this Court's pre-APA precedents interpreting the

Commerce Court Act. SG Reply 10. But that statute only made review available to "an aggrieved *party*" to a "final judgment or decree" of the Commerce Court or the Interstate Commerce Commission. Ch. 309, § 2, 36 Stat. 542 (emphasis added). That language does not parallel the APA, and this Court read it narrowly to only authorize judicial review at the request of someone directly regulated by the administrative order in question. *See Alexander Sprunt & Son v. United States*, 281 U.S. 249, 255 (1930).

*Second*, Plaintiffs' constitutional claim is direct under the test courts customarily use to distinguish direct from derivative claims. *See* Plfs.' Br. 24–30. None of the cases Defendants cite involved a transaction that *increased* the value of some of a corporation's existing shares by *reducing* the value of others. As Judge Bork explained, claims are typically derivative "when an injury to corporate stock *falls equally upon all shareholders*." *Cowin v. Bresler*, 741 F.2d 410, 414 (D.C. Cir. 1984) (internal quotation marks omitted). In contrast, disadvantaged shareholders may sue directly "if a corporation rearranges the relationship of different classes of security holders to the detriment of one class." *Swanson v. Traer*, 354 U.S. 91, 99 (1957) (Frankfurter, J., dissenting). Treasury benefited from the Net Worth Sweep *as a stockholder*—not as a seller of assets, *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248 (Del. 2016), or as an ordinary "thief," *Kennedy v. Venrock Associates*, 348 F.3d 584, 591 (7th Cir. 2003). The fact that the Net Worth Sweep *also* harmed the Companies does not diminish the unique injury

Plaintiffs sustained when they were removed from the Companies' capital structures.[2]

*Third*, FHFA cannot "succeed" to the right to sue FHFA for violating the Constitution, 12 U.S.C. § 4617(b)(2)(A)—a right it is powerless to exercise. *See* Plfs.' Br. 30–31. Despite having previously told the Court that the Succession Clause "vests in FHFA itself the shareholders' right to sue for injuries to the enterprises," SG Opening Br. 18, Defendants now say that the Succession Clause merely allows FHFA "to determine whether it may be sued *by or on behalf of the enterprises*," SG Reply 12. Defendants do not even attempt to ground this new interpretation in the text of the Succession Clause, and the fact that the statute elsewhere contemplates judicial review "at the request of the Director" only reinforces the conclusion that the Succession Clause is not an additional limitation on judicial review. 12 U.S.C. § 4617(f).

*Fourth*, the Succession Clause violates procedural due process to the extent that it makes FHFA the Companies' exclusive representative in a lawsuit against FHFA. Plfs.' Br. 37–38. Defendants compare the Succession Clause to a statute that repeals a cause of action. SG Reply 14. But even when Congress can deprive a litigant of its claim altogether, that does not

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[2] Courts have long recognized that one set of facts can give rise to both direct and derivative claims. *See, e.g.*, *Borak v. J.I. Case Co.*, 317 F.2d 838, 844–45 (7th Cir. 1963), *aff'd*, 377 U.S. 426 (1964). Defendants are wrong to imply that this principle is limited to cases that fall within the so-called "dual nature" doctrine for shareholder dilution claims—a controversial doctrine that the Delaware Supreme Court announced in *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006).

mean it can require that the claim be heard in a manner that offends due process. *See, e.g.*, *Vitek v. Jones*, 445 U.S. 480, 488 (1980); *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

2. This Court has long avoided "the serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988) (opinion of Rehnquist, C.J.) (internal quotation marks omitted); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986); *Johnson v. Robison*, 415 U.S. 361, 366–67 (1974). Defendants ask the Court to bulldoze those precedents and resolve in their favor an issue that has perplexed generations of federal courts students. The Court should decline to do so. The Succession Clause does not come close to supplying the clear statement foreclosing judicial review of constitutional claims that this Court has always required and never found.

Defendants do not argue that the Succession Clause satisfies *Webster*'s clear statement rule but instead contend that the rule is inapplicable because the Companies could have objected to FHFA's structure as part of a challenge to conservatorship under 12 U.S.C. § 4617(a)(5). SG Reply 30. But neither Plaintiffs nor the Companies could have invoked that provision, which permitted judicial review during a 30-day window in 2008, to challenge an action FHFA took in 2012.

Defendants also argue that no clear statement is required to foreclose judicial review when a plaintiff asserts the constitutional rights of a third party. But

Plaintiffs are suing to vindicate *their own* constitutional rights. *See Bond*, 564 U.S. at 222. In any event, the only authority Defendants cite to support their argument is *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004), which did not involve a statute that arguably foreclosed judicial review of a third party's constitutional claims and does not even cite *Webster*. Moreover, *Kowalski* said that a suit can go forward when there is a "close relationship" between the plaintiff and a third party facing "a 'hindrance' to [its] ability to protect [its] own interests"—as Fannie and Freddie certainly do here while under FHFA's control. *Id.* The contours of the third-party standing doctrine only reinforce the conclusion that Plaintiffs' claims should be heard.

**B. Defendants' Argument that the President Can Remove the Acting Director For Any Reason is Both Irrelevant and Wrong.**

1. Defendants and Amicus defend the Net Worth Sweep on the theory that it was approved by an acting Director who did not enjoy for-cause removal protection. This argument fails at the outset because HERA includes a provision that prevents the President from taking control of FHFA even after removing its Director. When the agency's top post is vacant, the statute provides that "the President *shall* designate" one of the outgoing Director's three handpicked deputies to serve as acting Director. 12 U.S.C. § 4512(f) (emphasis added); *see id.* § 4512(c)–(e). It follows that President Obama could not have influenced FHFA's policy direction by removing acting Director DeMarco; regardless of the removal standard, the President would have

been required to select a new acting agency head from a list of people chosen by the man he had just fired.

The consequences of HERA's limitation on who serves as acting Director are more than hypothetical. When asked about the prospect of firing Mr. DeMarco, the ranking member of the House Financial Services Committee answered that FHFA's Deputy Directors "support DeMarco's strategies" and "would likely continue the same" policies. M. Lillis, *Rep. Frank Joins Calls for Top Fannie, Freddie Regulator to be Replaced*, THE HILL (Mar. 11, 2012), https://bit.ly/3naejAS. Thus, even if Defendants were correct that the President could have removed Mr. DeMarco for any reason, it would make no difference. With Mr. DeMarco and his deputies in charge, FHFA was not "subject to the ongoing supervision and control of the elected President." *Seila Law*, 140 S. Ct. at 2203.

Defendants say nothing about this issue even though the Fifth Circuit resolved it in Plaintiffs' favor. *See* Pet. App. 196a n.199; Pet. App. 56a. Amicus argues that the President can also select an acting Director under the Federal Vacancies Reform Act (FVRA), but the mandatory language in Section 4512(f) displaces the President's authority under the FVRA. *See English v. Trump*, 279 F. Supp. 3d 307, 322 (D.D.C. 2018). Moreover, by the time the Net Worth Sweep was imposed, whatever authority the President has under the FVRA had lapsed because more than 210 days had passed since the Senate rejected President Obama's first nominee to head the agency. *See* 5 U.S.C. § 3346(b)(1); 156 CONG. REC. S11071 (Dec. 22, 2010).

Defendants' argument about the removal standard for the acting Director also fails for another threshold reason: it assumes an unduly narrow view of the actions FHFA has taken to sustain the Net Worth Sweep. For most of the last seven years, Senate-confirmed Directors who indisputably have statutory for-cause removal protection have ordered and approved the payment of Net Worth Sweep dividends and have directed the agency's lawyers to defend the Net Worth Sweep in court. Irrespective of whether acting Director DeMarco was subject to presidential oversight, Plaintiffs are entitled to a meaningful remedy for those serial separation of powers violations. *Cf. Seila Law*, 140 S. Ct. at 2220–21 (Thomas, J., dissenting in part).

2. Despite Defendants' strained arguments to the contrary, HERA is most naturally read not to allow the President to remove FHFA's acting Director except for cause.

HERA says that FHFA is an "independent agency of the Federal Government," 12 U.S.C. § 4511(a), and nothing in the statute's text suggests that FHFA loses its independence during the tenure of an acting Director. Defendants argue that Congress used the word "independent" "as a synonym for 'freestanding,'" SG Reply 34, but that is not a plausible interpretation of a statute that was enacted against the backdrop of decades of debate over "the so-called independent agencies, whose heads the President may not remove at will." E. Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246, 2247 (2001). In the context of a statute that creates a federal agency, "independent" means "[n]ot subject to the control or influence of" the

President. *Independent*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 695 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) ("[W]hat makes an agency 'independent' is the for-cause removal restriction that limits the President's ability to remove the heads of the agency.").

Just last Term, the Court rejected a statutory interpretation that would have allowed the President to fire the head of the "independent" CFPB over policy differences, explaining that the agency would not be "'independent' if its head were required to implement the President's policies upon pain of removal." *Seila Law*, 140 S. Ct. at 2207 (quoting 12 U.S.C. § 5491(a)). The Court should decline Defendants' invitation to read into the statute an exception to FHFA's independence that appears nowhere in the text.

A close reading of HERA's acting Director provision—12 U.S.C. § 4512(f)—confirms this interpretation. That provision says that if the Director resigns, "the President shall designate [one of FHFA's three Deputy Directors] to serve as acting Director until the return of the Director, or the appointment of a successor pursuant to subsection (b)." The text makes clear that an acting Director differs from a Senate-confirmed Director in three respects: (1) manner of appointment, *see id.* § 4512(b)(1); (2) qualifications, *see id.* § 4512(b)(1); and (3) length of tenure, *see id.* § 4512(b)(2). With the text having enumerated three ways in which the acting Director differs from a Senate-confirmed Director, there is no basis for reading into the statute a fourth, implicit distinction. If anything, the text suggests that the acting Director has

*greater* protection from removal than a Senate-confirmed Director, for the statute provides that the acting Director serves "until the return of the Director, or the appointment of a successor" without specifying that the President can remove the acting Director under any circumstances. *Id.* § 4512(f).

This interpretation is buttressed by the fact that neither Section 4512(f) nor anything else in HERA specifies the powers of the acting Director. Instead, the statute presumes that the acting Director succeeds to all the powers of the office except as otherwise provided. Defendants deride the notion that Section 4512(f) "incorporates the removal provision applicable to the Director," SG Reply 32, but Section 4512(f) indisputably *does* incorporate dozens of other provisions of HERA that prescribe the powers of the "Director." Otherwise the acting Director would have no powers at all.

Defendants' interpretation would also lead to the bizarre result that FHFA would at times be fully insulated from the President and at others subject to his plenary control, with no corresponding check from Congress through the normal appropriations process. *See* 12 U.S.C. § 4516. Allowing the President to give policy directives to FHFA during the tenure of an acting Director "would subvert the very structure and premises of the agency" and cannot be what Congress intended. *See* Kagan, *supra*, at 2327. Defendants attempt to explain away this anomaly by arguing that Congress might have been less concerned about the independence of an acting official who the Senate did not confirm. SG Reply 36. But Section 4512(f) requires the President to select the acting Director from a list

of individuals chosen by the outgoing Director—someone the Senate *did* confirm. That dispels the notion that Congress left open a loophole through which the President could maintain control over housing finance policy in perpetuity by declining to nominate a permanent head for the agency.

Defendants appeal to "[t]he longstanding practice of the executive branch," SG Reply 34, but they ignore the executive branch's most relevant precedent: FHFA itself. As we observed in our previous brief, the Obama Administration concluded that the President could not fire Mr. DeMarco despite vehement differences with him over housing finance policy. Plfs.' Br. 72. As for the examples Defendants discuss, most involved holdover members of multi-member commissions, and denying for-cause removal protection to one such individual does not strip the entire agency of its independence. The same is true for *Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996), which concerned the President's authority to remove a member of the National Credit Union Administration (NCUA) after his statutory term expired. Even after removal of one holdover member, the "independent" NCUA is still headed by two individuals whom the President cannot fire except for cause. *See* 12 U.S.C. § 1752a(a), (b).

*Swan* is also distinguishable for another reason. In that case, the D.C. Circuit strained to avoid the constitutional problem that would be presented if the President's ability to remove an agency head depended upon the Senate's willingness to confirm one of the President's nominees. 100 F.3d at 987. Unlike the NCUA, FHFA presents that problem no matter how its statute is interpreted. As already explained,

until the Senate confirms a permanent FHFA Director, the President is required to fill the position with one of the removed Director's deputies. Regardless of whether the President can remove FHFA's acting Director over a policy disagreement, he cannot change the agency's direction without cooperation from the Senate.

Finally, Defendants urge the Court to apply a "clear statement rule" under which only express statutory language could confer for-cause removal protection. SG Reply 33–34, 36. Defendants' rule would give the President a free hand to remove the heads of many important agencies that have traditionally been thought to be independent—including the SEC, FCC, FDIC, and FEC. Unlike those agencies, FHFA is by statute "independent," 12 U.S.C. § 4511(a), and that is enough to confer for-cause removal protection on the acting Director under any clear statement requirement that the Court could reasonably adopt.

In any event, Defendants' clear statement rule is contrary to *Wiener v. United States*, 357 U.S. 349 (1958). That case held that members of the War Claims Commission enjoyed for-cause removal protection without any clear statement to that effect in the statute. Defendants attempt to cabin *Wiener* to cases involving agency officials with adjudicatory power, but the Court's reasoning was not so limited. "The most reliable factor for drawing an inference regarding the President's power of removal . . . is the nature of the function that Congress vested in" the officer in question. *Id.* at 353. With Congress having vested in the acting Director the very same responsibility for

running an independent agency that is otherwise assigned to the Director, the best inference is that Congress intended for the acting Director to enjoy the Director's removal protection.

This Court in *Shurtleff v. United States*, 189 U.S. 311, 316 (1903), "recognized and applied the strong presumption against the creation of a life tenure in a public office," *De Castro v. Bd. of Comm'rs of San Juan*, 322 U.S. 451, 462 (1944). That presumption is inapplicable because Plaintiffs do not contend that the acting Director has lifetime tenure but only that he is protected from removal "until the return of the Director, or the appointment of a successor pursuant to subsection (b)." 12 U.S.C. § 4512(f).

### C. FHFA Was Not Acting in a Private Capacity When It Nationalized Fannie and Freddie.

1. At least for constitutional purposes, FHFA is either the federal government or a private entity—it cannot be both. That is the teaching of *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 378 (1995), in which this Court deemed it "unnecessary to traverse" the "difficult terrain" of the state action doctrine because Amtrak "is not a private entity but Government itself." *See also Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 51–55 (2015). In *Lebron*, the Court did not consider whether the particular actions by Amtrak that the plaintiffs challenged had "the essential features of sovereignty." SG Reply 38. Instead, *Lebron* reasoned that because the federal government created and permanently controls

Amtrak, that entity is the government under the Constitution. 513 U.S. at 400. Like Amtrak, FHFA *is* the federal government and therefore must *always* comply with the separation of powers—irrespective of whether it acts as regulator, conservator, or in some other capacity.

Defendants and amicus do not deny that FHFA—the *Federal* Housing Finance *Agency*—is the government. Instead, they insist that FHFA is exempt from the Constitution so long as it exercises statutory powers that Congress has labeled as belonging to the agency as "conservator." SG Reply 38; Amicus Br. 22. Adopting such a schizophrenic approach to FHFA's governmental status would be unworkable given the extensive overlap between FHFA's regulatory and conservatorship powers. *See* Amicus Br. 22 n.5. Such an approach would also be contrary to *Lebron* and many other important precedents. Cases in which an indisputably governmental entity hires contractors, fires employees, or manages property have never been thought to present questions under the state action doctrine. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Pickering v. Bd. of Ed. of Township High School Dist. 205*, 391 U.S. 563 (1968); *Adderley v. Florida*, 385 U.S. 39 (1966). Yet it is doubtful that a governmental entity could be sued for violating the Constitution in any of those contexts if Amicus were correct that the proper analysis focuses on "*what* is being done rather than on *who* is doing it." Amicus Br. 22.

To be sure, the Court in *Buckley v. Valeo*, 424 U.S. 1, 137 (1976), assessed the FEC's authorities on a function-by-function basis to decide whether that

agency's powers are *executive* or *legislative* for purposes of the Appointments Clause. But that passage of *Buckley* is inconsistent with the Court's more recent separation of powers decisions; in *Seila Law*, the Court did not consider the CFPB's authority to issue CIDs in isolation but examined the full panoply of the agency's powers. *Seila Law*, 140 S. Ct. at 2203–04; *see also Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 882 (1991). In any event, whatever the proper framework for distinguishing between legislative and executive power, *Lebron*'s reasoning refutes the notion that an entity can sometimes be the government and other times not, depending on what it is doing.

But even if the Court ignores FHFA's vast regulatory authority and focuses only on its activities "as conservator," this entity is the federal government. As conservator, FHFA exercises powers conferred by a federal statute, claims authority to prioritize federal interests, and serves at the pleasure of a federal officer—FHFA's Director. Irrespective of statutory labels, that makes the conservator the government. *See Ass'n of Am. Railroads*, 575 U.S. at 51; *Lebron*, 513 U.S. at 392. The Court did not suggest otherwise when it observed, as a matter of statutory interpretation, that as receiver the FDIC "steps into the shoes" of a failed bank when it sues former management on the bank's behalf. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86 (1994). The issue in *O'Melveny* was whether the statutory regime Congress enacted left room for the creation of federal common law; the Court did not have before it any question that called for deciding whether a federal receiver is the government under the Constitution. And although the D.C. Circuit has

ruled that *Fannie and Freddie* are not the government during conservatorship because FHFA only controls them temporarily, *Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017), it does not follow that the same is true for the conservator itself, which is subject to the FHFA Director's *permanent* control.

Defendants are correct that historical practice is critical in separation of powers cases, but they cite nothing to support their assertion that the first federal receivers for distressed financial institutions were "private persons" who operated "outside the strictures of Article II." SG Reply 38; *see* Act of June 3, 1864, ch. 106, § 50, 13 Stat. 114–15. To the contrary, receivers under the National Bank Act were subject to the direction of the Comptroller of the Currency, *see Nat'l Bank of the Metropolis v. Kennedy*, 84 U.S. 19, 22 (1872); *Kennedy v. Gibson*, 75 U.S. 498, 504–05 (1869), and they were "agent[s] and officer[s] of the United States," *Ex parte Chetwood*, 165 U.S. 443, 458 (1897); *Price v. Abbott*, 17 F. 506, 507–08 (C.C.D. Mass. 1883) (Gray, Cir. Justice); *see FDIC v. Meyer*, 510 U.S. 471, 475, 484 (1994) (treating receiver as federal agency for purposes of sovereign immunity and *Bivens* claim). The conservator in this case is a federal agency that purports to wield vast statutory powers that would have been unimaginable to any historical conservator or receiver. *See* Vartanian Amicus Br. 5. It follows *a fortiori* from this Court's treatment of past receivers that FHFA is the government when it acts as conservator.

Defendants also note that Fannie and Freddie were thought not to be governmental entities *after* they were placed under shareholder control. SG Reply

38. But *before* privatization, Fannie was an on-budget federal agency. *See* R. Van Order, *A Microeconomic Analysis of Fannie Mae and Freddie Mac*, 23 REGULATION 27, 28 (2000); *Builders Corp. v. United States*, 259 F.2d 766, 768 (9th Cir. 1958). Ginnie Mae, which engages in essentially the same business as Fannie and Freddie but under the government's permanent control, remains that way today. *See* DEP'T OF HOUSING AND URBAN DEV., FISCAL YEAR 2021 CONGRESSIONAL JUSTIFICATIONS, at 29-1 to 29-4, https://bit.ly/3pvzQX0. These examples rebut the notion that the Constitution's restraints on government action are inapplicable when an entity under the government's permanent control engages in "the kinds of tasks a private financial manager might undertake." SG Reply 38.

The First and Second Banks of the United States are likewise no help to Defendants. Unlike FHFA, federal officers never controlled either bank. *See Lebron*, 513 U.S. at 398–99 (distinguishing First Bank from Amtrak on this basis); *see generally* A. Bamzai, *Tenure of Office and the Treasury*, 87 GEO. WASH. L. REV. 1299, 1340–45 (2019). Moreover, the fact that the Second Bank made monetary policy without oversight from federal officials was one of the grounds on which President Jackson vetoed a bill that would have renewed its charter. *See* Veto Message from President Jackson Regarding the Bank of the United States (July 10, 1832), *available at* https://bit.ly/2IdgXGU. This historically contested example provides no basis for treating FHFA as anything other than the government.

2. Irrespective of whether FHFA's actions as conservator are attributable to the government as a general matter, the Court of Appeals was correct to hold the government responsible for the Net Worth Sweep given federal officials' "pervasive entwinement" with the conservator when it imposed the Net Worth Sweep. *See Brentwood Acad. v. Tenn. Secondary School Athletic Ass'n*, 531 U.S. 288, 298 (2001). Rather than attempting to silo FHFA's pursuit of its conservatorship and regulatory functions, the same policymakers simultaneously represent the agency in both capacities. The Net Worth Sweep was the product of this blending of roles, as FHFA signed an agreement on behalf of the Companies that pursued the "governmental" objective of winding down the Companies. *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 608 (D.C. Cir. 2017).

Notably, Plaintiffs sued FHFA's Director—*i.e.*, the agency as regulator. The Net Worth Sweep could not have gone forward without FHFA's regulatory blessing. And by regulation, every Net Worth Sweep dividend payment must be approved by FHFA *as regulator*. 12 C.F.R. § 1237.12(a), (b). Yet FHFA admitted below that it does not make "discrete approvals of contractually-required dividend payments to Treasury in FHFA's distinctive capacity as regulator" but instead approves those payments only once—simultaneously acting as *both* conservator *and* regulator. FHFA En Banc Br. 30 fn.6 (5th Cir. Jan. 14, 2019). Even if FHFA were a private entity when it acts as "conservator," that would not defeat Plaintiffs' constitutional claim against the agency as regulator.

Finally, common sense dictates that the Net Worth Sweep is attributable to the government. Unless the word "conservator" is a talisman that Congress can use to ward off the Constitution, the government is responsible when an entity that it created and controls works with another federal agency to nationalize two companies and wipe out their private shareholders. *See Brentwood Acad.*, 531 U.S. at 306–11 (Thomas, J., dissenting).

## CONCLUSION

The Court should affirm the Fifth Circuit's ruling on the merits of Plaintiffs' constitutional claim and reverse its denial of a meaningful remedy for FHFA's violation of the separation of powers.

Respectfully submitted,

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