No. 25-1144

IN THE

Supreme Court of the United States

DAISEY TRUST, BY AND THROUGH ITS TRUSTEE, EDDIE HADDAD; CAPE JASMINE CT. TRUST, BY AND THROUGH ITS TRUSTEE, EDDIE HADDAD; AND SATICOY BAY LLC, SERIES 10007 LIBERTY VIEW,

Petitioners,

v.

FEDERAL HOUSING FINANCE AGENCY; WILLIAM J. PULTE, IN HIS OFFICIAL CAPACITY AS THE DIRECTOR OF THE FEDERAL HOUSING FINANCE AGENCY,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

JORDAN T. SMITH
Counsel of Record
BRIANNA SMITH
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106
jtsmith@bhfs.com

Counsel for Petitioners

121125

COUNSEL PRESS
A Proceed Service
The Appellate Experts®
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT

Petitioners have no parent companies, and no publicly held company owns 10% or more of their stock.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

INTRODUCTION

The Federal Housing Finance Agency ("FHFA") contends that the Appropriations Clause allows executive agencies to unilaterally raise and spend limitless amounts while declaring that its self-generated funds "shall not be construed to be . . . appropriated money." But the Appropriations Clause's text, history, and *CFPB*[1] do not tolerate this dangerous principle—a principle that would endanger the liberty and property rights of all Americans.

The Appropriations Clause states that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law." The word "Appropriation" embodies the concept of a cap, sum certain, or other ascertainable limit on how much an agency may spend from an identified source for a particular purpose. *CFPB*'s emphasis on a cap reflects this meaning of the Appropriations Clause. Section 4516 flunks the constitutional standard. At minimum, *CFPB* leaves open whether a numerical limit is required.

Even if the Appropriations Clause does not mandate a quantitative limit, the nondelegation doctrine separately requires other judicially enforceable constraints on an agency's spending spree, especially when an agency controls vast sectors of the economy like the FHFA does. Yet FHFA identifies no limits on how much it can spend or what it can spend on. In this specific statutory context, the terms "sufficient" and "reasonable" provide no check or qualitative substitute for the missing numerical lid.

---

1. *CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416 (2024).

There are no vehicle problems inhibiting this Court's review and this case is exceptionally important. "[T]here can be no question that the FHFA's control over Fannie Mae and Freddie Mac can deeply impact the lives of millions of Americans by affecting their ability to buy and keep their homes."[2]

This Court should grant the petition.

ARGUMENT

A. Text

On text, FHFA repeats the same error as the Ninth Circuit. FHFA offers no examination of the original public meaning of "Appropriation" and, instead, it depends on snippets from *CFPB.* Resp. 4; Pet.App.10a-13a. But textual analysis must start with the text. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021) ("[W]e start with the text of the Constitution.").

Founding Era dictionaries and early legal treatises show that the commonly understood meaning of "appropriation" connotes a cap, sum certain, or other ascertainable limit on government expenditures. Pet. 17-19; *see also* 1 Judicial and Statutory Definitions of Words and Phrases 471 (St. Paul West Pub. Co. 1904) (collecting cases and defining "appropriation" as "the setting apart from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, *and no more*, for that object, and for no other.") (emphasis added).

2. *Collins v. Yellen*, 594 U.S. 220, 255 (2021).

Ignoring the text, FHFA points to supposedly unrebutted statements from the *CFPB* dissent and contends that "this Court rejected [Petitioners'] theory in *CFSA*, where it explained that 'an identified source and purpose are all that is required for a valid appropriation.'" Resp. 4.

Setting aside that a dissent is not always the best guide to reading a majority opinion,[3] *CFPB* mirrors the constitutional text in the context of a case where a cap was present. *CFPB* emphasized the cap's significance at least thirteen times. The Court's repeated references to the cap were not dicta or irrelevant asides. The Court characterized a cap as one of the "the requisite features of a congressional appropriation." *CFPB*, 601 U.S. at 435.

The Court explained that CFPB's funding structure complied with the Appropriations Clause because "Congress determined the amount of the Bureau's annual funding *by imposing a statutory cap.*" *Id.* at 436 (emphasis added). The Court reasoned that, unlike FHFA, "[t]he only sense in which the Bureau decides its own funding, then, *is by exercising its discretion to draw less than the statutory cap.*" *Id.* (emphasis added).

When framing one of its conclusions, this Court said, "we cannot conclude that Congress violated the Appropriations Clause by permitting the Bureau to decide how much funding to draw *up to a cap.*" *Id.* (emphasis added).

3. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023).

In the end, *CFPB* reviewed and approved a funding mechanism with a cap. *See CFPB*, 601 U.S. at 421 ("we must decide the narrow question whether *this* funding mechanism complies with the Appropriations Clause. We hold that it does.") (emphasis added). Far from rejecting Petitioners' view, this Court has never expressly approved a funding mechanism without some congressionally established limit.

So, while a source and purpose are necessary for a constitutional appropriation, they are not the only elements. *See id.* at 427 ("Taken as a whole, this evidence suggests that, *at a minimum*, appropriations were understood as a legislative means of authorizing expenditure from a source of public funds for designated purposes.") (emphasis added). The text shows that a cap, sum certain, or other ascertainable limit is an essential feature of an appropriation too.

B. History

FHFA's historical survey describes just *one* early Postmaster General statute. Resp. 5. FHFA ignores all other Founding Era examples showing that acceptable appropriations either contained a sum certain or allowed discretion up to a cap. Pet. 19-22. The Appropriations Clause's origins reveal that "[s]ome appropriations required expenditure of a particular amount, while others allowed the recipient of the appropriated money to spend up to a cap." *CFPB*, 601 U.S. at 431.

Even so, FHFA misreads the lone postage statute. Congress set how much the Postmaster could charge and required him to turn over to the Treasury "the balance in his hands." 1. Stat. 234-35; *see also id.* at 239 ("all surplus revenue of the general post-office, which shall have accrued, previous to the first day of June next, not heretofore appropriated, be and the same is hereby appropriated towards defraying any deficiency which may arise in the revenue of the said department for the year next ensuing.").

By contrast, FHFA's Director unilaterally sets the amount of the assessments on the regulated entities and unilaterally decides how much to keep in a "working capital fund." 12 U.S.C. §§ 4516(a), (e). The Director can always demand more. *Id.* § 4516(c)(3). The sky is the limit for the assessments and the working capital funds is bottomless.

FHFA provides no answer to the many early state courts that interpreted their analogous constitutional appropriations provisions as demanding their legislatures to set apart a certain sum of money from the public revenue for a particular purpose. Pet. 22-24; *see also Peabody v. Russel*, 134 N.E. 150, 152 (Ill. 1922) ("The constitutional provision requires a definite amount for a definite object and purpose."). "From a careful consideration of the authorities on the subject and of the terms of our Constitution . . . an appropriation, in the sense that that word is used in our Constitution, is the setting apart from the public revenue of a definite sum of money for the specified object[.]" *State ex rel. McDonald v. Holmes*, 123 N.W. 884, 886-87 (N.D. 1909).

Early courts did not consider indefinite or limitless funds as the kind of "appropriation" that the Constitution contemplated. *See The Appropriations Power:*

Constitutionality of Indefinite Appropriations, 38 Harv. L. Rev. 250, 251 (1924).

C. 12 U.S.C. § 4516(f)(2)

1. FHFA tries to dodge defending Congress's decree that "[t]he amounts received by the Director from any assessment under this section shall not be construed to be Government or public funds or appropriated money." Resp. 9 (quoting 12 U.S.C. § 4516(f)(2)). But Petitioners repeatedly preserved and advanced Section 4516(f)(2)'s constitutionally problematic nature as one of two *arguments* under the umbrella of the Appropriations Clause *issue*. Pet. 28; *see also PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

Petitioners' complaint sought a declaration that Section 12 U.S.C. § 4516(f)(2) was unconstitutional and unlawful. 3-ER-476, 481. Petitioners opposed FHFA's motion to dismiss, arguing that Congress cannot simply declare that "[t]he amounts received by [FHFA] from any assessment under this section shall not be construed to be Government or public funds or appropriated money." 2-ER-218; 2-ER-244 (quoting 12 U.S.C. § 4516(f)(2) and arguing "such congressional disclaimers of any exercise of authority under the Appropriations Clause are extraordinarily unusual."). The FHFA joined battle on the argument, contending that another agency's "shall not construe" "funding mechanism is of a kind with" FHFA's. 2-ER-191. FHFA also made the same argument below that it makes in this Court that the statute is "relevant to matters with[in] Congress's control, but it carries no significance to the constitutional analysis at hand[.]" 3-ER-616.

On appeal, Petitioners again asserted Congress cannot simply wash its hands and decree that "the amounts received by the Director from any assessment under this section shall not be construed to be Government or public funds or appropriated money." 9th Cir. Dkt. 10.1 at 15. Citing Section 4516(f)(2), Petitioners also contended that "[w]orse, Congress declared that FHFA's unilateral funding is outside the Appropriations Clause all together." 9th Cir. Dkt. 22.1 at 21. Petitioners raised the point at the beginning of oral argument. And they raised it once more in Petitioners' motion to stay mandate. 9th Cir. Dkt. 39.1 at 10-11. This Court routinely reviews purely legal issues like this one even when the Court of Appeals did not address it. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

FHFA feigns ignorance simply because the petition formats the argument in a separate question presented to highlight its importance. *See* S. Ct. R. 14.1(a). But Section 4516(f)(2)'s constitutionality is a "subsidiary question" that is "fairly included" in Petitioners' first question presented and even "fairly included" in FHFA's framing of its own question presented about "[w]hether the FHFA's funding structure"—which includes Section 4516(f)(2)—"violates the Appropriations Clause[.]" Resp. i.; *see also* S. Ct. R. 14.1(a).

2. That's likely why FHFA responds on the merits in any event. Resp. 5; *see also PGA Tour, Inc.*, 532 U.S. at 678 ("the argument was fully briefed on the merits by both parties. Given the importance of the issue, we exercise our discretion to consider it.").

FHFA argues that "labels used by Congress are controlling for statutory purposes but not for constitutional purposes." Resp. 5. However, Petitioners are not arguing that Congress can alter constitutional reality by label. The debate is whether courts can construe a statute as an appropriation when it disclaims being one. In other words, has Congress *actually* enacted a valid appropriation or is FHFA raising and spending money in violation of the Appropriations Clause?

Congress passed a statute that expressly disclaims being an appropriation. For statutory purposes, this statutory classification *is* controlling. FHFA acknowledges that "Congress's declaration that FHFA funds 'shall not be construed to be Government or public funds or appropriated money' affects how those funds are classified for statutory purposes[.]" Resp. 5 (internal quotation omitted).

FHFA is trying to have it both ways. On one hand, FHFA posits that Section 4516 supplies a valid appropriation. On the other, FHFA insists that a statutory component means nothing. FHFA's position renders Section 4516(f)(2) both essential and irrelevant. Essential because it is in FHFA's "appropriation." But irrelevant because courts supposedly may disregard Congress's instruction that the assessments "shall not be construed" as appropriated money so the statute can be treated as an appropriation.

FHFA's defense thus succeeds only by attributing to Congress an appropriation that Congress simultaneously instructed courts not to construe as an appropriation. But Congress did not enact an appropriation that it expressly said should not be construed as one. Congress said the money was not appropriated, and courts cannot save the statute by pretending Congress didn't say that.

To salvage FHFA's funding structure, the Court would not be looking through a constitutional label, it would be ignoring unambiguous statutory text and deleting an entire provision from the same statute that—according to FHFA—supplies its appropriation. "It is, however, a cardinal principle of statutory construction that [the Court] must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (cleaned up).

D. Nondelegation Doctrine

FHFA recognizes that the nondelegation doctrine requires Congress to provide "intelligible principles" as constraints on what an agency may do. Resp. 6. And FHFA concedes that, in the absence of a numeric limit, there must be qualitative standards limiting how much an agency may raise and spend. *Id.* at 7. But FHFA does not explain how the open-ended phrase "sufficient to provide for reasonable costs (including administrative costs) and expenses of the Agency, *including* –" is restrictive or qualitative enough to satisfy the nondelegation doctrine. 12 U.S.C. § 4516(a) (emphasis added).

Instead, as with the Ninth Circuit, FHFA retreats to this Court's approval of other broad delegations in different statutory contexts. *Id.* at 6-7; Pet.App.14a-15a. But "a nondelegation inquiry always begins (and often almost ends) with statutory interpretation." *Gundy v. U.S.*, 588 U.S. 128, 135 (2019). FHFA conducts no statutory interpretation and gives no roadmap to find an intelligible principle in Section 4516. There is none. Pet. 32-34. And the delegation here is unlike other delegations this Court has condoned. *See id*. at 34-35.

FHFA's silence is even more troubling given that "[t]he 'guidance' needed is greater . . . when an agency action will 'affect the entire national economy' than when it addresses a narrow, technical issue[.]" *FCC v. Consumers' Rsch*., 606 U.S. 656, 673 (2025); *see also A. L. A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 541-542 (1935). FHFA does not dispute—nor could it—that its operations affect the country's entire economy. *See Collins*, 594 U.S. at 226. The Ninth Circuit was incorrect to state that the intelligible principle standard as applied to FHFA is "an exceedingly modest limitation." Pet.App.15a (quotations omitted).

Contrary to FHFA, Petitioners nondelegation argument does not rest on the *Consumers' Research* dissent. Resp. 7. Rather, Petitioners demonstrated that Section 4516 does not survive the majority's opinion. Pet. 32-34. *Consumers' Research* shows that a funding mechanism might pass the nondelegation doctrine without a quantitative limit if there are enough qualitative boundaries to compensate. 606 U.S. at 680-81. In some statutory contexts, the word "sufficient" can act as a qualitative floor and a ceiling if a court can answer: "Sufficient for what?" *Id*. at 681-83.

FHFA does not answer how its Director or this Court can determine how much in assessments are "sufficient" or "reasonable." Unlike *Consumers' Research*, Section 4516 does not provide an exclusive or exhaustive list of permissible activities. The word "including—" proves that it is non-exhaustive. 12 U.S.C. § 4516(a). The "working capital fund" itself is unbounded. *Id.* § 4516(a)(3), (e). "The Director may use any amounts received . . . for compensation of the Director and other employees of the Agency and for all other expenses of the Director and the Agency." *Id.* § 4516(f)(4).

Like the Ninth Circuit, and the district court before it, FHFA does not defeat the hypothetical that Section 4516 would allow FHFA to buy gold staplers or other extravagancies for its operations. Pet. 35. That's because there are no guideposts, factors, or intelligible principles to tell when enough is enough. Section 4516 violates the nondelegation doctrine.

E. This Case is an Ideal Vehicle

1. FHFA contends this case is a poor vehicle to address the questions presented. Resp. 7-9. First, FHFA suggests the case is too messy because the Court may need to consider Petitioners' standing. But this Court has an independent obligation to assess standing in every case so this is nothing unique. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990). The Court's standing analysis for Petitioners will be easier than most because this case arises from a motion to dismiss and this Court "must accept as true all material [standing] allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

Under this standard, neither the district court nor the Ninth Circuit had trouble finding that Petitioners have Article III standing. Pet.App.7a-10a; Pet.App.29a-

35a. In short, Petitioners allege that their injuries—the threatened and actual loss of real property and money—are traceable to FHFA through its conservatorship over Fannie and Freddie. As their conservator, FHFA "succeeded" to the Enterprises' assets and possesses the ultimate authority over any property disposition, including foreclosures. *See* 12 U.S.C. § 4617(b)(2)(A)(i). FHFA directs and controls foreclosures using unappropriated funds. Petitioners' requested relief redresses their injuries by preventing future illegal foreclosures and paying compensation for the past foreclosures completed without a valid appropriation from Congress. There is no standing defect.

2. Next, FHFA asserts that Petitioners' "contentions are barred by claim preclusion" from prior state court litigation. Resp. 8-9. FHFA did not press or develop this argument in the Ninth Circuit and, therefore, has abandoned it. *U.S. v. Williams*, 504 U.S. 36, 41 (1992). And FHFA's waived claim preclusion defense wrongfully depends on matters outside the pleadings at the motion to dismiss stage. *See Warth*, 422 U.S. at 501; 2-ER-230-32. All the same, FHFA is incorrect. In federal court, under federal question jurisdiction, state preclusion law governs. *See Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). Under Nevada law, claim preclusion applies only if the second action's claims could have been brought in the first case. *Five Star Cap. Corp. v. Ruby*, 194 P.3d 709, 713 (Nev. 2008). Petitioners' current constitutional claims could not have been brought before. Petitioners' state court actions involved HOA sales and the validity and priority of liens. There were no foreclosures on the horizon. Petitioners could not have advanced their present constitutional challenges to foreclosures that

weren't yet threatened. These claims were not ripe in the state court actions.

CONCLUSION

For these reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JORDAN T. SMITH
Counsel of Record
BRIANNA SMITH
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106
jtsmith@bhfs.com

Counsel for Petitioners

July 21, 2026