

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 PATRICK J. COLLINS, ET AL.,)

4 Petitioners,)

5 v.) No. 19-422

6 STEVEN T. MNUCHIN, SECRETARY)

7 OF THE TREASURY, ET AL.,)

8 Respondents.)

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10 STEVEN T. MNUCHIN, SECRETARY)

11 OF THE TREASURY, ET AL.,)

12 Petitioners,)

13 v.) No. 19-563

14 PATRICK J. COLLINS, ET AL.,)

15 Respondents.)

16 - - - - -

17 Washington, D.C.

18 Wednesday, December 9, 2020

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20 The above-entitled matter came on for oral
21 argument before the Supreme Court of the United States
22 at 10:00 a.m.

23

24

25

1 APPEARANCES:
2 HASHIM M. MOOPPAN, Counselor to the Solicitor General,
3 Department of Justice, Washington, D.C.;
4 on behalf of the federal parties.
5 AARON L. NIELSON, Provo, Utah;
6 Court-appointed amicus curiae.
7 DAVID H. THOMPSON, Washington, D.C.;
8 on behalf of the Petitioners in 19-422 and
9 the Respondents in 19-563.
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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case Number 19-422,
5 Collins versus Mnuchin, and the consolidated
6 case.

7 Mr. Mooppan.

8 ORAL ARGUMENT OF HASHIM M. MOOPPAN
9 ON BEHALF OF THE FEDERAL PARTIES

10 MR. MOOPPAN: Mr. Chief Justice, and
11 may it please the Court:

12 In the Third Amendment, FHFA, acting
13 as conservator of Fannie and Freddie,
14 renegotiated the enterprises' financial
15 obligations to Treasury by replacing the
16 enterprises' multibillion-dollar dividend and
17 fee obligations with a variable dividend tied to
18 their net worth. The conservator eliminated any
19 risk that the cycle could continue where the
20 enterprises' obligations to Treasury would
21 themselves cause draws from Treasury's capital
22 commitment.

23 The shareholders' statutory and
24 constitutional challenges to the Third Amendment
25 fail for many reasons, but there are three key

1 defects that I'll try to address today.

2 First, both claims are barred by the
3 Recovery Act's succession clause, which
4 transfers to the conservator the authority to
5 decide whether shareholders may bring derivative
6 suits on behalf of the enterprises. The type of
7 shareholder injury alleged here, that the
8 corporations' assets have been unlawfully
9 dissipated to a particular shareholder, is
10 plainly derivative rather than direct. The
11 shareholders have not cited even a single case
12 to the contrary.

13 Second, the statutory claim is barred
14 by the Recovery Act's anti-injunction clause,
15 which prevents courts from restraining exercises
16 of the conservator's powers or functions. The
17 conservator acted well within its authority in
18 deciding that the renegotiation of the
19 enterprises' financial obligations may have been
20 appropriate to preserve and conserve Treasury's
21 capital commitment. The shareholders cannot
22 second-guess the wisdom or motives behind that
23 business judgment.

24 Third, the constitutional claim fails
25 because President Obama had unrestricted power

1 to remove and thus to supervise both of the
2 officials who signed the Third Amendment.
3 Treasury Secretary Geithner was of course
4 removable at will and so too was Acting FHFA
5 Director DeMarco. Thus, while the statutory
6 restriction on the president's power to remove
7 the FHFA director is invalid, it had no
8 prejudicial effect on the Third Amendment.

9 I welcome the Court's questions.

10 CHIEF JUSTICE ROBERTS: Counsel, you
11 say that the common stockholders claims can't
12 survive because they're derivative, really
13 claims of the corporation, and -- and then
14 barred by the succession clause. But it seems
15 to me that they're a little different, according
16 to the claims anyway, that their stock value --
17 their stock was completely wiped out in a unique
18 way compared to the other holders of interests
19 in the enterprises. In other words, that this
20 action was directed at them as distinct from the
21 corporation as a whole; therefore, is not
22 derivative, they claim, and -- and shouldn't be
23 barred. What -- what is your answer to that?

24 MR. MOOPPAN: So as we cite in our
25 reply brief, we cited cases from the Delaware

1 Supreme Court and from Judges Bork, Easterbrook,
2 and Posner, all of whom recognized that when
3 corporate assets are dissipated, that's a
4 derivative claim even though where the recipient
5 is a shareholder, such that the financial --

6 CHIEF JUSTICE ROBERTS: Yeah, but,
7 when you have -- excuse me -- but when you have
8 different categories of shareholders or people
9 with financial interests, and the complaint is
10 that they -- the one class was particularly
11 targeted, it does seem to me that that class has
12 a unique claim that can't be characterized as
13 just a claim of the corporation.

14 MR. MOOPPAN: Well, Your Honor, I
15 think that there's no reason to differentiate
16 between dissipation of corporate assets pursuant
17 to dividend payment versus a dissipation of
18 corporate assets pursuant to a side transaction.

19 In the cases that we cited in our
20 reply brief, each of those cases involved
21 certain shareholders being treated better than
22 other shareholders, and it shouldn't make any
23 difference for purposes of a derivative claim
24 whether that special treatment occurs pursuant
25 to a side transaction or through a dividend

1 payment. I --

2 CHIEF JUSTICE ROBERTS: Well, maybe
3 shareholders being treated differently but when
4 the way you're being treated differently is that
5 you're completely wiped out, I mean, the
6 corporation doesn't have any particular interest
7 in the balance it seems to me or at least not
8 the same sort of interest as the shareholders
9 who are left out in the cold.

10 MR. MOOPPAN: Well, I think that
11 the -- the harm here is in the first instance
12 the corporation. The claim is that the
13 corporate assets have been dissipated, so the
14 corporation does have an injury. And I guess
15 one way of making the point I've been trying to
16 make is I think the shareholders would have the
17 exact same objection if Fannie and Freddie had
18 entered into a contract with the Treasury
19 Department where they bought a commemorative
20 coin from the Treasury Department and paid them
21 for that, all of their net worth in perpetuity.

22 That would be exactly like the claims
23 that we cited in our reply brief where you had a
24 side transaction to a -- one shareholder, to the
25 disadvantage of all of the other shareholders,

1 and that's -- there's just no difference for
2 purposes of a derivative claim whether the harm
3 to the certain shareholders comes because of a
4 side transaction or pursuant to an amendment to
5 the dividend obligation.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas.

9 JUSTICE THOMAS: Thank you, Mr. Chief
10 Justice.

11 Well, counsel, would you -- perhaps
12 this is redundant, but give us another example
13 of what a direct would look like rather than a
14 derivative.

15 MR. MOOPPAN: So direct claims are
16 claims where the injury to the shareholder is --
17 doesn't turn on a harm to the corporation. So,
18 for example, if shareholders are injured in
19 their right to vote, that doesn't implicate the
20 right to the corporation. It is a direct
21 shareholder claim.

22 Those -- and the -- the cases that
23 have recognized direct suits where shareholders
24 are harmed tend to be in those sort of contexts
25 where there's a dilution of, for example, voting

1 power. That's what the Delaware Supreme Court
2 laid out in its El Paso case.

3 Mere harm to shareholders because the
4 corporate assets have been dissipated is a
5 derivative claim. Harms to the shareholders'
6 ability to do things that don't turn on a harm
7 to the corporation first, those are direct
8 claims.

9 JUSTICE THOMAS: Well, what if you
10 had -- and I know the -- this agreement doesn't
11 say this directly, but an agreement that simply
12 transferred directly all dividends from existing
13 shareholders, say, to Treasury, that it
14 explicitly said that? Would that be -- I -- I
15 think it's rather odd that your -- that the
16 shareholders' dividends can be jeopardized or
17 depleted and that's not a direct claim but the
18 right to vote on corporate matters is a direct
19 claim.

20 So what if -- so what in it was more
21 explicit, what would you say to that?

22 MR. MOOPPAN: So I think that would be
23 different. I think the difference is it's not a
24 question of being explicit versus implicit. In
25 your hypothetical, they are acting directly on

1 the shareholders' contractual rights to
2 dividends. That doesn't harm the corporation at
3 all.

4 Maybe one way of thinking about it is
5 it's the difference between the size of the pie
6 and the share of the pie. The claim here is
7 that the corporate assets have been dissipated.
8 That is a question about the -- the size of the
9 pie, and that is a harm to the corporation.

10 In your hypothetical, what has been
11 changed is the share of the pie by -- there's
12 been a direct action on the shareholders' rights
13 to dividends that's been transferred to another
14 shareholder. But importantly, that's not what's
15 going on here. It might be the effect.
16 Whenever the corporation has less assets, that's
17 going to affect shareholders' ability to get
18 dividends, no matter why this corporation's
19 assets have been wasted or stolen.

20 And, you know, Judge Posner's opinion
21 in the Seventh Circuit lays this out pretty
22 clearly, that when you have a harm to the
23 corporate assets, it just doesn't matter why the
24 assets have been dissipated, whether it's by
25 theft or conflict of interest or a side

1 transaction, in all events, the harm is in the
2 first instance to the corporation, not to the
3 shareholders.

4 JUSTICE THOMAS: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Breyer.

7 JUSTICE BREYER: Thank you. I think
8 in reading this you could, with trying to
9 simplify as much as possible, do you -- the
10 shareholders' claim as saying we bought into
11 this corporation, it was supposed to be private
12 as well as having a public side, and then the
13 government nationalized it. That's what they
14 did. If you look at their giving the net worth
15 to Treasury, it's nationalizing the company.

16 Now, whatever conservators do and
17 receivers do, they don't nationalize companies.
18 And when they nationalized this company,
19 naturally they paid us nothing and our shares
20 became worthless. And so what do you say?

21 MR. MOOPPAN: Well, Your Honor, what
22 the Third Amendment did is it renegotiated the
23 enterprise's financial obligation. The
24 enterprises were saddled with --

25 JUSTICE BREYER: I know that, but what

1 I wonder is can you -- is it fair to
2 characterize it not with this more legal
3 language but just saying, look, they
4 nationalized it, they gave the company away to
5 the Treasury. Who do you think the Treasury is?
6 It's the government of the United States.

7 MR. MOOPPAN: Right. And -- and --

8 JUSTICE BREYER: And what I will --
9 really look into this and you'll discover they
10 didn't get enough money for it, they did it at
11 too cheap a price, they did it dot, dot, dot,
12 and they paid us nothing. All right. But can I
13 do this as nationalization?

14 MR. MOOPPAN: No, Your Honor,
15 because --

16 JUSTICE BREYER: Do you follow?

17 MR. MOOPPAN: -- because what the
18 agreement does is it replaces a \$20 billion a
19 year dividend. So the enterprise is already
20 owed to the federal government \$20 billion a
21 year.

22 JUSTICE BREYER: Yeah.

23 MR. MOOPPAN: What the conservator did
24 was say rather than having that --

25 JUSTICE BREYER: That goes to the

1 reasonableness of the agreement. They say,
2 okay, let's have a trial on that. We -- you --
3 they think it's a very reasonable thing to do.
4 We don't.

5 MR. MOOPPAN: And -- and the point is
6 the anti-injunction clause doesn't expose the
7 conservator's business judgment to
8 reasonableness review.

9 JUSTICE BREYER: Yeah. Correct.

10 MR. MOOPPAN: The question is whether
11 they exceeded their power --

12 JUSTICE BREYER: They say
13 nationalization is not the kind of thing
14 conservators and receivers do and, therefore,
15 you can examine it. And when you examine it,
16 you will see how unreasonable it is.

17 MR. MOOPPAN: Your Honor, what the
18 enterprises did was they renegotiated financial
19 obligations. That is what they did. Whatever
20 label the Plaintiffs want to put on it --

21 JUSTICE BREYER: No, that was my
22 fault.

23 MR. MOOPPAN: What the actual power
24 that was exercised here was a renegotiation of
25 financial obligation. That is what conservators

1 do day in and day out.

2 Now the terms of this renegotiation
3 are fairly unique, but that's because the
4 enterprises were in a fairly unique condition.
5 Most companies don't owe \$20 billion a year to
6 the federal government.

7 And so when they switched that and
8 they switched it to -- to ensure that there was
9 no risk to the quarter trillion dollars of
10 capital that Treasury had committed to these
11 enterprises, that is the nature of the agreement
12 here.

13 It is an unusual agreement but it is
14 still -- at the end of the day, it is a
15 renegotiation of financial obligations that is a
16 heartland exercise of conservatorship power and
17 if the anti-injunction clause means anything, it
18 means that you don't second-guess whether they
19 could have done it a different way, whether it
20 was a bad deal, whether they did it for bad
21 motives. At the end of the day, what they did
22 is they renegotiated financial obligations.

23 CHIEF JUSTICE ROBERTS: Justice Alito.

24 JUSTICE ALITO: If we agree with you
25 about the removability of -- of an acting

1 director and also agree with you that the only
2 relevant action was one taken by the acting
3 director, would we have any reason to address
4 the question whether the restriction on the
5 removal of a confirmed director is
6 constitutional?

7 MR. MOOPPAN: Well, yes, Your Honor.
8 The Court of Appeals, in addition to declining
9 to set aside the Third Amendment, did issue a
10 declaratory judgment that prospectively the FHFA
11 removal restriction should be set aside.

12 Petitioners here did file a cert
13 petition where that is the first question
14 presented. We think the Court should confirm
15 that that was a correct holding, that that
16 removal restriction is invalid and shouldn't be
17 applied prospectively, but we do think that it
18 is no basis to set aside the Third Amendment,
19 both because the acting director is in fact
20 removable at will --

21 JUSTICE ALITO: Well, perhaps this
22 is -- if it's legally irrelevant, it could be
23 vacated on that basis without reaching the
24 merits of the question.

25 But let me ask you this: What is your

1 response to the argument on the other side that
2 confirms directors took actions pursuant to the
3 amendment and, therefore, we have to consider
4 the status of confirmed directors?

5 MR. MOOPPAN: Your Honor, I don't
6 think they've actually ever challenged any
7 action enforcing the Third Amendment by
8 confirmed directors. And I don't know what
9 those actions would be since there is -- it's
10 administerial. The Third Amendment requires the
11 dividends. At most, maybe -- the only thing I
12 can even think they might be talking about,
13 though I'd be curious what they have to say, is
14 whether to pay the dividends under the Third
15 Amendment in cash or, instead, in kind through
16 the liquidation preference. That wouldn't do
17 them any good either way, so I'd be surprised if
18 that's what they're challenging. But other than
19 that I don't know what it would be that they
20 would be referring to.

21 JUSTICE ALITO: If we were to reach
22 the issue of the removability of a confirmed
23 director and if we were to agree with you on
24 that question, what basis do you have for
25 distinguishing between the relief that you think

1 is appropriate in this case and the relief that
2 was provided in cases like Bowsher, Seila Law,
3 and Appointment Clause cases where an
4 Appointments Clause violation was found?

5 MR. MOOPPAN: So I think the most
6 significant difference is the fact that in this
7 case the Treasury Secretary was a party to the
8 action that's being challenged. Their
9 constitutional claim is a claim that the agency
10 action was unconstitutionally insulated from
11 presidential supervision. And unlike in all of
12 the cases you just mentioned, here one of the
13 parties to the contract is the Treasury
14 Secretary, who of course is removable at will by
15 the president and is the president's right-hand
16 man. So no one can say that the president
17 didn't have sufficient control over this
18 agreement. And that's why, if -- if the APA's
19 presidential error rule means anything, it means
20 you can't set aside a multibillion-dollar
21 agreement on the theory that the president
22 didn't have enough control over it when the
23 president's Treasury Secretary signed it.
24 That's --

25 CHIEF JUSTICE ROBERTS: Justice --

1 Justice --

2 JUSTICE ALITO: All right. Thanks.

3 CHIEF JUSTICE ROBERTS: Justice
4 Sotomayor.

5 JUSTICE SOTOMAYOR: I just want to
6 make sure that I get the gist of your argument,
7 and I think I have it right. I know you and the
8 shareholders disagree on whether this deal had a
9 reasonable cause, but let's posit a deal that
10 didn't. For no rational base -- reason, the
11 FHFA sold all of Fannie and Freddie's assets in
12 exchange for one dollar to itself. It did
13 exactly what Justice Breyer said. It
14 nationalized things. It nationalized the
15 company. Your position is that there is no
16 court review of a decision by the FFH as
17 conservator that could give shareholders the
18 right to challenge their action?

19 MR. MOOPPAN: So we think -- in the
20 hypothetical like that, we think you could -- we
21 don't think the anti-injunction clause would bar
22 a claim that actions were taken that have no
23 objective rational justification of being taken
24 to preserve and conserve assets. We do think
25 that even that claim would be barred by the

1 succession clause because it would still be a
2 derivative suit.

3 But if you -- if the Court disagreed
4 with us about the succession clause, we don't --
5 we aren't arguing that the anti-injunction
6 clause means that there's no review of anything
7 the conservator does. We are just saying that
8 when the conservator takes action that may be
9 appropriate and necessary to preserve and
10 conserve assets, there's no second-guessing the
11 business judgment. And I think that's an
12 important point here, that --

13 JUSTICE SOTOMAYOR: All right,
14 counsel, let me just stop you there. If the
15 company is still in existence but owns by the
16 FHFA, there is no claim. This -- my colleagues
17 have posited something close to this. But it is
18 the shareholders who have been kicked out for no
19 business reason. I don't see how that's a
20 derivative suit that the succession clause would
21 bar.

22 MR. MOOPPAN: Your Honor, it's because
23 the shoulders' harm is derivative of the harm to
24 the corporation. All they have lost --

25 JUSTICE SOTOMAYOR: No, the -- the

1 corporation is not losing its profit. The
2 corporation has actually made -- may be gaining
3 money by not paying out dividends to the
4 shareholders, but I -- but it's the shareholders
5 and not the company that's being deprived of --
6 of a profit.

7 MR. MOOPPAN: Well, I -- I don't think
8 that's right, Your Honor. Their -- their claim
9 is that Fannie and Freddie -- FHFA acted
10 improperly in giving away the assets of the
11 corporation.

12 JUSTICE SOTOMAYOR: All right,
13 counsel, I just want to get in one last
14 question. Your argument is that the FHFA is
15 unconstitutionally structured given this Court's
16 decision in Seila Law.

17 I see vast differences between the
18 FHFA and the F -- CFPB. The FHFA's most notable
19 power and the reason we are here today is that
20 they can put certain government-affiliated
21 companies under conservatorship.
22 Conservatorships are -- are never thought of, in
23 my experience, as an executive power. It's
24 historically been an adjunct to the judicial
25 power.

1 So why isn't that -- and -- and this
2 is not a wide-reaching power that affects many
3 entities. It's one company at a time
4 essentially, unlike in the CFPB. So why can't
5 we say that this is an exception to Humphrey's
6 Estate or Morrison versus Olson?

7 CHIEF JUSTICE ROBERTS: Briefly,
8 counsel.

9 MR. MOOPPAN: The question is whether
10 it's significant executive power, and the
11 authority to decide whether to put Fannie and
12 Freddie into conservatorship or receivership, a
13 decision that affects the entire mortgage market
14 and thus the home equity of every homeowner in
15 this country is unquestionably a significant
16 executive power.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Justice Kagan. Justice Kagan?

20 JUSTICE KAGAN: Sorry. Mr. Mooppan,
21 can I take you back to your answers to Justice
22 Alito? If -- if I understood you right, you
23 said that the only final action that's being
24 challenged here is the Third Amendment. So I'm
25 going to repeat his question to you because I --

1 I wasn't quite sure I got your answer.

2 If that's the case, that that's the
3 only final action challenged here, what basis
4 would we have to do anything more than issue a
5 -- a declaratory judgment about the validity of
6 that amendment?

7 MR. MOOPPAN: So I don't think you
8 have it quite right. The plaintiffs in this
9 case did seek a declaratory judgment that the
10 structure of the FH -- FHFA was
11 unconstitutional, and the Fifth Circuit granted
12 them that relief. And there is a cert petition
13 that raises -- that was granted that includes
14 that question. So we do think it would be
15 appropriate for this Court to confirm that that
16 aspect of the judgment is correct.

17 JUSTICE KAGAN: Well, I know that they
18 asked for it, but usually if you bring an APA
19 challenge, you know, you have to point to a
20 final agency action that you think is wrong in
21 some sense. And -- and here the Third Amendment
22 was done by the acting director. If you are
23 right about that, it doesn't raise the removal
24 issues. So what does raise the removal issues?

25 MR. MOOPPAN: So it's just like Free

1 Enterprise Fund, Your Honor. They are entitled
2 to bring a prospective suit saying that the
3 ongoing regulatory power of the agency over
4 them, even absent a concrete final agency
5 action, they could seek prospective relief
6 against that because, of course, the FHFA, as a
7 regulator, has the authority to decide whether
8 these entities will continue to be in
9 conservatorship or not or whether they could be
10 put into receivership. They -- the shareholders
11 here have the ability to say that that decision
12 should be made only by a regulator that's
13 constitutionally structured, just like --

14 JUSTICE KAGAN: You're saying that --
15 you're saying that that's true even if they are
16 not -- they're not pointing to any particular
17 actions in the period when there was a confirmed
18 director that they objected to?

19 MR. MOOPAN: Well, it's a prospective
20 suit, Your Honor, so it -- their -- their point
21 is that every regulatory decision FHFA makes
22 going forward, including, most obviously, most
23 importantly, whether to keep the entities in
24 conservatorship or receivership, just like in
25 Free Enterprise Fund, the court allowed a

1 prospective suit even though, by then, the
2 investigation was basically done.

3 The -- the -- the point is that you
4 got a regulator and a regulated entity or the
5 shareholders as a regulated entity can bring a
6 claim to say that that regulator is
7 unconstitutionally structured as a prospective
8 matter, but you are right --

9 JUSTICE KAGAN: Thank you --

10 MR. MOOPPAN: And.

11 JUSTICE KAGAN: -- Mr. Mooppan.

12 Thanks.

13 CHIEF JUSTICE ROBERTS: Justice
14 Gorsuch.

15 JUSTICE GORSUCH: I -- I guess,
16 counsel, I'm -- I'm a little confused at this
17 declaratory judgment as to -- with respect to
18 future actions, it seems to me like it would be
19 appropriate for hanging on the wall but not much
20 else. The plaintiffs here have sought
21 declaratory judgment in aid of further remedies
22 retrospective -- retroactive remedies that might
23 actually do them some good, and -- and -- and
24 that's the Third Amendment.

25 And I guess I'm a little confused why

1 we wouldn't proceed to hold that the Third
2 Amendment was void from the beginning by virtue
3 of the Appointments Clause problem. It's pretty
4 much what we did in Lucia, as you'll recall,
5 where we vacated the -- the ALJ's decision. Why
6 wouldn't we do the same here?

7 MR. MOOPPAN: Well, again, because
8 their claim is that the Third Amendment was
9 unconstitutionally insulated from presidential
10 supervision. That claim is clearly wrong on the
11 merits because it -- the Third Amendment was
12 signed by the Treasury Secretary, who is --

13 JUSTICE GORSUCH: So it's a merits --
14 a merits determination, then?

15 MR. MOOPPAN: Yeah, we're not --

16 JUSTICE GORSUCH: Okay.

17 MR. MOOPPAN: -- seeking a standing
18 argument.

19 JUSTICE GORSUCH: And -- and -- and
20 then, with respect, if it is, then -- then --
21 then why -- why isn't it your -- it's a harmless
22 error argument as I understand it, but we don't
23 do harmless error in -- in structural
24 constitutional cases typically, and if we did,
25 isn't it rather speculative to say what would

1 have happened here if -- if we would have had a
2 different director who is actually subject to
3 Presidential oversight in the political process,
4 especially when Congress insulated this person
5 in theory from that process. Isn't that a
6 degree of speculation that is quite beyond us?

7 MR. MOOPPAN: I don't think it's
8 speculative at all, Your Honor, because, again,
9 this isn't a decision just by the FHFA director.
10 It was signed by the Treasury secretary.

11 JUSTICE GORSUCH: I understand --

12 MR. MOOPPAN: The Treasury secretary
13 --

14 JUSTICE GORSUCH: -- I -- I
15 understand that point, but if Congress decided
16 to put this person separate from the political
17 process for a reason, and it might have been to
18 insulate them all from the blowback that might
19 come. Who knows? I don't know, you don't know,
20 none of us knows. Isn't that -- isn't that the
21 whole point? And -- and what do we do again,
22 just to return to my fundamental question, why
23 isn't this void? When -- when we have the
24 Federal Vacancies Reform Act, for example, it
25 says that an action taken by somebody who's

1 without power is void, not just voidable, not
2 ratifiable, it's void. Why wouldn't the same be
3 true here?

4 MR. MOOPPAN: So, in addition to my
5 point about the Secretary of the Treasury, I
6 guess I would say even from the other side of
7 the coin this was one done by an acting
8 director, and an acting director is also
9 removable at will by the President.

10 JUSTICE GORSUCH: I understand that
11 argument. Put that argument aside. Put that
12 argument aside and your harmless error argument
13 aside. Why wouldn't this be void?

14 MR. MOOPPAN: Your Honor, if you
15 reject all the arguments we've made, then I
16 suppose we would probably lose. But --

17 JUSTICE GORSUCH: Okay. All right.
18 Thank --

19 MR. MOOPPAN: -- to say that the
20 contract --

21 JUSTICE GORSUCH: No, no, no. So I've
22 got it. It's -- it's a harmless error argument
23 on the one -- one hand, and I -- I've got it.
24 Okay, those are your two arguments. That's it.
25 After that, it's void.

1 MR. MOOPPAN: Well, in addition to
2 our, you know, antecedent arguments about the
3 succession clause, which I -- I -- I --

4 JUSTICE GORSUCH: Correct, correct.

5 MR. MOOPPAN: -- but I want to focus
6 on the merits because I know --

7 JUSTICE GORSUCH: I got that. But --
8 but, when we come to remedies, it's -- it's
9 either the acting director is -- is -- is -- is
10 -- is reportable to the President or it's
11 harmless error. I've got it.

12 MR. MOOPPAN: And -- and --

13 JUSTICE GORSUCH: Thank you, counsel.

14 MR. MOOPPAN: -- and I would --

15 CHIEF JUSTICE ROBERTS: Justice
16 Kavanaugh.

17 JUSTICE KAVANAUGH: Thank you, Chief
18 Justice.

19 And good morning. You were saying
20 something there. Why don't you continue on.

21 MR. MOOPPAN: Yes, I -- I would like
22 to talk a little bit about the acting director
23 point because I think it is an important point
24 and it avoids some of Justice Gorsuch's concerns
25 about the Treasury Secretary's side.

1 The statute does not expressly provide
2 that the acting director is subject to the same
3 clause protections as the confirmed director,
4 and this Court should not read a statute to
5 create constitutional problems. It normally
6 reads statutes to avoid constitutional problems.

7 So the -- an easy solution that avoids
8 all the concerns about structural error and
9 speculation and all the rest is to simply say
10 that under this statute, the acting director,
11 who is the official who took this decision on
12 behalf of H -- FHFA is, in fact, removable at
13 will by the President, and so there's no problem
14 to begin with.

15 JUSTICE KAVANAUGH: Is that true of
16 all acting officials?

17 MR. MOOPPAN: It -- you know, I'd have
18 to look at any given statute to tell you the
19 answer, Your Honor, but --

20 JUSTICE KAVANAUGH: Well, I guess, is
21 it true -- is -- is your principle that you're
22 asserting there that acting officials are
23 presumptively removable at will by the President
24 unless the statute with respect to the acting
25 director or acting official himself or herself

1 specifically puts restrictions on the
2 removable -- removability?

3 MR. MOOPPAN: Yes, I -- I -- I -- I --
4 our general position is that you should not
5 leapfrog from any clause restriction for a
6 confirmed official and assume that that extends
7 to an acting official. You would have to always
8 look at the provisions that govern the acting
9 official and see whether there is a removal
10 restriction for them. That's both as a matter
11 of constitutional avoidance and as a matter of
12 the Shurtleff clear statement requirement and as
13 a matter of simple common sense.

14 You know, Congress might have very
15 good reasons for why it wouldn't impose a
16 removal restriction on an acting official than
17 it did for a confirmed official, namely, that
18 the Senate has actually confirmed the person, so
19 then, at that point, they might be willing to
20 give them tenure protection. But someone that
21 has never gone through the gauntlet of Senate
22 confirmation, Congress might well be unwilling
23 to provide them with tenure protection.

24 So both as a matter of text and common
25 sense and structural constitutional provisions

1 and constitutional avoidance, you shouldn't read
2 the statute to create a constitutional problem,
3 let alone to set aside a multi-billion dollar
4 contract.

5 JUSTICE KAVANAUGH: Well, those are
6 good points and I guess the one point that's in
7 tension with that is that Congress also
8 designated it an independent agency, and if the
9 official, even though acting, running it is
10 removable at will, the agency's no longer
11 independent.

12 MR. MOOPAN: So I'll make two points
13 about that, Your Honor. The first is that
14 Congress often designates agencies as an
15 independent establishment even when they're
16 concededly not subject to any clause
17 restrictions at all. The best example of that I
18 can give you is if you look at Swan versus
19 Clinton, the agency there was described as
20 independent, but an earlier iteration of that
21 agency was removable expressly at will by the
22 President.

23 The second point I would make is that
24 the fact that the agency is independent, even if
25 it had said something about clause restrictions,

1 it's one thing to say that they're independent
2 when they've got a confirmed director. It
3 doesn't necessarily mean that they're
4 independent when they have an acting director,
5 and we know that for this statute itself
6 because, if you look at this statute, before the
7 first confirmed director, there was a
8 transitional period and the head of the FHFA
9 during that transitional period was an officer
10 in HUD who was not subject to any clause
11 restriction.

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett.

15 JUSTICE BARRETT: Mr. Mooppan, let's
16 say that we agree with you that the Third
17 Amendment was entered into by an acting director
18 who was removable at will by the President, and
19 so the entry into the Third Amendment, let's
20 say, was valid. He had the -- there was no
21 constitutional problem with it.

22 Let's say that we also agree with you
23 that there was a problem with the confirmed
24 director because he was removable only for
25 cause. So the confirmed director was

1 administering the Third Amendment, administering
2 the conservatorship and passing along all the
3 earnings from the DOT into the Treasury.

4 Would that create a structural problem
5 because even though perhaps the Third Amendment
6 at its inception was valid, could the
7 administering of the Third Amendment by an
8 unconstitutional executive official contaminate
9 it with structural errors such that the whole
10 Third Amendment would have to be set aside?

11 MR. MOOPPAN: I don't think so, Your
12 Honor, because, again, the only -- there's not
13 some discretionary decision within the Third
14 Amendment other than perhaps whether the
15 dividends that are owed are paid in cash or
16 instead paid as a liquidation preference,
17 neither of which would do the plaintiffs here
18 any good, and that's not the claim that they're
19 bringing. Their claim isn't that the Third
20 Amendment is valid, but the money should all be
21 paid in liquidation preferences. Their claim is
22 that the Third Amendment itself should be set
23 aside.

24 JUSTICE BARRETT: Well, so who decides
25 when the Third Amendment -- when this

1 arrangement should come to an end, if ever?
2 Because, you know, Treasury viewed it as winding
3 down the GSEs, winding down their assets,
4 although, you know, it's been characterized not
5 as a receivership but as a conservatorship.
6 Could the confirmed director have said, okay,
7 listen, now this is no longer serving to make
8 the GSEs solvent, and so it's time to shift
9 arrangements. Did the confirmed director have
10 that authority under the Third Amendment?

11 MR. MOOPPAN: So, yes, just like the
12 Second Amendment and the First Amendment and
13 everything else that the agency does. That's
14 why we think that they're entitled to relief
15 prospectively that the FHFA director should be
16 removable at will. And then, if the FHFA
17 director wants to change any of these agreements
18 and can get Treasury --

19 JUSTICE BARRETT: But --

20 MR. MOOPPAN: -- to agree, they can.

21 JUSTICE BARRETT: -- but -- but let me
22 just ask you this. If the confirmed director
23 could have taken that action at some point in
24 the past, why isn't that an injury?

25 MR. MOOPPAN: Again, it's not -- it's

1 just not a problem with the Third Amendment any
2 different than everything else, all right? That
3 -- that is essentially a challenge to agency
4 inaction, the failure to amend the contract.

5 On that theory, all of the agreements
6 would have to go, not just the Third Amendment,
7 the Second Amendment, First Amendment, the
8 original amendment. So you would have to --
9 they -- Fannie and Freddie would have to lose
10 all of the money Treasury had ever given them
11 and all of the capital that is backed by them.
12 That's not the claim they've brought, and it
13 would be disastrous.

14 JUSTICE BARRETT: Let me just ask you
15 one last quick question. This is shifting gears
16 to the distinction between direct and derivative
17 suits. I'm having a hard time understanding why
18 the corporate law distinction matters in this
19 APA claim, why we can import those concepts from
20 corporate law into the APA, because it seems to
21 me that the shareholders have Article III
22 standing. They've suffered a pocketbook injury.
23 You haven't contended, I don't think, that
24 they're not within the zone of interest of the
25 statute. And the APA gives a direct cause of

1 action for someone aggrieved by agency action,
2 so why do we even care about the
3 direct/derivative distinction?

4 CHIEF JUSTICE ROBERTS: Briefly,
5 counsel.

6 MR. MOOPPAN: The APA doesn't displace
7 traditional corporate law. It incorporates it.
8 And that's why in the 70-year history of the APA
9 plaintiffs haven't been able to cite a single
10 case that has allowed a shareholder to bring
11 what would otherwise be a derivative suit.

12 CHIEF JUSTICE ROBERTS: You have a
13 minute to wrap up, counsel.

14 MR. MOOPPAN: The Third Amendment
15 should not be set aside. If the APA's
16 prejudicial error rule means anything at all,
17 courts cannot set aside a multi-billion dollar
18 contract on the ground that it was
19 unconstitutionally insulated from presidential
20 supervision even though both of the officials
21 who signed it were removable at will by the
22 President. If the Recovery Act's
23 anti-injunction clause means anything at all,
24 courts cannot set aside a conservator's
25 renegotiation of complex financial obligations

1 by second-guessing the conservator's statutory
2 exercise of business judgment, and in all
3 events, the Recovery Act's succession clause
4 bars both claims.

5 No change in the history of the APA or
6 American corporation law appears to allow a
7 shareholder to claim direct rather than
8 derivative injury merely because the
9 corporation's assets allegedly were dissipated
10 unlawfully to another shareholder. Accordingly,
11 this Court should reject the challenges to the
12 Third Amendment but uphold the determination
13 that the FHFA director's removal restriction is
14 unconstitutional yet severable.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Mr. Nielson.

18 ARGUMENT OF AARON L. NIELSON,
19 COURT-APPOINTED AMICUS CURIAE

20 MR. NIELSON: Mr. Chief Justice, and
21 may it please the Court:

22 There is a very easy way to answer the
23 constitutional question in this case. The Court
24 should hold that unless Congress says so in a
25 statute, an acting director does not have tenure

1 full stop.

2 I agree with the Solicitor General on
3 this in all respects but one. Because an acting
4 director is removable at will, this part of the
5 case should be over. As the United States
6 explained below, plaintiffs do not, in fact,
7 challenge ongoing action by the FHFA. That,
8 rather than the government's latest position, is
9 correct. I urge the Court to read J.A. 117.
10 There is no reference to any prospective suit or
11 anything like that in the complaint here.

12 If the Court chooses to tackle the
13 harder question, it should still reverse.
14 First, for the reasons this Court gave in Seila
15 Law, the FHFA does not wield significant
16 executive power because it does not regulate
17 purely private actors. Even the Department of
18 Justice concedes that conservatorship is not an
19 exercise of executive power. By itself, this is
20 another reason to reverse. Regardless, neither
21 party undermines Seila Law's observation that
22 the FHFA isn't in the same league as the CFPB
23 when it comes to liberty.

24 Second, the Court should focus on the
25 actual text of the statute, which the parties

1 essentially ignored. Neither party meaningfully
2 disputes that for cause provides the weakest
3 protection in removal law and can easily be read
4 to allow removal based on policy disagreement
5 with the President. The parties say that even
6 that is unconstitutional.

7 But their argument makes a hash out of
8 the take care clause, and it would also have
9 far-reaching consequences. Under their logic,
10 the Social Security Administration, the Office
11 of Special Counsel, the Federal Reserve, the
12 civil service, will all be subject to
13 constitutional attack, and that's just the
14 beginning. Neither party offers this Court a
15 coherent line.

16 I welcome the Court's questions.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel. I'd like to give -- get your take on
19 the question a number of my colleagues have been
20 asking. Say I agree with you that the acting
21 director is constitutional because removable at
22 will and he enters into the Third Amendment, but
23 the Third Amendment provides for payments in an
24 ongoing way and including payments under a -- a
25 -- a regular director who is -- is not

1 constitutionally appointed.

2 How does that work? What are the
3 consequences, particularly for the payments that
4 take place under the jurisdiction of the
5 unconstitutionally appointed director?

6 MR. NIELSON: I agree with the
7 Solicitor General's answer on this point. The
8 Third Amendment is not ongoing agency action.
9 It is a discrete thing. It is a contract. And
10 that is what is challenged. That's the decision
11 of the Haynes majority of the Fifth Circuit en
12 banc decision. That is the discrete thing being
13 challenged. There is not ongoing discretion
14 that might affect the interests of the
15 plaintiffs here. It's a contract, and that
16 contract is -- is what governs.

17 CHIEF JUSTICE ROBERTS: Well, there
18 were contracts before the Third Amendment too
19 and they were significantly altered, but I guess
20 my question is what if the complaining
21 stockholders here, you know, sent a letter to
22 the director, the confirmed one, and said we
23 want you to get out of this agreement because
24 it's unfair to us, and the director said no.

25 That would be action by the regular

1 director and, certainly, it would seem to me
2 could be challengeable under the -- given that
3 unconstitutionality.

4 MR. NIELSON: Well, I guess two
5 points, Your Honor. First, nothing like that is
6 in the complaint. There's no complaint about
7 this taint theory. So, you know, this is all
8 hypothetical.

9 But, beyond that, this isn't an
10 ordinary agency action where you could, like,
11 file a petition for rulemaking or something like
12 that. It's a contract, and, sure, the parties
13 could renegotiate the contract, but it takes two
14 to tango, and it's not just the decision of the
15 -- of the FHFA.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Thomas.

19 JUSTICE THOMAS: Thank you, Mr. Chief
20 Justice.

21 Counsel, usually when you have an
22 agency action, it's an enforcement action or
23 something that affects a particular party.

24 Here, you're talking about a major
25 change in an -- in -- in an entity in which the

1 parties -- the plaintiffs are invested. Now
2 they do -- I know you want to keep us at the --
3 sort of the initial stage of Amendment III or
4 the Third Amendment, but there are -- as Justice
5 Barrett noted, what about the administration of
6 it now? It's still in existence. It affects
7 them. And what about the future administration?
8 It will have a continuing effect. This is
9 unlike other agency actions.

10 How do you address that?

11 MR. NIELSON: Well, first, I would
12 again point the Court to the actual complaint
13 here. It's on page J.A. 117 is the relevant
14 count, and there's no ongoing taint theory here,
15 so all of this is hypothetical.

16 But, again, this is a contract, and
17 with a contract, sure, you might be unhappy with
18 it, but it was entered into by a conservator who
19 wasn't even exercising executive power, and the
20 FHFA as regulator can't just undo a contract.
21 It takes a decision from the FHFA and the
22 Treasury Department.

23 JUSTICE THOMAS: So the mere fact that
24 it was -- it was fortuitous and not for a -- an
25 acting director to do this insulates it from a

1 -- from a -- a challenge.

2 MR. NIELSON: Well, with respect, Your
3 Honor, I don't think it's this side that is
4 relying on a fluke. The -- the idea that the
5 acting -- that the fourth column provision has
6 anything whatsoever to do with the Third
7 Amendment is entirely implausible, and that's
8 why none of the other complaints or -- or counts
9 that raise this in other -- in other courts even
10 raise this as an issue, because it just didn't
11 have anything to do with it.

12 JUSTICE THOMAS: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Breyer.

15 JUSTICE BREYER: Thank you.

16 As probably you know, in the
17 structural cases like Peek-A-Boo and -- and the
18 others, I dissented. Very well. What is your
19 advice to me? Should I in a sense throw in the
20 towel? Should I stick to my prior dissent?
21 Should I say this is different because? And, of
22 course, I'm particularly interested in what
23 follows the because. What would you do?

24 MR. NIELSON: Well, this is different
25 because the thing that is being challenged here,

1 leaving aside the acting point, is an act of a
2 conservator, and that isn't even executive
3 power. The Department of Justice, which is
4 about the most vigorous defender of Presidential
5 power on earth, concedes that this is not
6 executive power. So that's one way to -- to
7 distinguish this entire issue. This is not --
8 doesn't raise any of those types of issues in
9 this case.

10 JUSTICE BREYER: Well, what if it --
11 it -- it's not part of the Article III
12 judiciary?

13 MR. NIELSON: No, Your Honor.

14 JUSTICE BREYER: It's not part of the
15 Article I legislature, and what does that leave?
16 It leaves Article II.

17 MR. NIELSON: Well, no, Your Honor,
18 the Court has not been clear if it's private
19 power or simply nonsovereign power. My gut says
20 it's nonsovereign power because it's an agency
21 that's doing it. But, if a private person can
22 do it, the government can do it too, and that
23 doesn't take executive power to get there, no
24 different than, you know, ordering books or
25 anything like that that the Court does. That

1 didn't make ordering books a judicial power.
2 It's just something the government can do to
3 function.

4 JUSTICE BREYER: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice Alito.

6 JUSTICE ALITO: We've said many times
7 that structural provisions of the Constitution,
8 like the appointments clause and rules about the
9 removal of executive officers, are ultimately
10 important because they affect ordinary people,
11 they affect liberty, as you just mentioned, and
12 they affect democratic accountability.

13 The argument against your position
14 here includes the -- the proposition that the
15 way in which the agency carries out its
16 responsibility as conservator has a profound
17 effect on the housing market and, therefore, a
18 profound effect on ordinary people.

19 What's your answer to that?

20 MR. NIELSON: The Court needs to
21 decide what type of power conservatorship is,
22 and once you know the answer to that, then the
23 logic all falls into place. Conservatorship is
24 not executive power. There are things that have
25 vast significance for the economy that are not

1 executive power. I point the Court to the Bank
2 of the United States, which surely was even more
3 consequential than this, but it wasn't executive
4 power because banking was not understood as
5 executive power.

6 So too here. Essentially, being a
7 conservator for a government insurer is not
8 executive power. It's just outside of Article
9 II even though it has significant effect on the
10 economy.

11 JUSTICE ALITO: All right. Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Sotomayor.

14 JUSTICE SOTOMAYOR: Counsel, I --
15 I'm -- the FHFA is, as a director, an executive
16 appointment. They presumably have executive
17 decisionmaking. But it seems to be that you're
18 trying to say that we should not be looking at
19 the agency qua agency as an executive agency,
20 but we should see whether the power that they're
21 wielding in individual situations is executive
22 or not. Am I getting your argument correct?

23 MR. NIELSON: Mostly correct. I -- I
24 think that you could look at the type of power
25 for a broader range of things, so if we're

1 talking about the agency as regulator, you would
2 look --

3 JUSTICE SOTOMAYOR: Well, if it's not
4 --

5 MR. NIELSON: -- at the agency
6 director.

7 JUSTICE SOTOMAYOR: -- I -- I think
8 one of my colleagues asked this. If the FHFA is
9 not an executive agency, what is it? Put aside
10 the conservatorship part of it. Is it or is it
11 not an executive agency?

12 MR. NIELSON: Yes, the FHFA is an
13 executive agency in that it has a regulatory
14 function too. This case doesn't confer --

15 JUSTICE SOTOMAYOR: All right. So, if
16 it's an executive agency, then I think we do
17 have to look at the constitutionality of its
18 structure, and -- and if we have to do that, how
19 do we get to a subdivision of whether an
20 individual act it did was executive or not?
21 Difficulty separating the concepts.

22 MR. NIELSON: Well, I would invite the
23 Court, if we're looking at the powers as
24 regulator, they are not significant executive
25 power. They exist, but Con- -- but Congress has

1 essentially given the FHFA, you know, a recipe
2 book, this is what you're supposed to do.

3 It's almost binary, and that easily
4 allows for cause to control the exercise of this
5 power because it doesn't have the sort of
6 discretion that the CFPB did.

7 JUSTICE SOTOMAYOR: That's actually
8 the point I was raising with the government
9 earlier, but I still see that as a different
10 argument.

11 So, if the shareholders -- if the
12 shareholders have argued that the director's for
13 cause removal is a structural error, that has to
14 do with Justice Alito's question and Justice
15 Gorsuch's earlier questioning of the government.

16 If they are correct, do we have
17 discretion against enjoining the Third Act? How
18 do we get from a structural error to a harmless
19 error? What do we consider to do that? In
20 which situations are we permitted to do that?

21 MR. NIELSON: Well, it certainly would
22 be the case when you're talking about
23 conservatorship. I know that that isn't exactly
24 the question, but, here, if we're talking about
25 a discrete act which is the thing that they have

1 challenged and that act did not require any
2 executive power whatsoever, it's hard for me to
3 see how you even get into the question of, you
4 know, is it harmless error. There was no
5 constitutional violation at the threshold.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Kagan.

9 JUSTICE KAGAN: Mr. Nielson, you --
10 you just said that the FHFA is not a very
11 important agency, doesn't have very many powers,
12 but I would think it has all the powers that
13 both the majority and the dissent referred to in
14 Seila Law. I mean, there's -- there's not much
15 that those two opinions agreed on, but this
16 seems to be one of them, that, you know, the
17 FHFA makes rules, it conducts enforcement
18 actions, it has subpoena power. You know, even
19 the dissent again in Seila Law says -- I'm
20 quoting here -- "the FHFA plays a crucial role
21 in overseeing the mortgage market on which
22 millions of Americans annually rely?"

23 So how can you say this?

24 MR. NIELSON: Again, my answer to this
25 would be I understand all of that. I think

1 you're always safe going with the majority and
2 the majority says that it's not a lot of power.

3 But your point is well taken. I think
4 the way that you reconcile the dissent and the
5 majority is the dissent is saying, look how much
6 effect it has in the real world, and the
7 majority is saying, but look at how much power
8 it actually exercises.

9 The difference between this agency and
10 the CFPB is the CFPB has vast discretion,
11 whereas, if you go through the statute here,
12 it's true they can do certain things but only in
13 a very, very limited way. Congress has
14 essentially said, here is the instruction
15 manual, go forth and do it.

16 And for something as reticulated as
17 that, if the agency doesn't do it correctly, the
18 President can say that's cause. That's the
19 easiest type of cause there is. You're supposed
20 to have a report. I don't have a report.
21 You're out the door.

22 JUSTICE SOTOMAYOR: But wait, wait.
23 You're -- you're suggesting that there's a
24 difference between just saying for cause and --
25 and saying inefficiency, neglect, or

1 malfeasance, but -- but where do we get that? I
2 mean, once again, the majority said we don't
3 want to really parse the language that way, and
4 the defense just assumed that these were
5 essentially coterminous restrictions.

6 MR. NIELSON: Well, the easiest way to
7 look at this is, if these are companion agencies
8 and Congress uses one language in Dodd-Frank and
9 the other language in the Recovery Act, we
10 ordinarily assume they mean different things.

11 And for all of the reasons that Dean
12 Manning explains in his article, Kent Barnett
13 explains in his article, the ordinary meaning of
14 for cause, at least with constitutional
15 avoidance, allows that type of removal.

16 JUSTICE KAGAN: Thank you, Mr.
17 Nielson.

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch.

20 JUSTICE GORSUCH: Good morning, Mr.
21 Nielson. A -- a lot of your remedial argument
22 seems to hinge on the happenstance that we had
23 an acting director at the time of the Third
24 Amendment's adoption. I -- I'd like to
25 highlight two potential difficulties with that

1 and ask for your thoughts.

2 The first is the assumption that the
3 acting director is answerable to the President
4 while the director is not. Under the statute
5 creating this outfit, the director appoints
6 deputy directors, the director, not the
7 President.

8 It appears that those deputy directors
9 would be insulated from the President therefore.
10 And when -- when the director steps aside, he
11 names the acting director, or rather he gives a
12 pool of three of his deputies and the President
13 chooses which of those three. But the director
14 appointed all three of them.

15 So I'm not sure in what sense or where
16 we get the inference or how we generate from
17 some penumbra emanating somewhere that the
18 President has the removal power over this acting
19 director. That's one.

20 And two is, let's -- let's box in
21 that, let's assume that's the case. So what?
22 The -- the plaintiffs here challenged actions
23 after -- during this whole period, including
24 after a period in which the acting director
25 disappeared and we now have a director.

1 You say, well, that -- that -- that
2 doesn't matter because the amendment is a thing
3 that was adopted by the acting director. But
4 the plaintiffs are challenging the director's
5 actions as void because he is unanswerable to
6 the President.

7 So why wouldn't we at least be able to
8 provide relief voiding the director's actions
9 once we had a -- a Senate-confirmed director in
10 2014?

11 MR. NIELSON: Well, that -- that's a
12 lot to answer. I'll do my best.

13 As to the acting point, the -- the
14 premise of the other side's argument is that the
15 Vacancies Act doesn't apply. I don't see the
16 basis for that. That's not consistent with how
17 courts have read it in analogous circumstances.

18 But even beyond that, merely because
19 -- assuming that the President could only pick
20 among those three, that says nothing about
21 whether the President can remove them.

22 Ordinarily, the power to designate
23 includes the power to undesignate, and, here,
24 the statute says nothing whatsoever to prevent
25 the ordinary operation of -- of that background

1 principle.

2 As to the "so what," I would point the
3 Court again to J.A. 117, which is the actual
4 complaint here. There isn't this ongoing theory
5 that, you know, we were challenging a -- a
6 future action. All they were challenging was
7 the Third Amendment.

8 You know, you could maybe make an
9 argument that the Third Amendment should be, you
10 know, undone or something like that, but that's
11 not even pleaded, and the idea that agency
12 inaction or, you know, merely defending
13 something that was constitutional when done
14 becomes unconstitutional really has no limiting
15 principle.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Kavanaugh.

19 JUSTICE KAVANAUGH: Thank you, Chief
20 Justice.

21 Good morning, Mr. Nielson. Is there
22 anything more you wanted to say in response to
23 Justice Gorsuch?

24 MR. NIELSON: Yeah, I would also like
25 to talk about the acting point a little bit

1 more. One of the arguments that the other side
2 makes is that the President could use the acting
3 to try to get away from ever having Senate
4 confirmation, and that -- there -- there's two
5 reasons why that isn't so.

6 One is that Congress has many tools to
7 try to stop presidential shenanigans like that.
8 But more than that, there is an appointments
9 clause backstop to all of this. The head of an
10 agency is supposed to be a Senate-confirmed
11 officer. You can have temporary, non- -- you
12 know, non-Senate-confirmed officer heading an
13 agency, but the appointments clause is a firm
14 backstop against that kind of chicanery that the
15 -- that the -- the plaintiff posits.

16 JUSTICE KAVANAUGH: In your opening,
17 you mentioned a -- a slippery slope argument
18 that if this agency structure was
19 unconstitutional, then so too would be the
20 Social Security Administration, the Office of
21 Special Counsel, which are also headed by single
22 directors, and I think the Solicitor General
23 agrees on that.

24 But then you went on to name
25 multi-member agencies in the federal and civil

1 service. And my understanding of the principle
2 that would be applicable here would be that
3 single director independent agencies are not
4 historically rooted, as the Court said in Seila
5 Law, and that's all we would be saying and
6 applying here.

7 MR. NIELSON: So, in my brief, I make
8 the point, what do you with the chair of the
9 Federal Reserve, which is separately nominated,
10 separately confirmed, and has his or her own
11 statutory duties? That's not controlled by a
12 multi-member entity. He -- he or she has her
13 own duties under -- under -- under law.

14 I have a theory for why that isn't
15 unconstitutional. I don't think that power is
16 significant. I also don't think you should
17 start inferring removal protections. But, under
18 their theory, why is that -- why would that be
19 constitutional, how could that be
20 constitutional?

21 Likewise for the civil service, you
22 know, in Seila Law, the Court says we're not
23 going to, you know, recognize an exception for
24 inferior officers that make real policymaking
25 powers, or we -- we haven't recognized one yet.

1 Well, if that's the case, all the
2 plaintiff has to do is throw on, as a last count
3 to a complaint, a challenge to somebody who's a
4 -- a member -- member of the civil service who
5 may have been involved and say that person
6 really is an inferior officer, and the whole
7 thing comes crashing down.

8 JUSTICE KAVANAUGH: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Barrett.

12 JUSTICE BARRETT: So, Mr. Nielson, I
13 would have come away from Seila Law thinking
14 that there were two exceptions to this rule,
15 Humphrey's Executor and Morrison versus Olson.
16 But it seems to me -- and this goes back to some
17 of the questions that Justices Sotomayor and
18 Kagan were pressing you on -- it seems to me
19 that you're kind of arguing for a third ground
20 here, which is, well, then we take a look at
21 what is the executive official really doing.
22 Does this really seem like a lot executive power
23 or a little executive power, something that
24 looks more like private power? Strikes me as a
25 pretty hard test to administer. So could you

1 say a little bit more about that?

2 MR. NIELSON: Sure. "Significant," of
3 course, is not my word. That's what the Court
4 used numerous times in Seila Law itself. So I
5 look to Seila Law to understand what the Court
6 means by "significant." And I think Seila Law
7 makes plain that "significant" captures the
8 liberty and accountability concerns that require
9 plenary control. The Court focused on two
10 things, whether private citizens are being
11 regulated and whether there is substantial
12 policy discretion.

13 Here, no one's talked about the point
14 that the Court said in Seila Law that the FHFA
15 does not regulate purely private actors. We're
16 not talking about the same sort of, you know,
17 course of power of the state that the CFPB
18 wields.

19 Likewise, Congress has tightly
20 reticulated what this agency can do. It's like
21 an instruction manual. And with a for-cause
22 removal protection, it makes the President easy
23 to control this thing so it doesn't slip -- slip
24 his leash or the -- or the buck doesn't stop
25 with the President. The President has ample

1 ability to control this type of agency.

2 JUSTICE BARRETT: Thank you,
3 Mr. Nielson.

4 CHIEF JUSTICE ROBERTS: A minute to
5 wrap up, Mr. Nielson.

6 MR. NIELSON: Thank you, Your Honor.

7 I would like to return to the point
8 that Justice Kavanaugh made about, you know, the
9 parade of horrors or where does this end. It
10 seems to me the Court is going to have to answer
11 some very hard questions, including what is the
12 constitutional basis for any of this? Is it the
13 Vesting Clause? Well, if so, why doesn't the
14 logic of that end all the way with the civil
15 service?

16 Is it the Take Care Clause? If so,
17 how could a provision that allows for removal
18 for insubordination prevent the President from
19 faithfully executing the law?

20 Likewise, just how relaxed is standing
21 in these cases? And, you know, more than that,
22 how far is the Court really willing to go
23 without clear constitutional text to guide it?

24 These are all hard questions that have
25 significance far beyond this appeal.

1 Thankfully, however, the Court doesn't need to
2 answer any of them because an acting director
3 doesn't have tenure to begin with.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Mr. Thompson.

8 ORAL ARGUMENT OF DAVID H. THOMPSON
9 ON BEHALF OF THE PETITIONERS IN 19-422
10 AND THE RESPONDENTS IN 19-563

11 MR. THOMPSON: Mr. Chief Justice, and
12 may it please the Court:

13 The Net Worth Sleep -- Sweep leaves
14 Fannie and Freddie with no reasonable prospect
15 of becoming adequately capitalized, and so long
16 as it remains in place, the companies' best-case
17 scenario is to operate with so little capital
18 that under Section 4617(a)(3), FHFA could place
19 them into receivership at any time. FHFA
20 abandoned its conservatorship mission when it
21 imposed the Net Worth Sweep.

22 And the claim that only FHFA may sue
23 FHFA for nationalizing Fannie and Freddie is
24 contrary to this Court's decision in American
25 Power, decades of precedent on the lenient

1 zone-of-interests test, and the strong
2 presumption favoring judicial review of agency
3 action. Congress enacted the APA to make
4 judicial review widely available to anyone who
5 is aggrieved within the meaning of a relevant
6 statute. And shareholders are aggrieved by the
7 Net Worth Sweep.

8 But even under ordinary principles of
9 state corporation law, our claims may proceed
10 because they are direct. There are two distinct
11 injuries caused by the Net Worth Sweep, one
12 suffered by the companies, which cannot rebuild
13 capital and return to a sound condition, and
14 another suffered by private shareholders who
15 were moved -- were removed from the companies'
16 capital structures.

17 To see this, consider a hypothetical
18 Third Amendment that required the companies to
19 pay their net worth to plaintiffs rather than
20 Treasury. That action would have injured the
21 companies no less than the real Third Amendment,
22 but it would not have visited an injury on
23 plaintiffs.

24 The Net Worth Sweep needlessly
25 dissipated the assets of the companies FHFA is

1 charged with rehabilitating. And FHFA's
2 sweeping claims to unlimited standardless
3 discretion powerfully illustrate the framers'
4 wisdom in refusing to vest executive authority
5 in an unaccountable fourth branch of government.

6 I welcome the Court's questions.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel. Your claim which you describe as the
9 nationalization of the enterprises is basically
10 that the common shareholders, or your -- your
11 clients, were -- were -- were left out in the
12 cold and their holdings rendered worthless.

13 But I checked this morning, and Fannie
14 Mae was trading at \$2.69 and Freddie Mac at
15 \$2.56, and your shares are not worthless.
16 They're worth something, presumably largely
17 based on judgments about what the future holds.
18 So doesn't that run -- render your sort of
19 nationalization rhetoric just that, rhetoric?

20 MR. THOMPSON: No, Your Honor, in --
21 in the sense of there's no scenario under the
22 Third Amendment in which we will be able to
23 recover any economic value.

24 It's true that there's value in the
25 shares, but that's attributable to two factors,

1 number one, this lawsuit and, number two, that
2 there is an ongoing political discussion about
3 what to do with these companies, and maybe one
4 day in the future the government will abandon
5 the Net Worth Sweep. But, right now, it's in
6 force and effect, and the companies have been
7 nationalized.

8 CHIEF JUSTICE ROBERTS: Well, putting
9 aside the lawsuit -- lawsuit answer, the future
10 does seem to me to suggest that there is still
11 value in your shares. Now it may be a gamble on
12 the future, but that's -- that has value in
13 itself.

14 And on the other side of that, we
15 can't lose sight of the fact that, you know,
16 this was -- the Third Amendment, this was a
17 lifeline thrown to your clients, and that has to
18 be worth something too.

19 MR. THOMPSON: Well, Your Honor, so,
20 first of all, respectfully, I don't think the
21 Court should put aside the lawsuit. That's an
22 important driver, obviously, in the value of the
23 stock. But, in terms of the lifeline, Your
24 Honor, I -- I would just point out that the Net
25 Worth Sweep exposed that line of commitment to

1 maximum vulnerability because the companies can
2 never build up capital to absorb losses.

3 So, if there had not been a Net Worth
4 Sweep, there would be 124 billion dollars of
5 capital on the balance sheet today standing
6 between future losses and the line of
7 commitment. The -- the Net Worth Sweep took
8 away that ability to rebuild capital and has
9 exposed that lifeline to maximum vulnerability.

10 CHIEF JUSTICE ROBERTS: Do you make a
11 claim going forward about the payments even if
12 you accept the validity of what the acting
13 director did?

14 MR. THOMPSON: Yes, Your Honor, we do.
15 Under 12 C.F.R. 1237.12(a) and (b), not a penny
16 can be paid to the Treasury without the approval
17 of the director, and since 2014, there's been a
18 Senate-confirmed director with for-cause removal
19 protection. And on J.A. 118, we're asking that
20 all those future payments be enjoined.

21 CHIEF JUSTICE ROBERTS: Well, so your
22 theory is that even if an acting director
23 approved the instrument under which payments are
24 going to be made, that when those payments are
25 made, if there's an unconstitutional director,

1 that they are invalid?

2 MR. THOMPSON: Well, that -- that we
3 are challenging the regulatory action of the
4 Senate-confirmed directors in approving these
5 dividends. And, of course, there's 4512(f),
6 which handcuffs the President, and so that even
7 if there's an acting director, the President
8 can't put the person that he wants in there. He
9 has to pick one of the three deputy directors,
10 who were in turn picked by the prior director.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Thomas.

14 JUSTICE THOMAS: Thank you, Mr. Chief
15 Justice.

16 Mr. Thompson, the -- both the
17 government and amicus point out that your
18 complaint only notes or -- or focuses on the
19 adoption of Amendment III, or the Third
20 Amendment. I admit that, obviously, your --
21 your prayer for relief speaks in injunctive
22 relief, as you just noted.

23 But would you spend a few minutes on
24 that, should -- as to how we read in continuing
25 implementation of the amendment and future

1 implementation of the amendment when you only
2 complain of the adoption of the amendment?

3 MR. THOMPSON: Thank you, Your Honor.
4 We -- we do complain about the adoption, but we
5 also note throughout the complaint the
6 overpayments that were being made. We calculate
7 those overpayments to be 124 billion dollars,
8 and each one of those overpayments was an
9 implementation of the Net Worth Sweep. So that
10 theme really runs throughout our complaint.

11 We also complain about how, over time,
12 the -- the commitment itself has been exposed to
13 vulnerability, and so the implementation issues
14 are important, and that's one of the reasons on
15 J.A. 118 why we ask for an injunction in the
16 future so that there aren't any more dividend
17 payments to the Treasury at the expense of the
18 private shareholders.

19 JUSTICE THOMAS: Would it have
20 affected your separation of powers argument if
21 the President, together with the director, a --
22 a sub -- a -- a future or subsequent director,
23 and the Secretary of the Treasury fully endorsed
24 Amendment 3, openly endorsed and endorsed it in
25 writing? In a sense -- in essence, if all three

1 ratified what has been done with this amendment,
2 would it change your complaint at all?

3 MR. THOMPSON: Well, certainly, if it
4 was done after the fact, we -- it would still be
5 unconstitutional. One of the things that's
6 pernicious about this structure is it reduced
7 the President in -- in the real world to the
8 cajoler in chief where this was, as one of my
9 friends on the other side said, it takes two to
10 tango. And so this wasn't a reflection of the
11 what the President wanted. It was a reflection
12 of what the President was able to negotiate.

13 In your hypothetical, Justice Thomas,
14 if they were all to have done that
15 simultaneously on day one, that might have
16 changed things. But the other thing to realize
17 is, if we were creating a but-for world in which
18 there was no for cause removal protection, we'd
19 have to go back to the beginning of the agency,
20 at least to the beginning of the Obama
21 Administration, and see how the companies and
22 the conservator were different in 2012 at the
23 time of the sweep.

24 The administration had ongoing fights
25 with Mr. DeMarco. It led -- we put this in our

1 red brief at page 72 -- to calls for Mr. DeMarco
2 to be fired, and the administration said, we
3 don't have the authority to fire him.

4 JUSTICE THOMAS: But how would we
5 unscramble the egg here? How do we put the
6 parties back into the position they were in
7 prior to Amendment III?

8 MR. THOMPSON: Thank you, Your Honor.
9 Our preferred remedy that we articulated to the
10 Fifth Circuit Court of Appeals en banc is that
11 the overpayments measured against the
12 18.9 billion dollars of dividends that were
13 being paid, that anything above that be treated
14 as a paydown of principal on the government's
15 liquidation preference. And if you do the math,
16 the government's been paid back in toto plus 10
17 percent interest and there's 29.5 billion
18 dollars left over.

19 The Fifth Circuit Court of Appeals
20 asked the parties to address three questions.
21 They gave the government 100 pages between FHFA
22 and Treasury to address it, as it said, "in
23 practical terms, what would setting aside the
24 Net Worth Sweep entail and how would it affect
25 other functions of the FHFA."

1 And in response to our preferred
2 remedy, the government and FHFA said precisely
3 nothing. They did not object. They had no
4 practical concerns that they gave voice to.

5 JUSTICE THOMAS: Thank you.

6 MR. THOMPSON: And it's an accounting
7 adjustment.

8 CHIEF JUSTICE ROBERTS: Justice --
9 Justice Breyer.

10 JUSTICE BREYER: The talk -- you --
11 you said, well, this is really like a
12 nationalization and the -- the government took
13 the company, gave it to the Treasury, and our
14 shares are near worthless.

15 Well, why didn't you bring a takings
16 claim?

17 MR. THOMPSON: Your Honor, we have
18 brought a takings claim, but that doesn't
19 absolve this Court of -- under the APA, of
20 addressing our challenge to the lawfulness of
21 the agency action. There's no reason to think
22 that --

23 JUSTICE BREYER: I didn't say it did.
24 I was just thinking, if you brought a takings
25 claim --

1 MR. THOMPSON: Yes, Your Honor.

2 JUSTICE BREYER: -- and this seems
3 like a takings claim, why should we stretch out
4 of recognition or stretch or try to draw lines
5 unnecessarily on the question of derivative
6 actions?

7 MR. THOMPSON: Well, I think it's
8 basic --

9 JUSTICE BREYER: I'm -- I'm aware of
10 derivative action of the conservator. In fact,
11 he so -- goes so far that the company's hurt,
12 really hurt, and the shareholders are destroyed,
13 bring a takings claim, but as long as there's a
14 colorable claim, as long as there's a colorable
15 defense, forget it. Apply ordinary derivative
16 law.

17 MR. THOMPSON: Well, Your Honor, two
18 points. Number one, principles of
19 constitutional avoidance would counsel in favor
20 of not reading the Congress as having authorized
21 nationalization. There's no reason to think
22 Congress would have wanted to stick the
23 taxpayers with a bag tab for a takings verdict
24 in the Court of Federal Claims.

25 But also, if the Court were to apply

1 traditional measures of derivative direct, we
2 say we win. We would point to the Alleghany
3 case.

4 JUSTICE BREYER: I see that, but you
5 have a rather special company which your
6 shareholders brought into -- brought into with
7 knowledge, and that is a company that has a
8 public as well as a -- more of a public aspect
9 than ordinary. They're there and both parts are
10 relevant.

11 And so even if this is at the border
12 of derivative action, shouldn't we interpret the
13 derivative actions -- why not? -- to encompass
14 what goes on here with a colorable argument that
15 they did it for the benefit of the -- of the
16 corporation?

17 MR. THOMPSON: Well, again, Your
18 Honor, constitutional avoidance. We don't think
19 the Court should depart from its precedent in
20 Alleghany to create a massive takings liability.

21 JUSTICE BREYER: All right. If I have
22 time for one more question, I don't know.

23 On your APA claim, my cousin, Joe,
24 whom I love dearly, I give to him a piece of
25 land and I assign to him, though I can retain

1 ownership, I assign to him all rights to bring
2 any lawsuit, defend lawsuits, I have no rights
3 left in respect to that land. I gave them all
4 to Joe.

5 And if Bill comes along and cuts the
6 tree illegally, it's Joe who can sue, not me,
7 right? And as long as that's so, why is the APA
8 any different?

9 Suppose it's the Forest Service that
10 does something to that land. I assigned all my
11 rights to Joe. Joe can bring an APA claim, but
12 I gave mine away, right?

13 MR. THOMPSON: Well, Your Honor --

14 JUSTICE BREYER: If that's right, how
15 is this any different?

16 MR. THOMPSON: Well, because, Your
17 Honor, here, it would be Joe suing Joe because
18 they -- they would have to sue themselves and
19 it's a succession clause, not a termination
20 clause.

21 Congress knew how to terminate claims.
22 They did so in 4617(b)(2)(K)(i), where they
23 terminated the claims in receivership, and they
24 didn't do that here with the -- the -- the
25 conservatorship. So we would respect --

1 JUSTICE BREYER: I'm thinking of
2 the -- I'm thinking of the anti-injunction
3 clause, you see, or I'm thinking of both
4 clauses. Look, Joe can't sue because I assigned
5 to Joe -- I mean, I can't sue because I gave all
6 those rights to Joe. Now is the APA any
7 different if that's Joe's claim?

8 MR. THOMPSON: It -- it -- it is
9 different, Your Honor, if we look at the
10 language of -- of this statute. It says -- it
11 doesn't say just all rights go. It says all
12 with respect to the regulated entity and its
13 assets, and that's been understood not to
14 include direct claims, only the derivative
15 claims and not the derivative claims that would
16 be terminated.

17 JUSTICE BREYER: I thought that --

18 CHIEF JUSTICE ROBERTS: Justice Alito.

19 JUSTICE BREYER: All right. Thank
20 you.

21 JUSTICE ALITO: Counsel, let me give
22 you this hypothetical situation. A director is
23 appointed and, upon appointment, the director
24 and the President have a joint news conference.
25 The President says, I know the statute says that

1 you are removable only for cause, but that's
2 unconstitutional. Under the Constitution, I can
3 remove you at will, and I will proceed on that
4 basis. And the director says, I agree, and I
5 will conduct myself on that understanding, and,
6 in fact, I will verify every single morning that
7 you still want me in office and you don't, as a
8 matter of whim, want me to leave.

9 Would it follow that everything done
10 thereafter by the director is ab -- is void ab
11 initio?

12 MR. THOMPSON: Well, Your Honor, I --
13 I think that would obviously mitigate the
14 concerns over the President being the cajoler in
15 chief and not having sufficient control over the
16 agency.

17 There'd still be a residual concern
18 that, well, the director might change his mind
19 and then he's got this legal protection, and so
20 there still might be some issues about
21 accountability and liberty, but it -- it
22 certainly would be a much less problematic
23 situation than what we have here.

24 JUSTICE ALITO: Well, I -- I do think
25 we have to answer that question in order to

1 determine whether it follows that the -- the
2 identification of an unconstitutional
3 restriction on removal necessarily means,
4 because it is a structural defect, that
5 everything done by that officer is void ab
6 initio.

7 MR. THOMPSON: Well, Your Honor, we do
8 think that this qualifies under Weaver for being
9 a structural error for two reasons.

10 Number one, there are interests beyond
11 the outcome that is produced. There's the
12 interest in accountability. And, also, it's
13 hard to measure the effects.

14 That's why this Court, presumably, in
15 Seila Law and Free Enterprise, said plaintiffs
16 don't have to create a but-for world. Federal
17 courts aren't well suited to psychoanalyzing
18 coordinate branches of government and what they
19 would do in a hypothetical world, and so where
20 it's hard to measure the effects, and that's
21 particularly true here, where, again, it was a
22 negotiation between a Republican appointee and
23 the Obama Administration, and they had had
24 bitter disputes throughout the three years that
25 Mr. DeMarco was there.

1 JUSTICE ALITO: Well, it is hard to
2 measure the -- the -- the effects, but sometimes
3 we have to do things that are hard.

4 Suppose we were to agree with
5 Mr. Nielson that this can't be distinguished
6 from the -- the head of the Social Security
7 Administration, or suppose we were to overrule
8 Humphrey's Executor, as some members of the
9 Court have suggested. Do you think it would
10 follow that everything ever done by a Social
11 Security administrator or everything ever done
12 by the FCC or one of the other multi-member
13 commissions was void ab initio, they would all
14 be wiped off the books?

15 MR. THOMPSON: Your Honor, as I
16 understand it, in Free Enterprise, the Court
17 left open the question of, if it's a lower-level
18 employee who made the determination at the
19 Social Security Administration, whether that
20 would have to be voided, but, certainly, yes,
21 our position is everything done by the principal
22 officers of those agencies would -- would be
23 void.

24 Of course, there would be the statute
25 of limitations in Article III that would limit

1 what would have to be thrown out, and, of
2 course, in Noel Canning, this Court invalidated
3 20 months of the NLRB's activities.

4 JUSTICE ALITO: Well, do you think
5 that if a provision of a massive statute is held
6 to be unconstitutional, a person who was not in
7 any way affected by that provision is entitled
8 to relief?

9 MR. THOMPSON: Well, when -- if -- if
10 they suffered Article III injury at the hands of
11 that person and it's a separation of powers
12 case, I do think it should be void given the
13 broad prophylactic protections that separation
14 of powers protect.

15 JUSTICE ALITO: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Sotomayor.

18 JUSTICE SOTOMAYOR: I want to follow
19 up a little bit on Justice Alito's questions.

20 It does seem counterintuitive, perhaps
21 illogical, to say that assuming you're right
22 that the FHFA director must be removable at
23 will, why you should get anything more than a
24 gen -- than a declaratory judgment to that
25 effect.

1 First, the argument is that this
2 decision was entered into by two entities under
3 the complete control of the President. There is
4 no dispute that the Treasury had -- treasurer is
5 removable at will.

6 So we know what the President would
7 have wanted because he had an agency he fully
8 and unequivocally controlled entering this
9 agreement.

10 And then, secondly, we have an acting
11 director, which almost logically means that he
12 could be removable entering it.

13 Second, no President has ever tried to
14 remove the director, acting or otherwise. So,
15 given those circumstances, I am not sure why
16 structural -- how this agreement or even the at
17 will -- how the at will termination affected
18 you.

19 MR. THOMPSON: Well, Your Honor --

20 JUSTICE SOTOMAYOR: And why you're
21 entitled to an unwinding of an agreement that
22 was entered into, assuming, again, assuming we
23 rule against you, that had a valid or a
24 reasonable business reason for being entered
25 into.

1 MR. THOMPSON: Your Honor,
2 respectfully, we don't know what the President
3 wanted. We know the President was willing to
4 sign this deal; otherwise, the Secretary of
5 Treasury wouldn't have signed it.

6 But, as my friends on the other side
7 said, it took two to tango. This was a
8 negotiation and it was a negotiation with a
9 Republican appointee with whom things --
10 relationships had gotten so bad that on our red
11 brief at page 72 we point out there was open
12 calls for him to be fired, and the
13 administration said he's an acting director and
14 we can't fire him.

15 And, presumably, that's because of
16 4511(a) that says it shall be an independent
17 agency of the federal government. And under
18 this interpretation that the acting director can
19 be fired, it would toggle back from being a
20 radically independent agency to a radically
21 dependent agency.

22 My friend on the other side points to
23 the Swan case. But, there, that was the NCUA
24 and there were three Board members, and the fact
25 that one of them became dependent didn't

1 transform the agency radically.

2 Here, when you have a single director
3 and you say that the acting director can be
4 fired at -- at will, then you just radically
5 transform the nature of it.

6 In addition, even if I'm wrong about
7 that, under 4512(f), the President's hand --
8 hands are handcuffed in terms of whom he can
9 designate, and we do challenge the actions of
10 the regulator.

11 So, for all of those reasons, we --
12 we're entitled to relief. Certainly,
13 backward-looking relief was given in the Bowsher
14 case as well.

15 JUSTICE SOTOMAYOR: You argue that the
16 APA eliminates any need to look into whether a
17 shareholder's injury is derivative of an injury
18 suffered by the corporation.

19 So I take it that you're taking the
20 position that anyone holding a single share in a
21 company can challenge any agency action or
22 rulemaking that affects the company's stock
23 price?

24 MR. THOMPSON: Well, Your Honor --

25 JUSTICE SOTOMAYOR: That would seem to

1 me as a sea change in how administrative law
2 challenges are litigated.

3 MR. THOMPSON: Your Honor, this was a
4 concern that the American Power dissent
5 articulated, and 75 years later, it hasn't come
6 to fruition and I think because of cases like
7 Air Courier.

8 There, you had the Postal Service with
9 a monopoly on international air routes. The
10 employees came forward when that monopoly was
11 lost and said that's going to hurt us
12 economically. And the Court said these
13 employees aren't within the zone of interest.

14 But, here, it is different because
15 it's highly protective of shareholders' rights.
16 We see that in the rehabilitative mission of the
17 conservator. We see that in receivership, where
18 there's a priority scheme as to how the money
19 can be distributed. And we see that in the
20 preserve and conserve mandate. And we see that
21 in 4617(b)(11)(e), which requires the
22 conservator to maximize the net present value of
23 asset sales. That protects shareholders more
24 than anyone because they're at the bottom of the
25 waterfall --

1 CHIEF JUSTICE ROBERTS: Justice Kagan.

2 MR. THOMPSON: -- for getting
3 proceeds.

4 JUSTICE KAGAN: Mr. Thompson, I -- I
5 just go back to Justice Alito's question about
6 the Social Security Administration. I'll put
7 some scary sounding numbers on this.

8 The SSA has been led by a single
9 commissioner since 1994 and ever since then,
10 it's rendered 650,000 decisions every year, so
11 that's about 17 million decisions.

12 Now you told Justice Alito, well,
13 maybe there are some exceptions for lower-level
14 employees. I'm not sure that ALJs would qualify
15 as that, and even if they do, let's assume,
16 which I think is probably true, that all of
17 those decisions are rendered pursuant to
18 guidance and rules that the SSA commissioner has
19 enforced.

20 So are we really going to void all of
21 those decisions?

22 MR. THOMPSON: Well, Your Honor, a few
23 points. Number one, there's the statute of
24 limitations and the Article III limitations.

25 There's also the fact that the SSAA is

1 different than the FHFA. We don't think it
2 makes a constitutional difference, but it -- it
3 has much more limited jurisdiction. It's not
4 running multi-trillion dollar companies.

5 And so, to the extent the Court wants
6 to try to preserve the Social Security
7 Administration, it could potentially try to do
8 that. We don't think it should. We agree with
9 the Solicitor General that it's unconstitutional
10 and that, yes, its actions over the last --
11 within the statute of limitations should be void
12 if -- if done by principal officers.

13 JUSTICE KAGAN: Don't you think it's a
14 little bit odd because, I mean, none of us
15 really think that any of those decisions would
16 be different if there were a different level of
17 Presidential supervision, do we?

18 MR. THOMPSON: Well, Your Honor, I --
19 I think that's right. That was Lucia, in fact,
20 as I recall. It was precisely because it wasn't
21 thought that there would be different that a --
22 a new ALJ was assigned on remand.

23 JUSTICE KAGAN: No, I -- I mean, I
24 think Lucia is a different question. It's an
25 appointments clause question. We can come back

1 to that.

2 But, I mean, are you really making a
3 good faith argument that if there were at -- if
4 there were for cause -- excuse me, if there were
5 at will removal of the Social Security
6 Administration that these 17 million decisions
7 would come out differently or, indeed, that any
8 of them would?

9 MR. THOMPSON: Your Honor, I -- I -- I
10 understand and -- and highly likely that they
11 would not, but the same was true when Stern and
12 Marshal, it was very unlikely that the
13 bankruptcy judge, if he had had Article III
14 protection, would have come out a different way
15 on that state law counterclaim, and yet still
16 relief was provided.

17 And likewise in Seila Law. It was
18 very unlikely that if the President had -- was
19 able to fire the head of the CFPB, that that
20 subpoena to that law firm would have come out
21 any differently. So that's sort of a feature
22 of --

23 JUSTICE KAGAN: I mean, in a case like
24 this, Mr. Thompson, where we're trying to figure
25 out the proper remedy, I mean, it's -- it's --

1 it's a -- it's a kind of equitable question,
2 isn't it, and we're trying to figure out what
3 position you would have been in absent a
4 constitutional violation. Why -- why isn't that
5 the right question?

6 MR. THOMPSON: Well, I think footnote
7 12 of Free Enterprise and Seila Law just last
8 term rejected that. They said plaintiffs don't
9 have to try to re-create a but-for world. And
10 here if we -- it shows why. We'd have to go
11 back to 2009 and see what would have happened if
12 Director Watt, for example, had been there
13 throughout the entire time and, you know, would
14 the president have preferred to keep the money
15 at Fannie and Freddie and spend it on affordable
16 housing rather than send it all to the
17 Republican-controlled House of Representatives
18 and the Treasury?

19 So that's a difficult --

20 JUSTICE KAGAN: Does that mean,
21 Mr. Thompson, that we have to do a great deal
22 more than invalidate the -- the -- the Third
23 Amendment and everything that follows from it?
24 I mean why shouldn't we go back to the -- the --
25 the -- the -- the first or the second?

1 MR. THOMPSON: Well, Your Honor, we
2 focused on the Third Amendment because that's
3 the -- the feature of this that rearranged the
4 capital structure, but as we made clear to the
5 Fifth Circuit Court of Appeals, we are perfectly
6 content with all of these arrangements, which,
7 as we say in the complaint, were a concrete
8 life-preserver. It's like getting a credit card
9 with a double-digit interest rate that you can't
10 repay the debt on. It's not debt, but you can't
11 pay the money back, and so --

12 JUSTICE KAGAN: Thank you,
13 Mr. Thompson.

14 MR. THOMPSON: -- we would be
15 perfectly content with it being thrown out.

16 CHIEF JUSTICE ROBERTS: Justice
17 Gorsuch.

18 JUSTICE GORSUCH: Counsel, your
19 remedial ask is a big one and -- and hard --
20 hard for us to swallow, I know. And -- and I --
21 I want to -- I want to focus on a couple aspects
22 of it that -- that we've -- that are
23 particularly important. The -- the first is
24 that once we had a new director in 2014, we --
25 we've heard suggestion that -- that you haven't

1 complained about actions taken after 2014 in
2 your complaint, and the only complaint has to do
3 with the entry into the Third Amendment, which
4 took place during the pendency of a prior
5 director.

6 I'd like your -- I'd like to
7 understand your thoughts about that first. And,
8 second, whether a new constitutionally correct
9 director that we ordain today could ratify the
10 actions of an unconstitutional arrangement
11 previously. Why would it have to be void?

12 MR. THOMPSON: Yes, Your Honor. So on
13 the first question, we do complain about the
14 implementation. We are complaining about each
15 and every one of the decisions under the Net
16 Worth Sweep by the director. Every one of these
17 dividend payments gets declared quarterly, and
18 none of them can be paid to the Treasury under
19 12 C.F.R. 1237.12(a) and (b) unless the director
20 blesses those.

21 And so we've complained in the
22 complaint that, but for each and every one of
23 those payments, there'd be \$124 billion of extra
24 capital at the company. And, obviously, the
25 implication of that calculation in our complaint

1 is we're not satisfied that any of these
2 payments were made.

3 Now, as for the Court's second
4 question with respect to ratification, we don't
5 believe this could be ratified, in large part
6 because, if the government is coming in and
7 trying to justify this by saying, well, there
8 was a death spiral, we didn't know the companies
9 were going to do so well, well, now we know. We
10 know that they're thriving in -- in -- in terms
11 of their profitability, not soundness, because
12 all of the money is being siphoned off to
13 Treasury, but we don't believe it could be
14 ratified now, Your Honor.

15 JUSTICE GORSUCH: I -- I guess I don't
16 understand that latter answer, a -- a lot of
17 facts in there. But what legally, what
18 constitutionally would prohibit ratification?

19 MR. THOMPSON: Well, when the
20 underlying rationale that the government has
21 proffered is now, eight years later, been
22 totally exposed to have no validity, then we
23 don't see how the -- the government could sort
24 of time -- time-travel back in nunc pro tunc
25 flashbacks --

1 JUSTICE GORSUCH: I guess I'm
2 understanding why not. I mean, I understand
3 like the Federal Vacancy Reform Act says that
4 can't be done when its terms apply, and -- but
5 why -- why couldn't we as some sort of
6 equitable, remedial dodge do that here?

7 MR. THOMPSON: Well, I think the plain
8 language of the APA, which says that the
9 unlawful action shall be set aside, of course
10 with due account being taken for the rule of
11 prejudicial error, but as we've talked about
12 earlier today, this is structural error, not
13 harmless error.

14 JUSTICE GORSUCH: That really wasn't
15 my question.

16 MR. THOMPSON: Okay. I'm sorry.

17 JUSTICE GORSUCH: It -- it's fine. If
18 you -- if you have any further thoughts about
19 why it couldn't be ratified, I'd welcome them.
20 Let me just pose us one last question. And that
21 is the argument that, of course, the president
22 could have fired the acting director because the
23 Vacancy Act would normally and that would permit
24 him to do so.

25 MR. THOMPSON: Well, at -- at this

1 point, the Vacancies Act did not apply because
2 it had been more than 210 days since the Senate
3 had rejected the nominee that President Obama
4 had sent up. And so the FVRA just had no
5 application at the time of the Net Worth Sweep.

6 JUSTICE GORSUCH: Any reason why --
7 just that we shouldn't, as a background
8 principle, assume that the president could?

9 MR. THOMPSON: Well, one reason would
10 be with Wiener. Wiener said that you look at
11 the nature of the function of the office that's
12 vested in the officer. And I know some might
13 think Wiener wasn't correctly decided as an
14 original matter, but Congress is entitled to
15 legislate against the backdrop of this Court's
16 precedents. And -- and so the Wiener precedent
17 said here's how you can apply it and look to the
18 -- to the nature of the functions. It's
19 identical, the powers of the acting director and
20 the regulated director. And we've gone the
21 plain language of 4511(a), which says it
22 shall --

23 JUSTICE GORSUCH: Thank you.

24 MR. THOMPSON: -- shall be -- yeah.

25 JUSTICE GORSUCH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Kavanaugh.

3 JUSTICE KAVANAUGH: Thank you. And
4 good morning, Mr. Thompson.

5 Picking up on the first part of
6 Justice Gorsuch's question, the solicitor
7 general, in the reply brief on the remedies
8 question, starts with Marbury and says since
9 Marbury this Court has continued to subject
10 structural constitutional claims to the general
11 law of remedies that courts may deny relief on
12 such claims as a result of estoppel, de facto
13 officer doctrine, ratification, failure to make
14 a timely objection, or the grant of a stay, and
15 then says that you have cited other cases where
16 the Court has vacated actions taken by
17 unconstitutionally structured agencies.

18 But the solicitor general says those
19 cases show only that vacatur is permissible in
20 an appropriate case, not that it is mandatory in
21 every case and that those principles I've just
22 mentioned can apply. Your response to that?

23 MR. THOMPSON: Well, Number 1, they
24 haven't invoked, for example, the de facto
25 officer doctrine. That haven't invoked that in

1 this Court, so they -- they have waived that.

2 The only thing --

3 JUSTICE KAVANAUGH: No, you -- your
4 reaction to the general catalogue of principles
5 outlined by the solicitor general.

6 MR. THOMPSON: I don't believe that it
7 applies in a case brought under the APA.
8 Obviously, many of the older precedents before
9 1946 and even some after weren't under the APA.
10 But when the APA says "shall set aside" with due
11 account for the rule of prejudicial error, that
12 sweeps aside these equitable doctrines and tells
13 this Court that it shall set aside.

14 JUSTICE KAVANAUGH: And then switching
15 gears on the -- some of the arguments made by
16 the amicus, the forceful arguments made in
17 distinguishing *Seila Law* and other precedents, I
18 want to get your reactions to a couple of those.

19 The amicus points out that *Seila Law*
20 used the phrase "significant executive power."
21 Your response to that, was that a descriptor,
22 descriptive language, or -- or is that a
23 necessary condition before we can say that a
24 for-cause removal restriction on an executive
25 officer is unconstitutional? The amicus says

1 the latter.

2 MR. THOMPSON: We certainly did not
3 understand this Court to be creating a sliding
4 scale which would require lower courts to go and
5 try to figure out how much is a significant
6 executive power versus not. We -- we -- so we
7 did not understand it to be establishing a
8 legally required standard. If it were, there
9 are certainly significant executive
10 authority being --

11 JUSTICE KAVANAUGH: Okay.

12 MR. THOMPSON: -- exercised --

13 JUSTICE KAVANAUGH: Got it. Sorry,
14 can I stop you there?

15 MR. THOMPSON: Okay.

16 JUSTICE KAVANAUGH: Another
17 distinction that the amicus points out is that
18 the "for cause" language here is not the same.

19 MR. THOMPSON: That's true, but Wiener
20 tells us what the term "for cause" means. And
21 it says rectitude, which is moral failing. So
22 it's different but, in some ways, it's even a
23 higher standard than what was before the Court
24 in Seila Law. Moral failing is a smaller subset
25 than neglect and malfeasance.

1 JUSTICE KAVANAUGH: And then the
2 amicus says, on -- on a different front, that
3 the implications for other agencies could be
4 significant and that the Court could not limit
5 its holding here to single-director independent
6 agencies and leave those for another day,
7 whether those follow or not would still be an
8 open issue. Do you -- what's your reaction to
9 amicus's point that this would necessarily carry
10 over into multi-member agencies, at least with
11 chair designations and things like that?

12 MR. THOMPSON: We -- we disagree with
13 that, Your Honor. We think we fall comfortably
14 within the -- the Seila Law framework and there
15 would be no reason for the Court to go back and
16 redo that framework. So -- so we disagree with
17 it.

18 JUSTICE KAVANAUGH: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Barrett.

21 JUSTICE BARRETT: Mr. Thompson, I want
22 to just make sure I understand the thrust of
23 your argument for structural error. Let's
24 assume that we think that the acting director
25 was removable at will, there was no

1 constitutional problem with the acting director.
2 And let's further imagine that the acting
3 director is the one who was in charge for --
4 say, you know, up until six months ago, up until
5 last year, and then we had a confirmed director.

6 Does that mean that everything that
7 happened in the course of the Third Amendment is
8 then void as structurally invalid because at
9 some point a constitutionally invalid officer
10 entered the scene?

11 MR. THOMPSON: Well, Your Honor, if --
12 if it was an acting director and all -- all of
13 our arguments are rejected about 4512(f) as
14 well, and so that the Court concludes there was
15 no structural problem whatsoever at the agency
16 until just six months ago, certainly we would
17 complain about the last six months worth of
18 payments. But this is -- it's been many years
19 that there has been a Senate-confirmed director.

20 JUSTICE BARRETT: No, no, no, no. I
21 understand that. I'm just trying to figure out
22 how much participation by the unconstitutional
23 officer matters. I mean, because here we didn't
24 have constant, 100 percent of the time, control
25 by a confirmed director. But you're arguing, I

1 mean, and -- and I'm saying let's assume that
2 the acting director posed no problem, if the
3 Third Amendment was entered into by the acting
4 director with no constitutional problem you're
5 still saying that the participation of the
6 confirmed director was a structural error that
7 invalidated the Third Amendment and everything
8 with it, correct?

9 MR. THOMPSON: Well, that certainly --
10 it -- it -- it affected the implementation, yes,
11 Your Honor. That would invalidate any
12 implementation by that illegal director --
13 illegally constituted director.

14 JUSTICE BARRETT: But only for those
15 periods. It wouldn't actually throw the whole
16 thing out, it would just invalidate those
17 actions taken by the confirmed director?

18 MR. THOMPSON: I -- I think that is a
19 fair point that the director can only be, you
20 know, their actions can be invalidated -- you
21 know, the -- the director's actions that he took
22 could be invalidated but not his predecessor if
23 what his predecessor had done was totally
24 permissible.

25 JUSTICE BARRETT: And so then we would

1 have to parse through and figure out what was
2 done by the constitutionally problematic officer
3 and what was fine because it was done by the
4 acting director?

5 MR. THOMPSON: Well, but -- if, and
6 again it's a big if, if the Court concludes
7 there's no problem with 4512(f), then the Court
8 would want to look to see what did the director
9 do, and that stretches back to 2014, these
10 approvals.

11 JUSTICE BARRETT: And -- and let me
12 just -- I just want to be certain I understand
13 what you're asking for. Are you asking us to
14 say if we agreed with you on the whole thing you
15 want an injunction ordering Treasury to pay back
16 the billions of dollars?

17 MR. THOMPSON: No -- no -- no, Your
18 Honor. So this is very important. We're
19 seeking two things. Numbering 1, we're seeking
20 prospective relief so that in your hypothetical
21 the Senate confirmed director would be enjoined
22 from making any future sweep dividend, approving
23 any future sweep dividend payment; and, number
24 2, we're asking to go back and have the
25 overpayments, over and above the \$18.9 billion,

1 to be treated as a pay down of principal. And
2 that would essentially deem the government paid
3 back.

4 JUSTICE BARRETT: Thank you.

5 CHIEF JUSTICE ROBERTS: A minute to
6 wrap up, Mr. Thompson.

7 MR. THOMPSON: Yes, Your Honor.

8 For decades, federal conservators and
9 receivers have exercised powers under statutory
10 schemes that are indistinguishable from the one
11 at issue here. Yet no conservator receiver has
12 ever been before -- before permitted to operate
13 its ward for the exclusive benefit of the
14 federal government.

15 And so I will close with the words of
16 Mark Calabria, FHFA's current director, "Fair
17 and predictably applied insolvency rules allow
18 investors and creditors to judge the risks of
19 investing in a company. If that process can be
20 manipulated to favor one creditor, as FHFA has
21 favored Treasury, then there is no basis to
22 judge what could happen if a company fails.
23 Given the important role the government bodies
24 play in the resolution of many financial
25 institutions, it is essential that the

1 performance of this role assure all stakeholders
2 of fairness and predictability."

3 We agree. Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Rebuttal Mr. Mooppan.

7 REBUTTAL ARGUMENT OF HASHIM M. MOOPPAN ON
8 BEHALF OF THE FEDERAL PARTIES

9 MR. MOOPPAN: So my colleague hasn't
10 shown any presidential insulation on either side
11 of the Third Amendment. With respect to the
12 acting director, he hasn't shown any reason why
13 this Court would construe the statute to create
14 a constitutional problem rather than to avoid
15 one.

16 The only point he really made was to
17 say that once the acting director was removed by
18 the president at will, the president had limited
19 options for who could replace him. That's not a
20 problem about presidential removal, it's not the
21 claim they made, and it's actually not even
22 correct because the FCRA is available.

23 On the other side of the transaction,
24 it's undisputed, and indisputable, that the
25 Treasury Secretary signed the agreement and of

1 course is removal at will by the president. His
2 only argument on that side is to say, well,
3 maybe the contract wouldn't have happened
4 because of other things that happened earlier.

5 But that can't be right either because
6 on that theory, the agency could never act going
7 forward. Think about, for example, the CFPB.
8 On his theory he even though this Court has said
9 that the CFPB is now removable at will, the CFPB
10 can take no further action going forward because
11 someone could always walk into court and say,
12 well, the circumstances would have been
13 different if they hadn't been subject to a
14 removal restriction in the past.

15 That's not the way this Court judicial
16 review works. The question is whether the
17 agency action being challenged was insulated
18 from the president. And here, for the Secretary
19 of the Treasury and the acting director, the
20 ones who entered into the Third Amendment, it
21 was.

22 So then if we assume the Third
23 Amendment is valid as a constitutional matter,
24 his fall back argument is to suggest, well, the
25 implementation of the Third Amendment at least

1 can be challenged. And the reason that doesn't
2 work is because once the Third Amendment is
3 valid the money is owed.

4 The only question is how the money is
5 paid. Is it paid in cash or is it paid in
6 liquidation? I point the Court to J.A. in 179
7 and 180, which says: "To the extent not paid,
8 pursuant to Section 2A, dividends on these
9 shares shall accrue and shall be added to the
10 liquidation preference whether or not the funds
11 legally available for the payment of such
12 dividends and whether or not dividends are
13 declared."

14 A simple analogy that makes the point,
15 imagine that cabinet secretary entered into a
16 contract to buy a property and would pay for --
17 for five years a million dollars a year. And
18 then imagine two years in Congress imposed a
19 removal restriction. No one would say that the
20 -- the last three years worth of payments could
21 be challenged.

22 That money is owed as a legal matter
23 under a valid contract and there's no actual
24 executive or discretionary decision being made
25 in paying the money that's legally owed.

1 Finally, on the anti-injunction clause
2 which we didn't have too much time to discuss in
3 morning, I guess the key point I was trying to
4 make is that this wasn't a nationalization; it
5 was a renegotiation of dividend obligation. And
6 that's all the courts of appeals before the
7 court below recognized, and as Judge Stras and
8 Judge Bevis explained, the Court shouldn't
9 second-guess that under the anti-injunction
10 clause.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Mr. Nielson, this Court appointed you
14 to brief and argue the case as an amicus curiae
15 in support of the position that the structure of
16 the Federal Housing Finance Agency does not
17 violate the separation of powers. You have ably
18 discharged that responsibility for which we are
19 grateful.

20 The case is submitted.

21 (Whereupon, at 11:41 a.m., the case
22 was submitted.)

23

24

25

Official - Subject to Final Review

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