Nos. 19-422, 19-563

In The
Supreme Court of the United States

PATRICK J. COLLINS, et al.,

Petitioners,

v.

STEVEN T. MNUCHIN,
Secretary of the Treasury, et al.,

Respondents.

STEVEN T. MNUCHIN,
Secretary of the Treasury, et al.,

Petitioners,

v.

PATRICK J. COLLINS, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who focus on the intersection of law and finance. They teach, write, and practice in the fields of administrative law, corporate law, and securities regulation. Their scholarly work has been published in leading law journals and national media outlets.

David Zaring is a professor at the Wharton School of the University of Pennsylvania. He is a scholar of financial regulatory institutions and has written in particular about the post-financial crisis litigation pursued by the shareholders of Fannie Mae and Freddie Mac. *See* Steven Davidoff Solomon & David Zaring, *After the Deal: Fannie, Freddie, and the Financial Crisis Aftermath*, 95 B.U. L. Rev. 371 (2015).

Steven Davidoff Solomon is a professor at the University of California, Berkeley School of Law. He is one of the nation's most well-known authorities on corporate law and was a weekly contributor to *The New York Times* as The Deal Professor.

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[1] All parties and petitioners have filed blanket consents to the filing of *amicus* briefs. Counsel for a party has not authored the brief in whole or in part, nor has such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief.

None of the *amici* have any financial or other interest in this case.[2]

SUMMARY OF ARGUMENT

Once per decade, the executive branch and independent agencies have been called upon to drop their ordinary duties and take on the role of economic firefighter. During the 1990s, currency crises in Mexico, Russia, and Asia required the Federal Reserve Board (the "Fed") and U.S. Department of the Treasury ("Treasury") to work together to stabilize the global economy using stretched understandings of their statutory authority. In 2008 and 2009, the Fed and Treasury used a series of hasty deals and acquisitions to rescue the financial sector, including the takeovers of Fannie Mae and Freddie Mac ("the Companies") that eventually occasioned this litigation. And, as we write, the Fed and Treasury, along with other agencies, are once again acting in concert to rescue an unprecedented number of businesses that have been caught up in the COVID pandemic.

These rescues have been dramatic. They were probably necessary. But this recurring role of economic

[2] Prior to entering into academia, Professor Platt represented plaintiffs in related litigation challenging the Third Amendment, but he has no continuing financial or other interest in that litigation and has had no communication with the attorneys or parties involved in that matter regarding this case or this brief. This brief does not reflect the views of any of the parties or attorneys in that other litigation.

firefighter also brings new dangers. By design, the extraordinarily broad powers wielded by government during these crises often come without many of the ordinary legal and institutional checks that limit government action. Transparency is often lacking over these actions. And the legal authority claimed for these extraordinary measures – including, in the current crisis, a nationwide moratorium on housing evictions announced by the Centers for Disease Control – is not always clear.

In this zone of limited accountability, there is a heightened risk that the government will misuse or abuse its powers. The government might yield to pressures to leverage its extraordinary interventions in the economy to steer benefits to favored groups, to promote policy priorities entirely unrelated to the economic crisis, or to score political points by maximizing the volume of funds flowing into the federal fisc, potentially allocating serious losses and other harms along the way – and all without many of the limits ordinarily imposed on government action.

Amici contend that the contested transaction at the center of this case represents an alarming materialization of this risk. But it is precisely this risk that HERA's anti-injunction provision, 12 U.S.C. § 4617(f), was built to address. That provision gives FHFA free rein and insulates it from judicial review so long as it is acting within its statutory role as the Companies' "conservator." But once FHFA acts outside of that role, these special protections fall away, and ordinary tools of legal accountability for wrongful and abusive

executive actions, like the APA claims raised by Plaintiffs here, can and should be available.

Ultimately, it is up to courts to ensure that legal guardrails like HERA's anti-injunction provision are properly constructed – to preserve the government's discretion to act in crisis without litigious interference, while also ensuring that it is held accountable where appropriate.

Amici believe the stakes of this case go beyond particular issues of statutory interpretation or even the specific constitutional questions raised by the parties. The issue before this Court is whether the executive, when it is acting as economic firefighter, will be immune from any and all forms of legal accountability even for actions taken long after the crisis has faded. Our view is that the deal at issue in this litigation, signed four years after the height of the financial crisis, was deeply problematic. If any case merits an exception to the ordinarily broad deference accorded to the executive branch's financial rescues, this one does.

ARGUMENT

I. The Executive Branch Has Repeatedly Been Called Upon To Engage In Extraordinary Emergency Economic Rescues And Is Likely To Continue To Serve In This Role Going Forward.

It is no longer possible to pretend that the government will not be forced into dramatic action to respond

to economic emergencies, both domestic and international. During the past three decades, there have been three such interventions (one of which could be characterized as a cascading series of interventions), each more massive than the last. In each case, the government has stretched its legal authority and its actions have produced both winners and losers.

A. The Currency Bailouts of the 1990s.

In the 1990s, the Fed and Treasury teamed up to organize responses to collapses in the value of the Mexican peso, various Asian currencies, and the Russian ruble. In the case of the Mexican peso, Treasury partnered with the IMF to provide loans and loan guarantees through the Exchange Stabilization Fund (ESF) – an obscure revolving fund in the Treasury normally used to stabilize the dollar on world currency markets.[3] The U.S. ultimately contributed $20 billion through the "US-Mexico Framework Agreement for Mexican Economic Stabilization," sourced from the ESF.[4] The bailout helped stabilize the Mexican economy, but was

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[3] 31 U.S.C. § 5302. *See* Nora Lustig, *Mexico in Crisis, the U.S. to the Rescue: The Financial Assistance Packages of 1982 and 1995*, 2 UCLA J. INT'L L. & FOR. AFF. 25 (1997); *see also* Russell Dean Covey, Note, *Adventures in the Zone of Twilight: Separation of Powers and National Economic Security in the Mexican Bailout*, 105 YALE L.J. 1311 (1996) (challenging the legality of this executive action).

[4] *US-Mexico Framework Agreement for Mexican Economic Stabilization*, 1 NAFTA: L. & BUS. REV. OF THE AMERICAS 185 (1995).

politically unpopular, both with the public and with the legislature.[5]

Similarly, when several Asian currencies were collapsing, the U.S. government was forced to step in. Labelled the "Committee to Save the World" on the cover of *Time*, Fed Chair Alan Greenspan, Treasury Secretary Robert Rubin, and his deputy Larry Summers worked with the IMF to provide financing to a number of Asian governments, conditioned on a series of economic reforms known as "structural adjustment packages." These efforts imposed significant structural changes across Asia, including corporate governance requirements and enhanced regulatory authority. Though successful in calming the markets, the design and implementation of these heavy-handed interventions remains controversial.[6]

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[5] Congress subsequently imposed consultation requirements on any loans made through the ESF through the annual appropriations process in fiscal years 1997 and 1998. *See* C. Randall Henning, *The Mexican Peso Crisis of 1995 and Its Aftermath*, in THE EXCHANGE STABILIZATION FUND: SLUSH MONEY OR WAR CHEST? 62–64 (1999), https://piie.com/publications/chapters_preview/43/6iie2717.pdf.

[6] "In the wake of the Asian financial crisis, scholars from both outside and inside the IMF issued scathing criticisms of both the organization's inability to help avoid financial crisis and its overly draconian policy prescriptions . . . attribut[ing] part of the blame to the IMF's major shareholders, specifically the United States." Axel Dreher & Nathan M. Jensen, *Independent Actor or Agent? An Empirical Analysis of the Impact of U.S. Interests on International Monetary Fund Conditions*, 50 J.L. & ECON. 105, 106 (2007).

Finally, when the Russian ruble was devalued, accompanied by a moratorium on paying foreign creditors, the Fed again stepped in.[7] The devaluation devastated the American hedge fund Long-Term Capital Management (home to two future winners of the Nobel Prize in Economics), which had made a highly leveraged bet on the direction of the ruble. The ruble's collapse and the simultaneous crises in the Asian markets brought the hedge fund to the brink of failure – leading the Federal Reserve Bank of New York to organize a $3.625 billion bailout.[8] The bailout worked – markets stabilized. But commentators have recognized that it generated a significant "moral hazard" problem: Systemically important financial firms began to gain confidence that if they got into too much trouble, the government would be there to bail them out in order to stem the fallout.[9]

B. "Regulation by Deal" in Response to the Financial Crisis.

The second major rescue of the past three decades took place in response to the 2008–09 financial crisis.

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[7] Abbigail J. Chiodo & Michael T. Owyang, *A Case Study of Currency Crisis: The Russian Default of 1998*, Fed. Reserve Bank of St. L. (Nov.–Dec. 2002), https://research.stlouisfed.org/publications/review/2002/11/01/a-case-study-of-a-currency-crisis-the-russian-default-of-1998.

[8] John Komkov, *Do US Markets Really Need a "Supercop"?*, STANFORD REV. (April 2, 2008).

[9] *E.g.*, Henry T.C. Hu, *Faith and Magic: Investor Beliefs and Government Neutrality*, 78 TEX. L. REV. 777, 868 (2000).

Given the scale of the collapse, and the number of firms affected, the government had to act with haste on many fronts and with substantially more resources in order to put out the fire.[10] American International Group, Inc. (AIG), the largest insurer in the world at the time, initially received an $85 billion government loan, and later ended up receiving a total of $182.5 billion.[11] The government ultimately took over the insurance giant after engineering a vote over the objections of shareholders.[12] In a shareholder lawsuit challenging the government's action, the Court of Federal Claims found an Illegal Exaction, but awarded no damages.[13] This decision was vacated by the Federal Circuit on appeal, which found that the shareholders lacked standing.[14]

In the case of Fannie Mae and Freddie Mac (the "Companies"), both firms were placed in conservatorship, but not entirely taken over; part of the Companies were left in the hands of their public

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[10] For a review, see Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 464 (2009).

[11] STEVEN DAVIDOFF SOLOMON, GODS AT WAR: SHOTGUN TAKEOVERS, GOVERNMENT BY DEAL, AND THE PRIVATE EQUITY IMPLOSION 248 (2010).

[12] William K. Sjostrom, Jr., *The AIG Bailout*, 66 WASH. & LEE L. REV. 943 (2009).

[13] *Starr Int'l Co. v. United States*, 121 Fed. Cl. 428 (2015).

[14] *Starr Int'l Co. v. United States*, 856 F.3d 953 (Fed. Cir. 2017).

shareholders.[15] That choice, of course, led to this litigation.

The government also bailed out two automobile companies on the condition that they streamline their dealerships, leading to litigation that continues to this day.[16] It quarterbacked a series of deals that ended up transforming investment banking in the United States. It organized the sales of Bear Stearns, Merrill Lynch, and, post-bankruptcy, Lehman Brothers to commercial banks. And it required Goldman Sachs and Morgan Stanley to become bank holding companies regulated by the Fed as a condition of receiving government loans and other support that allegedly amounted to $874 billion in the case of Goldman Sachs and $2.28 trillion in the case of Morgan Stanley.[17] The government also bailed out the money market industry, again with resort to the ESF, and made other loans and engineered other bank mergers.

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[15] *See* Steven Davidoff Solomon & David Zaring, *After the Deal: Fannie, Freddie, and the Financial Crisis Aftermath*, 95 B.U. L. REV. 371, 374 (2015) (describing this litigation as "a new front in the debate over how, and who should be able, to hold the government accountable for its actions during and in the aftermath of an economic emergency").

[16] *See Colonial Chevrolet Co. v. United States*, 145 Fed. Cl. 243 (2019) (rejecting plaintiffs' Takings claims following a bench trial), *appeal docketed sub nom. Mike Finnin Mot., Inc. v. United States*, No. 20-1205 (Fed. Cir.) (filed Dec. 4, 2019).

[17] Better Markets, *Wall Street's Six Biggest Bailed-Out Banks: Their RAP Sheets & Their Ongoing Crime Spree*, April 2019, https://bettermarkets.com/sites/default/files/Better%20Markets%20-%20Wall%20Street%27s%20Six%20Biggest%20Bailed-Out%20Banks%20FINAL.pdf.

Eventually, the crisis abated. But the effects of the government's intervention were remarkable, resulting in a transformed financial sector and a government that was institutionally reoriented towards extraordinary interventions in the economy.

C. The Government's Massive Response to the COVID Crisis.

In the government's ongoing response to the COVID crisis, we see the latest example of the executive branch and central bank riding to the economic rescue. The Fed and Treasury have set up a number of facilities – so-called special purpose vehicles, which work a bit like corporate subsidiaries – that essentially offer dollars for a variety of assets held by banks and nonfinancial businesses. In the last crisis, the Fed also created these sorts of facilities, though they were not as well funded and not as directed at such a variety of asset classes as this one.[18]

In this crisis, fourteen special purpose vehicles have been created to provide dollars to nonbanks, most notably by buying up commercial paper, corporate bonds, and municipal commercial paper and bonds.[19] That takes the Fed far out of its comfort zone of dealing

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[18] *See* Davidoff & Zaring, *Regulation by Deal*, *supra* at 524-25.

[19] Fed. Reserve, *Term Sheet: Primary Market Corporate Credit Facility*, www.federalreserve.gov/newsevents/pressreleases/files/monetary20200323b1.pdf.

with and regulating banks, and places it in a new role – lender of last resort not just to financial institutions, but to a much broader swath of the economy, including local governments, corporations, and a panoply of other institutions. Though the Fed started rolling out its facilities before any congressional action, this role of crisis lender to all was subsequently endorsed in the CARES Act, when Congress appropriated funds for the facilities and directed the government deploy them pursuant to procedures applicable to the Fed's non-bank lending power in section 13(3) of the Federal Reserve Act.[20] As has become customary, the government's lending decisions have been subject to criticism from a variety of quarters, raising concerns about whether Wall Street has been bailed out more comprehensively than Main Street, and whether the response has been appropriate or disproportionate.[21]

The government's response to the current crisis has also had an international component. The Fed has flooded the world with dollars through swap lines with friendly foreign central banks and repo transactions

[20] *See* CARES Act, Pub. L. No. 116-136, § 4003. For an overview, see CONG. RESEARCH SERV., R44185, FEDERAL RESERVE: EMERGENCY LANDING (2020), https://fas.org/sgp/crs/misc/R44185.pdf.

[21] *See*, *e.g.*, Glenn Hubbard & Hal Scott, *'Main Street' Program Is Too Stingy to Banks and Borrowers*, WALL ST. J. (July 20, 2020), https://www.wsj.com/articles/main-street-program-is-too-stingy-to-banks-and-borrowers-11595284266. For a comprehensive review of the government's response to the COVID crisis, see David Zaring, *The Government's Economic Response to the COVID Crisis*, 40 REV. BANKING & FIN. L. ___ (forthcoming 2021), *available at* https://ssrn.com/abstract=3662049 or http://dx.doi.org/10.2139/ssrn.3662049.

with less friendly ones, although the authority to enter into such lines has never been clearly established in the Federal Reserve Act.[22]

Finally, the economic regulators have encouraged banks to lend through an explicit and implicit program of regulatory forbearance. This type of activity has been discouraged by Congress, but is unlikely to be reviewable in court.[23] The Fed and Treasury have not acted alone. Other agencies have also taken unprecedented action, exemplified by the Centers for Disease Control and Prevention's recent promulgation of a nationwide moratorium on housing evictions for the remainder of 2020.[24]

* * *

The government's role as economic firefighter has become institutionalized. When crises strike, financial and political actors now turn to the government, and in particular to the Fed and Treasury, with an expectation that they will take extraordinary steps to intervene in the economy in order to rescue it from collapse. But however necessary these dramatic interventions have been, and however successful in restoring economic stability, these interventions also come with a very real cost.

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[22] *See* Zaring, *The Government's Economic Response to the COVID Crisis*, *supra*.

[23] *See id.*

[24] *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID–19*, 85 Fed. Reg. 55,292 (Sep. 4, 2020).

II. The Government's Emergency Financial Interventions Raise Special Risks of Abuse.

These extraordinary interventions may be necessary to save the economy from recurring crises, but the powers that the government exercises during these episodes also raise special risks of abuse. The government faces a challenging set of incentives when engaging in economic rescues that may push it towards unfair, peremptory, and unjustified treatment of people and institutions.

By design, ordinary legal guardrails on administrative action – like notice and comment rulemaking and judicial review – are likely to be much more limited, or even absent altogether, when it comes to economic firefighting powers.[25] Similarly, some of the informal institutional guardrails that constrain administrative actions in normal times may not apply. Critical decisions may take place outside of normal well-governed channels without ordinary processes and layers of review. Entirely new programs may be assigned to agencies lacking the capacity to effectively manage them.[26] Or, as was the case here, Congress may

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[25] *Cf. Jifry v. Fed. Aviation Admin.*, 370 F.3d 1174, 1179 (D.C. Cir. 2004) (discussing the APA's "good cause" exception which "excuses notice and comment in emergency situations . . . or when delay could result in serious harm.").

[26] *See*, *e.g.*, MICHAEL S. BARR, HOWELL E. JACKSON & MARGARET E. TAHYAR, FINANCIAL REGULATION: LAW AND POLICY – SUPPLEMENT: THE FINANCIAL RESPONSE TO THE COVID-19 PANDEMIC 9 (Aug. 1, 2020), *available at* https://ssrn.com/abstract=3666461 (noting that one of the programs being implemented in the current crisis has been hampered by "significant regulatory confusion and

set up a new agency and task it with urgent programmatic responsibilities.

In this context, where the ordinary guardrails on administrative conduct are limited or absent altogether, *Amici* believe there is a seriously heightened risk that the government may succumb to temptations to misuse or abuse its emergency powers. For instance, the government may face strong incentives to ensure that the federal fisc is not only "protected" from losses related to its extraordinary activities, but also receives a maximum return on investment. During the last financial crisis, the government felt pressure to establish that the money it had used to bail out financial institutions had not been wasted, but had actually turned a profit.[27]

More generally, the government may be tempted to use emergency actions to pursue policies it favors that are unrelated to the mitigation of the emergency – including by benefitting favored interest groups and harming disfavored ones – and implement these

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administrative disarray," in part because it was assigned to be administered by "a small agency that was ill-equipped to suddenly administer a half-trillion-dollar economic rescue program.").

[27] *See* Jonathan Weisman, *U.S. Declares Bank and Auto Bailouts Over, and Profitable*, N.Y. TIMES (Dec. 19, 2014) ("[T]he Obama administration on Friday declared a profitable end to the sweeping federal interventions in Wall Street and Detroit. . . ."); Press Release, U.S. Dep't of the Treasury, *Treasury Sells Final Shares of AIG Common Stock, Positive Return on Overall AIG Commitment Reaches $22.7 Billion* (Dec. 11, 2012), http://www.treasury.gov/press-center/press-releases/Pages/tg1796.aspx.

actions without being subject to the usual procedural safeguards. During the financial crisis, the executive branch came to the rescue of only one set of nonfinancial companies – America's automobile manufacturers, whose workers were disproportionately located in electoral swing states.[28] There may have been good reasons for this bailout, but political connections between the unions seeking a rescue and the executive branch raised speculation, as did the way that the bankruptcy process for the automobile firms – another condition of the government's assistance – was managed.[29] Similarly, during the present crisis, Treasury and the Fed have faced criticism from climate activists and their allies on Capitol Hill for using taxpayer dollars to rescue the fossil fuel industry.[30]

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[28] Steven Rattner, *Auto Bailout: How Good Policy Became Good Politics*, POLITICO (Nov. 9, 2012), https://www.politico.com/story/2012/11/auto-bailout-how-good-policy-became-good-politics-083614.

[29] *See* Mark J. Roe & Joo-Hee Chung, *How the Chrysler Reorganization Differed from Prior Practice*, 5 J. LEGAL ANAL. 399, 428 (2013) (analyzing the way the Chrysler reorganization plan benefited labor unions and their pension plans).

[30] *See* Letter from 30 Climate Advocacy Groups to Hon. Jerome Powell (Mar. 27, 2020) ("The Federal Reserve should not prop up industry destroying the climate . . . "), *available at* https://d17a0173-b97b-4c08-a2e3-f8ea72c0874b.usrfiles.com/ugd/d17a01_62f18f6e12614fddac890d692066aea8.pdf; Letter from Nine U.S. Senators to Hon. Jerome Powell (Apr. 20, 2020) (expressing concern that the Fed's COVID response will "use taxpayer dollars to help sustain industries that may drive a future climate financial crisis"), *available at* https://www.schatz.senate.gov/imo/media/doc/Letter%20to%20Fed%20on%20Corporate%20Credit%20Facilities%2004.20.2020.pdf; Letter from Nine U.S.

All of government's emergency financial interventions have the potential to impose costs on markets, businesses, and individuals. As a country, we have chosen to embrace these interventions, judging that the risks are worth the benefits. But this justification falls away where the government has misused its emergency powers to pursue agendas unrelated to its economic firefighting role. In these circumstances – and particularly long after the emergency conditions subside – courts have a vital role to play in ensuring that the zone of limited accountability the government operates within during crises does not become a mask for serious abuse of government power.

Because courts have recently shown an inclination to deny review or, when they award it in separation of powers cases such as this one, deny the plaintiffs any meaningful remedy, the risk that no one will hold the

Representatives to Hon. Jerome Powell ("[B]ailouts for politically connected fossil fuel companies leave our economy more vulnerable to climate-related financial risk. . . ."), *available at* https://chuygarcia.house.gov/sites/chuygarcia.house.gov/files/Congressional%20Letter%20to%20Fed%20Treas%204_22.pdf. *Compare* Letter from U.S. Senator Kevin Cramer et al. to Hon. Jerome Powell (Apr. 7, 2020) ("Industries, like the energy and transportation sectors are facing significant economic challenges as the demand for products and services have dropped with the constraints on the economy. We urge you to ensure that the financial relief offered under the CARES Act is fully available to companies throughout the economy."), *available at* https://www.cruz.senate.gov/files/documents/Letters/2020.04.07%20-%20Letter%20to%20Powell%20Mnuchin%20re%20CARES%20Act%20Implementation%20.pdf.

government accountable has only grown.[31] After all, "[w]hat is the point of fighting this long battle, through many years and all the way to the Supreme Court, if the prize for winning is no relief at all?" *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2366 (2020) (Gorsuch, J., concurring in part and dissenting in part). If that happens – if, as Judge Janice Rogers Brown has put it, "allegations of regulatory overreach are entirely insulated from judicial review," – then "private capital may even become sparse" and [c]ertainly . . . more expensive, and potentially prohibitively expensive during times of financial distress." *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 647 (D.C. Cir. 2017) (Brown, J., dissenting in part).

III. Judicial Interpretation of Legal Guardrails Like HERA's Anti-Injunction Provision Should Aim To Preserve Broad Discretion for the Government To Act While Also Protecting Against the Risk of Abuse.

HERA appropriately balances the need for broad government discretion to act against the need to protect against government abuse. Enacted at the height of the 2008 financial crisis, the two key provisions at issue here – the anti-injunction provision, 12 U.S.C. § 4617(f), and the succession clause, 12 U.S.C. § 4617(b)(2)(A)(i) – operate together to ensure that the

[31] David Zaring, *Toward Separation of Powers Realism*, 37 YALE J. ON REG. 708, 735 (2020) (reviewing the separation of powers cases and observing that "[n]one of these outcomes come close to giving plaintiffs the relief that they sought.").

government has appropriately broad discretion to deal with the Companies without litigious interference, while also preserving critical avenues for litigation against the FHFA in the event it abuses its emergency powers.

Section 4617(f) leaves open three types of litigation to challenge emergency government actions: (1) constitutional claims; (2) damages claims; and (3) claims seeking injunctive relief based on *ultra vires* actions.[32] *Amici* believe that the third category is likely to be particularly important for ensuring legal accountability for executive abuse.[33]

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[32] *E.g.*, *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 613–14 (D.C. Cir. 2017).

[33] *See* Solomon & Zaring, *After the Deal, supra* at 399–406.

Among other reasons, important classes of constitutional and damages claims may prove to be categorically unavailable in this context unless this Court endorses the "manifest conflict of interest" exception to the statutory succession clause. *See Cacciapalle v. United States*, 148 Fed. Cl. 745 (2020) (holding that shareholders' Takings and Illegal Exaction claims raised regarding the Third Amendment were derivative not direct); *Fairholme Funds, Inc. v. United States*, 147 Fed. Cl. 1, 49–51 (2019) (declining to dismiss derivative Takings and Illegal Exaction claims based on the Federal Circuit's recognition of a "manifest conflict of interest" exception to the statutory succession clause); *Perry Capital*, 864 F.3d at 624 (holding derivative claims for breach of fiduciary duty barred by the succession clause and declining to recognize the "manifest conflict of interest" exception); *Fairholme Funds, Inc. v. FHFA*, 13-CV-1053, 2018 WL 4680197, at *14 (D.D.C. Sept. 28, 2018) (dismissing plaintiffs' direct claims for breach of fiduciary duty claims as preempted by HERA); *cf. Fisher v. United States*, 148 Fed. Cl. 478, 499 (2020) (declining to dismiss plaintiffs' derivative claims for breach of fiduciary duty relying on the "manifest

Everyone agrees that § 4617(f) allows such lawsuits if the FHFA has acted outside of its statutory authority as conservator.[34] It is certainly true that Congress defined this conservatorship role very broadly. For example, no one in this litigation doubts that a conservator would have authority to enter into the (extraordinary and unprecedented) original 2008 Preferred Stock Purchase Agreements with Treasury where the Companies gained access to up to $100 billion each in exchange for issuing new Senior Preferred Securities to Treasury granting it a host of highly valuable rights. *See* JA 56–57, 60–61.

However, while § 4617(f)'s "shelter is sweeping, . . . its scope is not boundless." *Roberts v. FHFA*, 889 F.3d 397, 402 (7th Cir. 2018). Conservatorship is not a blank check, *see County of Sonoma v. FHFA*, 710 F.3d 987, 994 (9th Cir. 2013) ("FHFA cannot evade judicial review and the APA's requirements for rulemaking simply by invoking its authority as conservator."), and *Amici* strongly disagree with the suggestion in the government's brief that conservatorship licenses FHFA to pursue *any* course of action that it finds to be in the "public interest." Br. for Federal Parties at 35–36. Rather, as the government concedes elsewhere in its brief, the conservator's statutory "mission" is to put the Companies "in a sound and solvent condition," carry on their business, and "preserve and conserve"

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conflict of interest" exception to the succession clause recognized by the Federal Circuit).

[34] *Collins v. Mnuchin*, 938 F.3d 553, 571 (5th Cir. 2019) (en banc) (collecting citations).

their assets and property. *Id.* at 3–4 (quoting 12 U.S.C. § 4617(b)(2)(D)).

Drawing on *Amici*'s experience analyzing complex corporate transactions and emergency government financial rescues, *Amici* believe that the Third Amendment was deeply problematic for three main reasons.

First, this deal was completely ***one-sided***. The Third Amendment required each Company to pay Treasury a dividend of 100% of its net worth (less a small buffer) each quarter in perpetuity – a change to the existing terms that netted Treasury $124 billion through the date this lawsuit was filed. JA 38–39. In return, the Companies got basically nothing.

Second, the record shows this deal was done for ***purposes that are inconsistent with conservatorship*****:** namely, (1) to maximize returns for the federal fisc; (2) to ensure that the Companies' private shareholders – which includes some opportunistic hedge funds as well as many other types of investors, including ordinary retirement savers – were excluded from any benefits derived from the Companies' return to profitability; and (3) to ensure that the Companies could not return to their prior operating status. JA 81 (quoting Treasury official stating that the deal would ensure that "every dollar of earnings that Fannie Mae and Freddie Mac generate will be used to benefit taxpayers."); JA 79 (quoting email from White House official to Treasury official stating that the purpose of the Third Amendment was to "close[ ] off [the] possibility that [the Companies] ever[ ] go (pretend) private

again."); JA 81 (quoting testimony from Fannie Mae's CFO at the time of the Third Amendment, stating that the purpose was "probably a desire not to allow capital to build up within the enterprises and not to allow the enterprises to recapitalize themselves," and that Fannie "didn't believe that Treasury would be too fond of a significant amount of capital buildup inside the enterprises."); *see also* JA 101 (quoting FHFA Director in 2014 stating that he focuses on "what is responsible for the taxpayers" and does not "lay awake at night worrying about what's fair to the shareholders"); JA 98 (quoting 2010 Treasury memorandum acknowledging the "Administration's commitment to ensure existing common equity holders will not have access to any positive earnings from the [Companies] in the future.").

The "innocent" rationale for the deal offered by the government in this litigation is entirely unpersuasive. The government has claimed that the Third Amendment was necessary to put a stop to a cycle of the Companies drawing more from the Treasury's commitment in order to pay dividends they owed back to Treasury. JA 33-34. But the government was fully aware that this cycle was over without any changes because the Companies had already entered into a period of stable profitability. JA 67-76. A pretextual rationale like this should not shield the government from legal scrutiny. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (rejecting as pretextual a proffered rationale where "the evidence tells a story that does not match the explanation the Secretary gave for his decision"); *Haight v. Thompson*, 763 F.3d 554, 562 (6th Cir.

2014) (per Sutton, J.) ("[E]xplanations offered for the first time in litigation ought to come with a truth-in-litigating label, requiring the official to disclose whether the new explanations motivated the [relevant] officials at the time of decision or whether they amount to post hoc rationalizations.").

Third, this deal was quite apparently the result of ***self-dealing*** by Treasury. Why would a conservator in FHFA's position enter into such an unfavorable agreement for the Companies? The tight relationship between FHFA and Treasury points towards the obvious answer: FHFA agreed to the Third Amendment because it was acting in Treasury's interest, not its own.[35]

CONCLUSION

While Congress defines the scope of executive conduct, the ultimate responsibility for enforcing its legal guardrails on executive emergency powers falls to courts. This Court has always upheld the strong presumption that administrative action is subject to judicial review. *See Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020); *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60 (1803) ("It is emphatically the province

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[35] *E.g.*, Solomon & Zaring, *After the Deal*, *supra* at 397; Ally Coll Steele, Note, *Fannie, Freddie and Fairness*, 53 HARV. J. ON LEGIS. 417, 438–39 (2016); *see also Fairholme Funds, Inc.*, 147 Fed. Cl. at 50-51 (finding that FHFA would face a manifest conflict of interest in deciding whether to sue the government).

and duty of the judicial department to say what the law is."). Courts have also policed financial rescues carefully in the past. In *James Madison Ltd. by Hecht v. Ludwig*, the court looked beyond a bar on judicial review to ensure that government takeovers are lawful. 82 F.3d 1085, 1092 (D.C. Cir. 1996) ("We thus read section 1821(j) to prevent courts from interfering with the FDIC only when the agency acts within the scope of its authorized powers, not when the agency was improperly appointed in the first place."). Other courts have held a government rescuer to account for "the way it has timed the repudiation of contracts in failed banks."[36]

Amici respectfully suggest that this case is an opportunity for this Court to reaffirm that foundational principle and send a message to lower courts – as well as to citizens, markets, and the government itself –

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[36] *See* Solomon & Zaring, *After the Deal*, *supra* at 412 n.186 (collecting cases); *Lexon Ins. Co. v. FDIC*, No. CV 18-4245, 2019 WL 4690412, at *3–4 (E.D. La. Sept. 26, 2019) (reviewing the FDIC's powers to repudiate a contract after taking over as a receiver).

that the government is not above the law, even when it is donning the helmet of economic firefighter.

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