Nos. 19-422 and 19-563

In the Supreme Court of the United States

PATRICK J. COLLINS, ET AL., PETITIONERS

v.

STEVEN T. MNUCHIN, SECRETARY OF THE TREASURY, ET AL.

STEVEN T. MNUCHIN, SECRETARY OF THE TREASURY, ET AL., PETITIONERS

v.

PATRICK J. COLLINS, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY AND RESPONSE BRIEF
FOR THE FEDERAL PARTIES

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QUESTIONS PRESENTED

During the financial crisis in 2008, the Director of the Federal Housing Finance Agency (FHFA) exercised his authority under a federal statute to appoint FHFA as conservator of Fannie Mae and Freddie Mac. FHFA, as conservator, negotiated agreements with the Department of the Treasury under which Treasury committed to investing billions of dollars in the enterprises in return for compensation consisting, in part, of dividends tied to the amount invested. In 2012, after numerous quarters in which the enterprises' dividend obligations exceeded their total earnings—causing the enterprises to draw additional capital from Treasury just to pay dividends to Treasury—FHFA and Treasury negotiated the Third Amendment to their agreements. The Third Amendment replaced the fixed dividends with variable quarterly dividends tied to the enterprises' net worth. The questions presented are:

1. Whether the statute's succession clause—which vests in FHFA, as conservator, the shareholders' "rights * * * with respect to the [enterprises] and the[ir] assets," including the right to bring derivative suits on behalf of the enterprises, 12 U.S.C. 4617(b)(2)(A)(i)—precludes shareholders from challenging FHFA's adoption of the Third Amendment.

2. Whether the statute's anti-injunction clause—which prohibits courts from taking any action that would "restrain or affect the exercise of powers or functions of the Agency as a conservator," 12 U.S.C. 4617(f)—precludes judicial invalidation of the Third Amendment.

3. Whether the statute's removal clause—which prohibits the President from removing the Director of FHFA except "for cause," 12 U.S.C. 4512(b)(2)—violates the separation of powers, and if so, whether it is severable from the rest of the statute.

4. Whether the asserted constitutional defect in FHFA's structure warrants the invalidation of the Third Amendment.

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SUMMARY OF ARGUMENT

The shareholders have failed to justify invalidating the Third Amendment—a multibillion-dollar contract on which the government and markets have relied for the better part of a decade. The shareholders challenge the Amendment under the Housing and Economic Recovery Act of 2008 (Recovery Act), Pub. L. No. 110-289, 122 Stat. 2654, but they have overcome neither the Act's sweeping grant of power to the Federal Housing Finance Agency (FHFA) as conservator nor its strict limits on judicial interference with that power. The shareholders also argue that FHFA's structure violates the separation of powers, but that defect had no prejudicial effect on the Amendment given the particular circumstances presented here.

I. The Recovery Act's succession clause bars the shareholders' statutory challenge. The shareholders agree that, in general, the clause bars derivative suits during a conservatorship. They argue that this suit is direct, but corporation law treats a suit as derivative where, as here, it alleges diversion of corporate assets. They also invoke the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, but the APA neither displaces the Recovery Act's limits on review nor transforms this derivative claim into a direct one. As for their argument that FHFA faces a conflict of interest in deciding whether the enterprises may sue, the succession clause contains no "conflict of interest" exception.

II. The Recovery Act's anti-injunction clause also bars the statutory challenge. That clause bars suits to restrain FHFA's exercise of its statutory powers as conservator. Although the shareholders fixate on the allegations in their complaint, those very allegations confirm that the Third Amendment performs a classic conservatorship task: renegotiating financial obligations in light of their past and potential future effects on the corporate wards. The shareholders also dispute the Amendment's necessity and wisdom, propose alternative measures, and even impugn the conservator's motives. But Congress could not have been clearer in entrusting those judgments to FHFA alone—not to the shareholders and not to the courts.

III. The shareholders are correct that the Recovery Act's removal clause, which makes the FHFA Director removable only for cause, violates the separation of powers. Last Term, in *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183 (2020), this Court recognized the general rule that Article II empowers the President to remove executive officers at will. *Id.* at 2197-2198. Although the Court had previously recognized two exceptions to that rule, it held that neither covers a single agency head who wields significant executive power. *Id.* at 2201-2207. Here, the FHFA Director is a single agency head who wields significant executive power. The Court-appointed amicus emphasizes that FHFA regulates government-sponsored enterprises rather than purely private parties, but that fact does not render the Director's power either insignificant or non-executive. *Seila Law* thus establishes that the removal clause violates Article II. But under this Court's precedents, that clause is severable from the rest of the statute.

IV. The constitutional defect in FHFA's structure does not support invalidating the Third Amendment. As a threshold matter, the succession clause bars the constitutional challenge to the Amendment for the same reasons that it bars the statutory challenge. The clause bars derivative claims during a conservatorship, and the constitutional challenge is no less a derivative claim, as it too seeks relief running to the enterprises for harm suffered by the enterprises.

On the merits, although the removal clause violates the Constitution, the Third Amendment does not. The Amendment was approved by an Acting Director of FHFA whom the President could displace at will, not by a Director removable only for cause. And the adoption of the Amendment was the business action of a conservator standing in the shoes of private corporations, not an exercise of the executive power under Article II.

In all events, separation-of-powers claims remain subject to traditional remedial limitations, two of which foreclose invalidating the Third Amendment in these unusual circumstances. The harmless-error rule bars relief because President Obama, through Treasury Secretary Geithner, retained the power to supervise the Amendment's adoption. Laches also bars relief, as the shareholders delayed this suit until four years after the Amendment's adoption, and the government and markets have relied on the Amendment in the meantime.

ARGUMENT

I. THE RECOVERY ACT'S SUCCESSION CLAUSE BARS THE SHAREHOLDERS' STATUTORY CLAIM

The Recovery Act limits judicial review of FHFA's actions as conservator, enabling FHFA to respond to the aftermath of the 2008 financial crisis without getting bogged down in litigation over its business decisions. One limit stems from the succession clause, 12 U.S.C. 4617(b)(2)(A)(i). The shareholders accept (Br. 15) that, in general, the clause bars derivative suits during a conservatorship. They also accept (Br. 26-27) that a suit is derivative if the corporation suffers the alleged harm and would receive the requested recovery. And far from disputing that their complaint alleges harm to the enterprises, they assert (Br. 46) that the Third Amendment "puts the Companies in a permanently unsound condition" and "depletes the Companies' capital." Nor do the shareholders deny (Br. 24-26) that the relief sought—the invalidation of future dividend obligations under the Amendment and the return of past excess dividend payments—would flow to the corporations.

Despite all that, the shareholders argue that (1) the claim is direct rather than derivative under corporation law, (2) the APA displaces any corporation-law analysis, and (3) the claim may go forward under an unwritten "conflict of interest" exception to the succession clause. Each of those arguments lacks merit.

A. The Shareholders' Statutory Challenge Is A Derivative Claim Under Background Rules Of Corporation Law

The shareholders argue (Br. 24-30) that the Third Amendment gives rise to a direct suit because it reorganizes the enterprises' capital structure in a way that transfers economic value from minority shareholders to controlling shareholders. That argument conflates a claim that the corporation's assets have been diverted (derivative) with a claim that a controlling shareholder has reorganized the corporation's structure (direct). This case falls in the former category.

It is black-letter corporation law that, if a person "steals a corporation's assets, the corporation is the victim of the wrong and owns the cause of action against the thief." *Kennedy* v. *Venrock Associates*, 348 F.3d 584, 591 (7th Cir. 2003) (Posner, J.), cert. denied, 541 U.S. 975 (2004). It makes no difference whether "the thief is a complete outsider," "a preferred shareholder," or someone else; regardless, stealing corporate assets "injures the corporation, and the right of redress therefore belongs to the corporation." *Ibid.* Even the shareholders recognize (Br. 28) that "waste of corporate assets" gives rise only "to derivative claims."

In contrast, if a controlling shareholder reorganizes the corporation's structure in a way that diminishes minority shareholders' voting power, the minority shareholders own the cause of action. See *Alleghany Corp.* v.

Breswick & Co., 353 U.S. 151, 159-160 (1957). A controlling shareholder owns "a majority of a corporation's voting power," or at least enough voting power to enjoy "'effective control.'" *Olenik* v. *Lodzinski*, 208 A.3d 704, 718 (Del. 2019) (citation omitted). If it exploits that control to dilute the power of other shareholders, it injures those shareholders without necessarily injuring the corporation. *Kennedy*, 348 F.3d at 591. In such a case, it is the injured shareholders who hold the claim.

This case falls squarely in the first category: a claim for diversion of corporate assets. The shareholders claim, at bottom, that FHFA has helped someone "steal" the enterprises' net worth each quarter. That someone happens to be Treasury, but nothing in the shareholders' claim turns on that point; if FHFA had given away the net worth to an outsider, or even taken the assets for itself, the claim would remain the same. That claim is a paradigmatic derivative suit for "theft" of the enterprises' assets.

The shareholders' effort to force this case into the second category—a claim that a controlling shareholder has exploited its control to dilute minority shareholders' voting power—fails multiple times over. To start, the shareholders claim here that *FHFA* has violated the Recovery Act, not that *Treasury* has done so. But FHFA has not received any assets at all, much less as a controlling shareholder. And Treasury is not a controlling shareholder either. Far from giving Treasury enough voting power to control the enterprises, the preferred stock agreements provide that Treasury has "*no* voting rights" and that its shares "shall not have *any* voting powers." J.A. 185 (emphases altered; capitalization omitted). Nor is the Third Amendment even a reorganization. The Amendment changes Treasury's fixed dividend into a variable dividend, but it does not change the enterprises' capital structure—much less in a way that dilutes anyone's voting power.

The shareholders argue (Br. 24-30) that the Third Amendment has the same economic effect as a reorganization: shifting economic value from the shareholders at large to a favored investor (Treasury). But that argument proves too much. *Any* diversion of corporate assets shifts value from the shareholders at large to the alleged thief, but that does not make the challenge direct whenever the thief is a controlling shareholder. For example, in *El Paso Pipeline GP Co.* v. *Brinckerhoff*, 152 A.3d 1248 (Del. 2016), minority equity holders claimed that a controlling equity holder had expropriated assets at the expense of the minority. *Id.* at 1250-1251. The Delaware Supreme Court classified the claim as derivative, "declin[ing]" to accept the view that "the extraction of solely economic value from the minority by a controlling stockholder constitutes direct injury." *Id.* at 1264. In *Cowin* v. *Bresler*, 741 F.2d 410 (D.C. Cir. 1984), a shareholder accused controlling shareholders of diverting corporate assets "at the expense of the minority." *Id.* at 412. The court, in an opinion by Judge Bork, held that the claim "fundamentally" belonged "to the corporation" and could be raised by the shareholder "only derivatively." *Id.* at 416. And in *Frank* v. *Hadesman & Frank, Inc.*, 83 F.3d 158 (7th Cir. 1996), one shareholder accused another of "hollow[ing] out" a corporation and "making off with [its] business." *Id.* at 159-160. The court, in an opinion by Judge Easterbrook, treated the action as derivative—even though the transaction transferred value from one shareholder to the other. *Id.* at 160. Judge Easterbrook also later joined an opinion holding that a parallel shareholder challenge to the Amendment is derivative and thus barred by the Recovery Act's succession clause. *Roberts* v. *FHFA*, 889 F.3d 397, 409 (7th Cir. 2018).

The shareholders insist (Br. 27) that actions that harm both the corporation and the shareholder can still give rise to direct claims. Again, that proves too much. *Every* action that harms a corporation also harms its shareholders—for instance, as alleged here, by reducing the value of the shares and diminishing potential dividends. If that were enough to allow a direct claim, it would "largely swallow the rule that claims of corporate overpayment are derivative" even where "the corporation transacts with a controller on allegedly unfair terms." *El Paso Pipeline GP Co.*, 152 A.3d at 1264 (citation omitted). That is why "indirect harm which may result to every stockholder from harm to the corporation" is "clearly insufficient" to support a direct claim. *Pittsburgh & West Virginia Railway Co.* v. *United States*, 281 U.S. 479, 487-488 (1930). The Delaware Supreme Court has allowed "dual-natured" claims only in "unique circumstances" where the harm to the shareholder is wholly "independent" of any harm to the corporation—for example, where the defendant breaches a contract signed by both the corporation and the shareholder. *El Paso Pipeline GP Co.*, 152 A.3d at 1262-1263. Here, however, the shareholders' alleged harms are not independent of any corporate injury. Far from it, they are byproducts of the Third Amendment's direct effect on *the enterprises'* assets.

In the end, the shareholders fail to muster a single case holding that a claim for diversion of corporate assets becomes derivative because the diversion transfers economic value to certain investors. The shareholders' account of corporation law is untenable.

B. The APA Does Not Convert The Shareholders' Suit Into A Direct Claim

The shareholders also argue (Br. 16-24) that they possess a direct claim under the APA, notwithstanding background rules of corporation law. But that argument defies the APA's text. After granting "aggrieved" persons a cause of action to challenge unlawful agency action, the APA provides that nothing in the statute "affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702. Restrictions on shareholder suits plainly qualify as "limitations on judicial review" and "legal or equitable ground[s]" for dismissal. Displacing those restrictions with the APA's zone-of-interests test for identifying "aggrieved" parties would (at least) "affect" those limitations. After all, restrictions on shareholder suits turn on who suffered the injury and would receive the recovery, whereas the zone-of-interests test turns, as the shareholders stress (Br. 16-17), on the entirely different question whether the party's interest is too attenuated from the legal provision being enforced.

The shareholders invoke (Br. 21) *Darby* v. *Cisneros*, 509 U.S. 137 (1993), but that case offers them no help. The Court there held that the APA changed the law on exhaustion of administrative remedies—but only because another APA provision, 5 U.S.C. 704, "by its very terms" "limited the availability of the doctrine." 509 U.S. at 146. The Court stressed that courts remain "free to apply, where appropriate, other prudential doctrines" not specifically cabined by the APA. *Ibid.* No APA provision addresses, much less overturns, the restrictions on shareholder suits at issue here.

The shareholders also invoke (Br. 18-19) this Court's pre-APA precedents, but those cases *refute* their position. Most notably, when Congress granted "interested" and "aggrieved" parties the right to challenge certain agency orders in court, Commerce Court Act, ch. 309, §§ 2, 5, 36 Stat. 542-544, this Court read the cause of action against the backdrop of traditional limits on shareholder suits. For example, in rejecting a shareholder's attempt to challenge an order that allegedly harmed the corporation, the Court explained that the "stockholder's interest" was "clearly insufficient" to support suit. *Pittsburgh*, 281 U.S. at 487-488. In a later case, the Court likewise rejected a shareholder's attempt to challenge the denial of a permit to the corporation, noting that the plaintiff asserted "only its stockholder's derivative rights" and thus was not "aggrieved" by the denial. *Schenley Distillers Corp.* v. *United States*, 326 U.S. 432, 435 (1946) (per curiam).

The shareholders' contrary view rests on a misreading of *American Power & Light Co.* v. *SEC*, 325 U.S. 385 (1945). There, a shareholder challenged an agency order that barred a corporation from using assets "to pay dividends" but that did not diminish the assets themselves. *Id.* at 386-387. This Court reaffirmed the "accepted doctrine" that a stockholder ordinarily lacks the right to sue when it is "merely seeking, in a derivative capacity, to vindicate the rights of the corporation." *Id.* at 389. The Court then explained that the suit at hand was direct, because the challenged order had a "direct adverse effect" on the stockholder and "d[id] not deprive the corporation of any asset or adversely affect the conduct of its business." *Ibid.* Nothing in the case suggests that the APA supersedes "accepted doctrine" on direct and derivative suits. *Ibid.* Nor does the case suggest that this suit is direct; here, the alleged harm falls directly on the corporation and only indirectly affects its shareholders.

Finally, the shareholders argue that the APA "pares back" "prudential" limits on suit, including shareholder suits. Br. 21-22 (brackets and citation omitted). That is wordplay. This Court has applied the "prudential" label to many different doctrines, including (1) the zone-of-interests rule, which requires the litigant's asserted interest to be sufficiently related to the legal provision he seeks to enforce, and (2) the doctrine of third-party standing, which requires a litigant to assert his own rights, rather than those of a third party. See *Lexmark International, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 127 & n.3 (2014). The shareholders' cases indeed state that the APA relaxed the stringency of the zone-of-interests requirement. See *FAIC Securities, Inc.* v. *United States*, 768 F.2d 352, 357 (D.C. Cir. 1985) (Scalia, J.). Yet the shareholders cite no case suggesting that the APA relaxed third-party standing limits. And the shareholder-standing rule is essentially a third-party standing limit imposed by corporation law; a shareholder is legally distinct from the corporation, and thus generally lacks third-party standing to seek relief for the corporation's harms. See *Franchise Tax Board* v. *Alcan Aluminium Ltd.*, 493 U.S. 331, 335 (1990).

In sum, the shareholders have failed to cite a single case, pre- or post-APA, allowing a shareholder to challenge action that dissipates corporate assets. Indeed, they have failed to cite a single APA case allowing a shareholder to challenge any action where the corporation suffered the harm and would receive the recovery. Their contention that the APA displaces traditional rules governing shareholder suits lacks merit.

C. There Is No "Conflict Of Interest" Exception

The shareholders argue (Br. 30-38) that their claim, even if derivative, falls within a "conflict of interest" exception to the succession clause. The clause, however, states that FHFA succeeds to "*all* rights, titles, powers, and privileges" of the enterprises and of "*any* stockholder, officer, or director" with respect to the enterprises. 12 U.S.C. 4617(b)(2)(A) (emphases added). The words "all" and "any" foreclose any unstated "conflict of interest" exception. Further, the statute elsewhere provides that "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator," "[e]xcept as provided in [the statute] *or at the request of the Director*," 12 U.S.C. 4617(f) (emphasis added)—thus contemplating that FHFA's approval may be needed for suits against FHFA to proceed.

The shareholders object (Br. 30-31) that the succession clause cannot plausibly be read to authorize FHFA to sue itself, but that is a strawman. Under the succession clause, FHFA has the power to determine whether it may be sued *by or on behalf of the enterprises*. It is perfectly coherent to require an entity's permission before that entity may be sued. Sovereign immunity, for example, means that a private citizen may sue the sovereign only with the sovereign's consent. *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941).

The shareholders also assert (Br. 36) that Congress adopted the Recovery Act after a "prominent" decision, *First Hartford Corp. Pension Plan & Trust* v. *United States*, 194 F.3d 1279 (Fed. Cir. 1999), read a conflict-of-interest exception into a different receivership statute. But the criterion for determining whether Congress adopted lower courts' gloss on a statutory term is "whether the uniform weight of authority is significant enough that the bar can justifiably regard the [gloss] as settled." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 325 (2012). *First Hartford*, which identified no textual support, did not forever "settle" the proposition that succession clauses contain unstated conflict-of-interest exceptions. In any event, *First Hartford* is hardly as prominent as the shareholders assert. By the government's count, it had been cited in only four appellate cases outside the Federal Circuit by the time of the Recovery Act in 2008. And the shareholders cite no evidence suggesting that Congress even knew about (let alone relied on) *First Hartford* when enacting the Recovery Act.

The shareholders next invoke (Br. 36-37) the presumption in favor of judicial review of agency action. But this Court has developed that presumption in the context of reviewing *regulatory* action. See *Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062, 1069 (2020). The presumption makes little sense in the context of business decisions taken by an agency standing in the shoes of a private corporation as conservator or receiver—Congress, to the contrary, has consistently "draw[n] a sharp line in the sand *against* litigative interference" with conservators and receivers. *Perry Capital LLC* v. *Mnuchin*, 864 F.3d 591, 605 (D.C. Cir. 2017) (emphasis added), cert. denied, 138 S. Ct. 978 (2018). In any event, the succession clause overcomes any presumption of review. As noted, the clause states that FHFA succeeds to "all" rights and powers of the enterprises and of "any" stockholder, 12 U.S.C. 4617(b)(2)(A), leaving no room for an unwritten conflict-of-interest exception.

Finally, the shareholders contend (Br. 37-38) that reading the succession clause to bar this suit would violate due process. That is meritless. Having created the Recovery Act, Congress of course had the power to determine whether, when, and how private plaintiffs may sue to enforce its provisions. See *Armstrong* v. *Exceptional Child Center, Inc.*, 575 U.S. 320, 325-326 (2015). Indeed, as Justice Scalia explained, Congress may preclude judicial review even of *constitutional* claims. See *Webster* v. *Doe*, 486 U.S. 592, 611-615 (1988) (dissenting opinion). Just as Congress could have denied jurisdiction, withheld a private right of action, or made FHFA as conservator immune from suit without its consent, so too Congress could, and did, grant FHFA as conservator the power to decide whether it may be sued by or on behalf of the enterprises.

II. THE RECOVERY ACT'S ANTI-INJUNCTION CLAUSE ALSO BARS THE SHAREHOLDERS' STATUTORY CLAIM

Even apart from the succession clause, the Recovery Act's anti-injunction clause, 12 U.S.C. 4617(f), bars challenges to FHFA's exercise of its statutory powers as conservator. Every court of appeals to consider the matter, besides the fractured en banc court below, has held that the Third Amendment falls within those powers. As Judges Millett and Ginsburg wrote for the D.C. Circuit, FHFA performed "quintessential conservatorship tasks" in the Amendment. *Perry Capital*, 864 F.3d at 607. Or as Judge Bibas wrote for the Third Circuit, the Amendment "is in essence a renegotiation of an existing [equity] agreement"—"a traditional power" of a conservator. *Jacobs* v. *FHFA*, 908 F.3d 884, 890 (2018) (citation omitted). And as Judge Stras has emphasized, "[e]ven accepting all of the shareholders' allegations as true does not negate the [Third Amendment's] asset-preserving-and-conserving effects or take this action outside the broad discretion afforded to the FHFA." *Saxton* v. *FHFA*, 901 F.3d 954, 962 (8th Cir. 2018) (concurring opinion).

The shareholders nevertheless insist that the Third Amendment exceeded FHFA's powers as conservator and instead required invoking its powers as receiver. Neither argument is correct.

A. The Third Amendment Was Authorized Under FHFA's Powers As Conservator

The Recovery Act empowers the conservator to take action that "may be—(i) necessary to put the [enterprises] in a sound and solvent condition; and (ii) appropriate to carry on the business of the [enterprises] and preserve and conserve the[ir] assets and property." 12 U.S.C. 4617(b)(2)(D). Given the size of the enterprises' obligations to Treasury and the enterprises' record of relying on Treasury's multibillion-dollar capital commitment to satisfy those obligations, it was well within FHFA's power to determine that the Amendment's renegotiation of those obligations may be appropriate to preserve the capital commitment and necessary to maintain the enterprises' solvency.

In response to that basic point, the shareholders raise a scattershot of objections: (1) the commitment was not an asset that FHFA had the power to conserve, (2) the complaint alleges that the commitment was not really at risk, (3) FHFA could have conserved the commitment in a different way, (4) the Amendment put the enterprises' solvency at risk by preventing them from accumulating capital, and (5) FHFA acted with impure motives. Those objections all lack merit.

1. To begin, the shareholders err in suggesting (Br. 56-57) that Treasury's commitment was not an "asset" that FHFA had the power to conserve. A binding legal entitlement to obtain hundreds of billions of dollars in invested capital certainly constitutes an "asset"—*i.e.*, an "item that is owned and has value." *Black's Law Dictionary* 145 (11th ed. 2019). The shareholders point to certain provisions of Treasury's purchase agreements, but those provisions simply exclude the commitment from the enterprises' assets for purposes of a formula to calculate how much money the enterprises may draw each quarter. J.A. 123, 124, 129. Rightly so, as the formula would be circular if it counted Treasury's commitment when determining the size of Treasury's commitment. The provisions offer no support for the counterintuitive notion that the conservator lacked the power to conserve a multibillion-dollar commitment of capital to the enterprises.

2. The shareholders likewise err in claiming (Br. 52-60) that, under the complaint's allegations, Treasury's commitment was not really at risk at the time of the Third Amendment. Even taking those dubious allegations as true, the complaint never disputes, and indeed confirms, that the Amendment eliminated a possible source of dissipation of the commitment. The complaint alleges that, from 2009 to 2011, the enterprises' dividend obligations to Treasury repeatedly outstripped their earnings by billions of dollars. J.A. 71, 74. It also alleges that, during those years, the enterprises drew on Treasury's commitment to satisfy those obligations, and that such draws in turn increased the size of future dividends. J.A. 57, 66. It further alleges that Treasury's commitment was slated to become capped in 2012, at which point potential commitment-fee obligations

also loomed. J.A. 62. Putting those allegations together, if the enterprises repeated the pattern of owing billions more than they earned and of drawing on the commitment to pay those sums, the payments could dissipate the now-capped commitment. The Amendment eliminated that potential source of dissipation, and for that reason "may be" appropriate to preserve the commitment. 12 U.S.C. 4617(b)(2)(D).

The shareholders respond (Br. 47-48, 57-60) that the enterprises' profits were projected to grow after 2012, enabling the enterprises to satisfy their obligations without using up the commitment. But the statute grants FHFA "exceptionally broad operational authority" to make business judgments. *Saxton*, 901 F.3d at 960 (Stras, J., concurring). Nothing in the statute required FHFA to focus only on projections of future earnings and to ignore the record of past earnings. Nor did the statute prevent FHFA from adopting a "risk-averse approach" that accounted for the possibility that the projections were wrong, and that ensured that, "[e]ven if the economy collapses again," "Fannie and Freddie can continue to [rely on the commitment in] stabiliz[ing] the housing market." *Jacobs*, 908 F.3d at 894. Nor, finally, did the statute compel FHFA to fixate on the short-term projections cited by the shareholders; FHFA instead could take "a broader and longer-term view" and put "a structural end to 'the circular practice of the Treasury advancing funds to Fannie and Freddie simply to pay dividends back to Treasury.'" *Perry Capital*, 864 F.3d at 612 (brackets and citation omitted).

3. Equally misguided is the shareholders' argument (Br. 54-56) that FHFA should have preserved Treasury's commitment in a different way—namely, refusing to pay cash dividends. As Judge Stras has observed,

"determining the best way" to preserve assets is a choice that Congress "assign[ed] to the FHFA, not courts." *Saxton*, 901 F.3d at 963 (concurring opinion).

In any event, the shareholders' approach is flawed on its own terms. Treasury's senior preferred stock certificates stated that the enterprises would "pay dividends in cash in a timely manner." J.A. 180. If the enterprises failed to do so, they would incur a penalty: the enterprises would be required to pay Treasury in kind by increasing its liquidation preference, and Treasury's dividend rate would go up from 10% to 12% until all accrued dividends were paid in cash. *Ibid.* Contrary to the shareholders' portrayal, that in-kind payment did not replace the cash dividend; rather, "all amounts required to be paid" ultimately had to be "paid in cash." J.A. 180-181.

The shareholders argue, in essence, that the enterprises should have repeatedly refused to pay their bills and incurred penalties instead. It is easy to see the flaws in that approach. Most obviously, it would have postponed rather than avoided payment of cash dividends, and thus delayed rather than eliminated the risk that those dividends would consume the commitment. Meanwhile, it would have increased both the dividend rate and the liquidation preference. Because Treasury's pre-Third Amendment dividend depended on both the dividend rate and the size of the preference, increasing both the rate and the preference would have significantly increased Treasury's dividends. See Pet. App. 14a. The growth of the preference also would have made it "more expensive and difficult" to "redeem Treasury's preferred shares"—a harmful outcome, because the outstanding shares "create dividend obligations" and "limit the companies' ability to raise capital and debt." *Roberts*, 889 F.3d at 405.

4. The shareholders fare no better in arguing (Br. 46-47) that the Third Amendment is "antithetical" to FHFA's conservatorship mission because it precludes the enterprises from retaining their earnings and puts them in a permanently unsound condition. The statute imposes no affirmative obligation to preserve the enterprises' earnings, let alone for the shareholders' benefit. "[T]ime and again, the Act outlines what FHFA as conservator 'may' do and what actions it 'may' take." *Perry Capital*, 864 F.3d at 607. "Entirely absent from the Recovery Act's text is any mandate, command, or directive to build up [the enterprises' net worth] for the financial benefit of the Companies' stockholders." *Ibid.* In fact, the statute expressly authorizes the conservator to "transfer or sell any asset" in the course of exercising its powers. 12 U.S.C. 4617(b)(2)(G). That provision contemplates that FHFA may sometimes need to trade away some assets (the amount of the variable dividend) to preserve other assets (Treasury's commitment). The shareholders argue (Br. 47) that the costs of the trade (preventing the enterprises from accumulating capital) outweigh the benefits (protecting the commitment), but "Congress could not have been clearer about leaving those hard operational calls to FHFA's managerial judgment." *Perry Capital*, 864 F.3d at 607-608.

The shareholders insist (Br. 52) that "[t]here is *no possible scenario*" in which the enterprises are better off with the Third Amendment's variable dividend than with the earlier fixed dividend. That is simply false. Because the Amendment replaced a fixed dividend and potential commitment fees with a variable dividend tied to the enterprises' quarterly earnings, each enterprise would be worse off in quarters when it earned more than the old fixed dividend and commitment fee, but better off in quarters when it earned less. *Perry Capital*, 864 F.3d at 602. Apart from the shareholders' flawed theory that the enterprises could indefinitely refuse to pay their obligations when not covered by their earnings, the shareholders' only rejoinder is that the enterprises could draw even more money from Treasury to pay the obligations. But the commitment would become capped in 2012, so depending on it to make payments to Treasury would risk depleting it.

5. Finally, the shareholders dismiss as "pretextual" (Br. 54) any concern about preserving Treasury's commitment. But the statute—which empowers FHFA to take actions that "may be" "appropriate" to conserve assets and "necessary" to promote solvency, 12 U.S.C. 4617(b)(2)(D)—focuses on the objective nature of FHFA's actions, not on FHFA's subjective motives for taking them. The shareholders cite (Br. 59) a different provision stating that FHFA may "be appointed conservator or receiver *for the purpose* of reorganizing, rehabilitating, or winding up the affairs" of the enterprises, 12 U.S.C. 4617(a)(2) (emphasis added), but that provision refers only to the purpose of the initial appointment; it does not suggest that, after such appointment, the motive for every action taken by the conservator remains open to scrutiny in litigation. Such a rule would invert settled norms of corporation law, which generally require courts reviewing business decisions to disregard subjective motives and to ask only whether, as an objective matter, the decisions "can be attributed to any rational business purpose." *Sinclair Oil Corp.* v. *Levien*, 280 A.2d 717, 720, 722 (Del. 1971); cf. *Devenpeck* v.

Alford, 543 U.S. 146, 153 (2004) (holding that a "'reasonableness' [standard] allows certain actions to be taken in certain circumstances, *whatever* the subjective intent") (citation omitted). Allowing objectively valid actions by FHFA to be second-guessed based on alleged subjective bad faith—which is "too easy to claim and too hard to defend against," *Hartman* v. *Moore*, 547 U.S. 250, 257 (2006)—would turn upside down the anti-injunction clause's preclusion of judicial action "to restrain or affect the exercise of powers or functions of the Agency as a conservator." 12 U.S.C. 4617(f).

B. The Third Amendment Did Not Require Invoking FHFA's Powers As Receiver

The shareholders separately argue (Br. 49-51) that the Third Amendment required invoking powers that belong to FHFA only as receiver, because the Amendment constitutes a "decisive step towards the Companies' ultimate liquidation." That argument is wrong in both factual premise and legal conclusion.

As for the facts, nothing about the Third Amendment put the enterprises on an irreversible path to liquidation. To the contrary, the enterprises remain going concerns eight years after the Amendment, and as the shareholders themselves note (19-563 Br. in Opp. 16), Treasury has developed plans for "permitting the Companies to rebuild capital and ultimately exit conservatorship." Although the shareholders emphasize (Br. 51) the lack of a "built-in end date," a measure should not be regarded as "permanent" simply because it lacks an "explicit end date," *Johnson* v. *Transportation Agency*, 480 U.S. 616, 639-640 (1987).

As for the law, Congress provided that FHFA may "be appointed conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of [the enterprises]," 12 U.S.C. 4617(a)(2), thus making clear that "winding up" the enterprises is an authorized purpose of a conservatorship no less than a receivership. The clause "uses the word 'or' to connect" its gerunds, indicating that the provision covers "any combination" of the "nouns" and "gerunds." *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1141-1142 (2018) (citation omitted). The shareholders respond (Br. 51) that this reading proves too much, because, in their view, a receiver cannot rehabilitate the enterprises. But the statute expressly empowers the receiver to "preserve and conserve" assets—indicating that rehabilitation is indeed a function of the receiver. 12 U.S.C. 4617(b)(2)(B)(iv). And regardless, even if rehabilitation were inconsistent with receivership, it would not follow that winding up is inconsistent with conservatorship, especially given Section 4617(a)(2)'s contrary language.

* * * * *

In the Third Amendment, FHFA eliminated the possibility that the $18.9 billion fixed annual dividend plus commitment fees would dissipate Treasury's multibillion-dollar commitment of capital to the enterprises. That fell squarely within FHFA's power to take action that may be appropriate to preserve the commitment and necessary to put the enterprises in a sound financial condition. The shareholders allege that the Amendment was unnecessary, that other measures would have worked better, and that the Amendment's harms outweighed any benefits, but "entering into the [Amendment] was the FHFA's call, not [the courts'], no matter how much the shareholders disagree." *Saxton*, 901 F.3d at 963 (Stras, J., concurring).

III. THE REMOVAL CLAUSE VIOLATES ARTICLE II, BUT CAN BE SEVERED FROM THE REST OF THE STATUTE

The shareholders have raised a constitutional claim that Congress violated the separation of powers by providing that the Director of FHFA "shall be appointed for a term of 5 years, unless removed before the end of such term for cause by the President." 12 U.S.C. 4512(b)(2). That independent claim extends beyond FHFA's adoption of the Third Amendment, since the shareholders have also challenged (C.A. Supp. Br. 8) FHFA's "ongoing" exercise of power as both regulator and conservator—thus presenting a live dispute about the constitutionality of FHFA's structure regardless of how this Court resolves the statutory and constitutional challenges to the Amendment.

As to that dispute, this Court should affirm the court of appeals. The en banc majority correctly held that the statutory restriction on the President's power to remove the FHFA Director violates the separation of powers, 19-563 Pet. App. 56a-58a (Pet. App.), but that the restriction can be severed from the rest of the statute, *id.* at 65a.

A. The FHFA Director's Removal Protection Violates The Separation Of Powers

1. In *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183 (2020), this Court held that Congress had violated the separation of powers by granting for-cause removal protection to the Director of the Consumer Financial Protection Bureau (CFPB). The Court reaffirmed that Article II establishes a "general rule" that the President possesses the "unrestricted" power to remove executive officers. *Id.* at 2198. The Court explained that its precedents had allowed only "two exceptions" to that rule: "one for multimember expert agencies that do not wield

substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority." *Id.* at 2198-2200. The Court "decline[d]" to "extend those [exceptions] to the 'new situation' before [it], namely an independent agency led by a single Director and vested with significant executive power." *Id.* at 2201 (citation omitted). That was "enough" to establish a violation, but the Court identified two aggravating factors that made the CFPB's structure "even more problematic": the CFPB Director served "a five-year term," meaning that "some Presidents may not have any opportunity to shape its leadership"; and the CFPB received funds "outside the annual appropriations process," meaning that Presidents lacked the opportunity to use ordinary "budgetary tools" to control its policies. *Id.*at 2188, 2204.

That reasoning applies equally to FHFA—which is "essentially a companion" to the CFPB, "established in response to the same financial crisis." *Seila Law*, 140 S. Ct. at 2202. FHFA, too, is led by "a single Director" rather than a multimember body of experts. *Id.* at 2201. And FHFA, too, wields "significant executive power," *ibid.*—most importantly, the power to regulate Fannie Mae and Freddie Mac, and thus to shape the national mortgage market, 12 U.S.C. 4511(a), 4513. That suffices to establish a constitutional defect, but FHFA also presents the same two aggravating factors as CFPB: its Director serves "a term of 5 years," 12 U.S.C. 4512(b)(2), and it receives funds outside the annual appropriations process, see 12 U.S.C. 4516.

2. The Court-appointed amicus stresses (Br. 19-33) that FHFA "regulates primarily Government-sponsored enterprises, not purely private actors." *Seila Law*, 140 S. Ct. at 2202. Amicus accepts (Br. 20) that the power

to regulate those enterprises is "executive," but argues that it is not "significant." Yet "FHFA plays a crucial role in overseeing the mortgage market, on which millions of Americans annually rely." *Seila Law*, 140 S. Ct. at 2241 (opinion of Kagan, J.). The power to "dictate and enforce policy for a vital segment of the economy affecting millions of Americans" is "significant" by any measure. *Id.* at 2203-2204 (majority opinion). Nor is amicus correct (Br. 27) that the regulation of the enterprises raises none of the "structural liberty concerns" underlying the removal power. Through its regulation of the enterprises, FHFA shapes the lives of millions of private citizens. And anyway, the removal power protects not just individual liberty, but also democratic accountability. See *Seila Law*, 140 S. Ct. at 2204. That objective would be undermined if the power to regulate the national mortgage market were to "slip from the Executive's control, and thus from that of the people." *Ibid.* (citation omitted).

Amicus also reprises several arguments that *Seila Law* considered and rejected. He draws an analogy (Br. 33-34) to the Comptroller of the Currency, but *Seila Law* explained that the procedural requirements for removing that officer impose no substantive constraints on removal, 140 S. Ct. at 2201 n.5. He observes (Br. 23) that "Congress has limited the FHFA's discretion" by statute, but *Seila Law* held that the CFPB's structure violated the separation of powers even though the CFPB, too, must follow statutory standards, see 140 S. Ct. at 2193. And he urges (Br. 36-47) a broad reading of the Recovery Act's for-cause standard, but *Seila Law* rejected a similar argument for "broadly construing the statutory grounds for removing the CFPB Director," 140 S. Ct. at 2206. Moreover, amicus' reading would not solve the constitutional problem anyway. The single head of an agency "is and must be the President's *alter ego*"—a "member of his official family" in whom he can place his "implicit faith." *Myers* v. *United States*, 272 U.S. 52, 133-134 (1926). For such officers, *any* for-cause restriction, no matter how broad, would infringe on the President's power to remove them "[t]he moment that he loses confidence in the[ir] intelligence, ability, judgment or loyalty." *Id.* at 134.

Amicus predicts (Br. 50) a "deluge" of challenges to other removal provisions, but that grim forecast is unwarranted. Although he is correct (Br. 48) that, under the government's reading of *Seila Law*, the President must have the power to remove at will the single heads of the Social Security Administration and Office of Special Counsel, both of whom likewise exercise "significant executive power," 140 S. Ct. at 2201 (majority opinion); see *id.* at 2241 (opinion of Kagan, J.), he ignores various remedial principles that would limit the retrospective effect of a decision from this Court so holding, see pp. 40-47, *infra*. And amicus is wrong to suggest (Br. 48) that applying *Seila Law* to FHFA would necessarily invalidate removal restrictions for "multimember agencies" and the "Civil Service." *Seila Law* did not purport to overrule existing precedent upholding removal restrictions in certain circumstances for multimember expert agencies and for inferior officers and employees. See 140 S. Ct. at 2199-2200.

B. The Removal Clause Should Be Severed From The Rest Of The Recovery Act

When faced with a provision unconstitutionally insulating an executive officer from removal, this Court consistently has treated the provision as severable from the rest of the statute establishing the office, whether or not the statute contains a severability clause. In *Seila Law*, for example, the Court held, under a severability clause, that the removal protection for the CFPB Director could be severed. 140 S. Ct. at 2209-2211 (opinion of Roberts, C.J.); *id.* at 2245 (opinion of Kagan, J.). Moreover, in *Free Enterprise Fund* v. *Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), the Court held, even in the absence of a severability clause, that removal protections for members of the Public Company Accounting Oversight Board were severable. *Id.* at 508. So too here, although the Recovery Act contains no severability clause, the Director's removal protection is severable from the rest of the statute.

Notably, even the shareholders do not contend that the entire Recovery Act is inseverable from the removal clause. Rather, they narrowly argue (Br. 78) that, if the removal clause falls, so must 12 U.S.C. 4617(b)(2)(J)(ii), which authorizes FHFA, as conservator or receiver, to "take any action authorized by [Section 4617], which the Agency determines is in the best interests of the [enterprise] or the Agency." But the shareholders identify no textual or structural justification for cherrypicking that one provision and tying it to the removal clause. They instead speculate (Br. 79) that "it is highly unlikely that Congress would have given such sweeping discretion to an agency subject to control by the President," without offering any basis in the Recovery Act itself for that speculation. In any event, similar clauses are a standard feature of conservatorship and receivership statutes. See, *e.g.*, 12 U.S.C. 1821(d)(2)(J)(ii), 2277a-10c(b)(2)(I)(i)(II). There is thus no reason to speculate that its inclusion in this statute was related to, let alone dependent on, the removal clause.

IV. THE CONSTITUTIONAL DEFECT DOES NOT SUPPORT INVALIDATION OF THE THIRD AMENDMENT

Although the removal clause is unconstitutional, that defect in FHFA's structure does not support invalidating the Third Amendment. As a threshold procedural matter, the succession clause bars the shareholders' constitutional claim against the Amendment. On the merits, although FHFA's structure violates the Constitution, the Amendment does not, because it was not an exercise of Article II executive power that the President lacked the ability to supervise. Finally, as a remedial matter, equitable principles bar the shareholders' belated attempt to unravel a multibillion-dollar contract agreed to by Treasury that was in no way tainted by any constitutional problem with FHFA's participation.[*]

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[*] The court of appeals rested its refusal to invalidate the Third Amendment on the government's harmless-error defense; it did not reach the government's additional laches defense, and it rejected the remaining arguments discussed above. See Pet. App. 55a-56a, 58a-63a, 65a-72a. Although a prevailing party generally may defend its judgment on alternative grounds without filing a cross-petition, see *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982), the shareholders have erroneously argued (19-422 Cert. Reply Br. 5) that a cross-petition is needed here because the federal parties' arguments might undercut the part of the court of appeals' judgment awarding a declaration that FHFA's structure violates the Constitution, see Pet. App. 5a. The arguments about the Third Amendment do not undercut that declaration; as noted, this challenge to FHFA's structure goes beyond the Amendment. See p. 23, *supra*. In any event, the shareholders' own petition asks this Court to review the court of appeals' decision that FHFA's structure violates the Constitution. See 19-422 Pet. i. The federal parties were not required to cross-petition on a question already presented in the shareholders' petition.

A. The Succession Clause Bars The Shareholders' Constitutional Claim Against The Third Amendment

The succession clause, as explained, bars derivative suits during a conservatorship. See p. 4, *supra*. The court of appeals gave several reasons why the clause did not bar the shareholders' constitutional claim against the Third Amendment, but they are all mistaken.

First, the court of appeals believed that the Constitution itself grants plaintiffs a "direct" cause of action "against government action that violates the separation of powers." Pet. App. 55a. But as a general matter, the Constitution does not itself create any cause of action (much less a direct one) to enforce its provisions. See *Armstrong*, 575 U.S. at 323-327. And the APA's cause of action neither displaces the succession clause nor supersedes the test for distinguishing direct from derivative claims. See pp. 9-11, *supra*; cf. *Armstrong*, 575 U.S. at 327 (explaining that the "power of federal courts of equity" to enjoin unconstitutional action remains "subject to express and implied statutory limitations").

Second, the court of appeals read *Bond* v. *United States*, 564 U.S. 211 (2011), to mean that "[a] plaintiff with Article III standing can maintain a direct claim against government action that violates the separation of powers." Pet. App. 55a. But *Bond* merely held that, because the Constitution's structural provisions serve in part to protect individual liberty, no categorical rule bars the standing of private persons to invoke those provisions. 564 U.S. at 220-226. The Court did not address the question at issue here: to *which* private person does the constitutional claim belong? Given the background shareholder-standing rule, the claim belongs to the enterprises, and nothing in the Constitution entitles the shareholders to invoke it on their behalf in an otherwise-prohibited derivative suit. See *Pagán* v. *Calderón*, 448 F.3d 16, 28-29 (1st Cir. 2006); *Gregory* v. *Mitchell*, 634 F.2d 199, 202 (5th Cir. 1981); see also *Kowalski* v. *Tesmer*, 543 U.S. 125, 134 (2004) (explaining that a plaintiff ordinarily may not assert the constitutional claims of a third party). Indeed, *Bond* itself admonished that a plaintiff who brings a structural constitutional claim remains subject to "prudential rules" that "appl[y] to all litigants and claims," 564 U.S. at 225, which, of course, include limits on shareholder standing.

Finally, the court of appeals relied on the principle that Congress may "preclude judicial review of constitutional claims" only if the statute makes that intention "clear." Pet. App. 55a (citation omitted). But the cases setting out that clear-statement rule all involve the preclusion of a litigant's ability to press its own constitutional rights. See, *e.g.*, *Webster*, 486 U.S. at 603; *Weinberger* v. *Salfi*, 422 U.S. 749, 762 (1975). The court identified no case requiring a clear statement to preclude a litigant from bringing a constitutional claim belonging to a third party; to the contrary, the general rule is that such claims are barred, see *Kowalski*, 543 U.S. at 134. In any event, this Court has squarely held that the clear-statement rule applies only to the denial of "*any* judicial forum for a colorable constitutional claim," not to a statute that simply channels review of such a claim to a particular time and place. *Elgin* v. *Department of Treasury*, 567 U.S. 1, 9 (2012) (emphasis added). Here, Congress expressly authorized the enterprises to challenge FHFA's appointment as conservator "within 30 days of such appointment," 12 U.S.C. 4617(a)(5), and the enterprises could have raised a constitutional challenge to FHFA's structure in such an action. It was entirely proper for Congress to require the enterprises either to challenge the conservatorship promptly, or else to allow the government and the public to rely on its validity.

B. The Adoption Of The Third Amendment Did Not Violate The Separation Of Powers

In *Seila Law*, this Court explained that Article II guarantees the President the "power to remove—and thus supervise—those who wield executive power on his behalf." 140 S. Ct. at 2191-2192. The Recovery Act's removal clause violates that principle, but the Third Amendment does not. Although the President can remove a Senate-confirmed Director only for cause, the Amendment was adopted by an Acting Director, whose acting designation the President could revoke at will. Moreover, the Amendment, a business decision made by a conservator while standing in the shoes of private corporations, did not involve an exercise of the executive power under Article II.

1. The Third Amendment was adopted by an Acting Director whom the President could displace at will

FHFA agreed to the Third Amendment in August 2012, when it was led by Acting Director DeMarco. See J.A. 36. Unlike the Director, the Acting Director was subject to plenary supervision by President Obama, who had the power to revoke at will DeMarco's ability to perform the office's functions and duties.

a. The Recovery Act provides: "The Director shall be appointed for a term of 5 years, unless removed before the end of such term for cause by the President." 12 U.S.C. 4512(b)(2). That provision, by its terms, applies only to the Director, not the Acting Director. The statute further provides: "In the event of the death, resignation, sickness, or absence of the Director, the

President shall designate" one of three Deputy Directors "to serve as acting Director until the return of the Director, or the appointment of a successor pursuant to [12 U.S.C. 4512(b)]." 12 U.S.C. 4512(f). That provision neither itself grants removal protection nor incorporates the removal provision applicable to the Director.

The statute thus contains no provision suggesting that Congress granted removal protection to the Acting Director. In fact, because Congress "include[d]" language granting removal protection in the Director provision, but "omit[ted]" similar language in the Acting Director provision, it must be "presumed that Congress act[ed] intentionally and purposely in the disparate inclusion [and] exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (brackets and citation omitted).

The D.C. Circuit's opinion in *Swan* v. *Clinton*, 100 F.3d 973 (1996), strongly supports this reading. Although the court there assumed that members of the Board of the National Credit Union Administration enjoyed tenure protection during their statutory terms, *id.* at 981-983, it nevertheless held that the tenure protection did not extend to members serving in a holdover capacity following the expiration of those terms, *id.* at 986. As Judge Wald explained, an interim officer with tenure protection would be not only independent of the President, but also dependent on the Senate, which could keep him in office "indefinitely" by declining to confirm a permanent replacement. *Id.* at 987. Potential congressional "involve[ment] * * * in the removal of an executive official" raises even more serious constitutional problems than restrictions on the President's removal power. *Morrison* v. *Olson*, 487 U.S. 654, 686 (1988). *Swan* thus refused to extend removal protection for regular members to reach holdover members without clear instruction from Congress. 100 F.3d at 987; see *id.* at 990-991 (Silberman, J., concurring). So too here, the Recovery Act's tenure protection for the Director does not itself extend to the Acting Director.

b. Various principles of statutory interpretation confirm that conclusion. Most importantly, in *Shurtleff* v. *United States*, 189 U.S. 311 (1903), this Court held that a statute presumptively preserves the President's power to remove at will the executive officers he appoints, even "if the statute had not contained a word upon the subject." *Id.* at 316. The Court explained that Congress may overcome that default rule only through "very clear and explicit language." *Id.* at 315; see *ibid.* ("explicit language to that effect"); *id.* at 316 ("plain language"); *ibid.* ("plain and explicit language"); *id.* at 318 ("plain and unambiguous language"). The Court found it "quite inadmissible" to rely on "mere inference or implication" or "doubtful inferences" to "take away this power of removal." *Id.* at 315-316; accord *Myers*, 272 U.S. at 119, 126.

That clear-statement rule draws reinforcement from two related canons. First, this Court reads statutes against the backdrop of "the separation of powers and the unique constitutional position of the President." *Franklin* v. *Massachusetts*, 505 U.S. 788, 800 (1992). Given that backdrop, the Court has "require[d] an express statement by Congress before assuming it intended" to restrict the President's traditional powers; "textual silence is not enough." *Id.* at 800-801; cf. *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-461 (1991) (requiring a clear statement before reading a statute to upset the federal-state balance). Second, "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Rust* v. *Sullivan*, 500 U.S. 173, 190-191 (1991) (citation omitted). The Court has applied a robust version of that rule in cases concerning the "separation of powers." *Public Citizen* v. *United States Department of Justice*, 491 U.S. 440, 466 (1989).

Here, the Recovery Act contains no statement—much less a clear statement—purporting to limit the President's power to revoke a designation to serve as Acting Director of FHFA. That alone compels the conclusion that President Obama retained the power to displace Acting Director DeMarco at will.

c. The court of appeals inferred that the Recovery Act grants the Acting Director tenure protection because the statute provides: "There is established the Federal Housing Finance Agency, which shall be an *independent agency* of the Federal Government." 12 U.S.C. 4511(a) (emphasis added). But the court overread the word "independent." Although one could use the word "independent" to signify an agency's insulation from presidential control, see *Seila Law*, 140 S. Ct. at 2192, one could also use the word as a synonym for "freestanding"—in other words, to signify that the agency is self-contained, rather than a component of a larger agency or department, see 5 U.S.C. 104 (defining an "independent establishment" as an executive-branch entity that, among other requirements, is not "part" of any larger executive-branch entity). "Independent" thus does not necessarily imply tenure protection—much less clearly do so.

The longstanding practice of the executive branch supports that view. Over the years, Congress has enacted an array of statutes that describe agencies as "independent," but that do not expressly confer tenure protection. Time and again, the executive branch has read those statutes to retain the President's power to remove officers at will, explaining that "all that should be inferred from the status of an 'independent agency' is that the entity is not located within another department or agency." Memorandum from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, *Removability of the Federal Coordinator for Alaska Natural Gas Transportation Projects* 2 (Oct. 23, 2009) (Barron Memo) (brackets and citation omitted); see 21 Op. O.L.C. 135, 138 (1997); 7 Op. O.L.C. 116, 120 (1983).

Seila Law is not to the contrary. There, the Court relied on Congress's designation of the CFPB as an "independent" agency, 12 U.S.C. 5491(a), in the course of interpreting a statutory provision expressly making the CFPB Director removable only for "inefficiency, neglect of duty, or malfeasance in office," 12 U.S.C. 5491(c)(3). *Seila Law*, 140 S. Ct. at 2206. That case shows only that the word "independent" can shed light on the scope of a removal restriction elsewhere in the statute. It does not, however, suggest that the word can *create* removal protection that no statutory provision expressly confers.

The court of appeals invoked (Pet. App. 59a n.247) *Wiener* v. *United States*, 357 U.S. 349 (1958), but that case also does not support its decision. In *Wiener*, this Court concluded that Congress had granted removal protection to certain "adjudicatory" officers in light of "the intrinsic judicial character of the[ir] task." *Id.* at 355. That decision establishes an "exception" to the *Shurtleff* clear-statement rule for officers "whose only functions are adjudicatory." Barron Memo 3. But that exception is inapplicable here, because FHFA's functions are not purely (or even primarily) adjudicatory.

d. The shareholders, for their part, argued below (C.A. Reply Br. 5) that, because Congress granted tenure protection to the Director, "the only reasonable inference" is that Congress meant for that protection to carry over to the Acting Director. That inference is flawed. The far more natural inference is that, because an acting officer "perform[s] the functions and duties of the vacant office temporarily," *NLRB* v. *SW General, Inc.*, 137 S. Ct. 929, 936 (2017) (citation omitted), he does *not* inherit the office's removal protections, which are designed to grant the officer a measure of "permanence" in his position, *Humphrey's Executor* v. *United States*, 295 U.S. 602, 625 (1935) (citation omitted). After all, it is one thing for Congress to try to protect the independence of an FHFA Director approved by the Senate; it is quite another to infer that Congress would try to do so for an Acting Director selected by the President without congressional involvement. See O.L.C., *Designating an Acting Director of the Bureau of Consumer Financial Protection* (Nov. 25, 2017), slip op. 10-11 (likewise concluding that the President may displace the CFPB Acting Director at will). And inferring that the Acting Director receives tenure protection while filling in for the Director makes no more sense than inferring that a teaching assistant gains temporary tenure while filling in for an absent professor.

Regardless, as explained, a statute should be read to restrict the President's supervisory power only if it contains "very clear and explicit language" to that effect; the power cannot "be taken away by mere inference or implication." *Shurtleff*, 189 U.S. at 315. This Court should reject the shareholders' unreasonable attempt to infer that Congress *unconstitutionally* restricted the

President's ability to displace the Acting FHFA Director, and to then use that manufactured defect as a springboard for invalidating the Third Amendment.

2. The adoption of the Third Amendment did not involve the exercise of Article II executive power

a. Even assuming that President Obama lacked the ability to revoke at will DeMarco's designation as Acting Director, FHFA's decision as conservator to adopt the Third Amendment was not an exercise of the executive power requiring presidential supervision under Article II. This Court has explained that a conservator or receiver simply "steps into the shoes" of its ward and exercises the ward's powers on the ward's behalf. *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 86 (1994) (citation omitted). As to FHFA specifically, the D.C. Circuit has held that when the conservator steps into the enterprises' "private shoes," it "'shed[s] its governmental character,'" becomes "'a private party,'" and exercises private power on their behalf. *Herron* v. *Fannie Mae*, 861 F.3d 160, 169 (2017) (citation omitted). Whether or not a conservator's actions may be characterized as governmental for some other purposes, business decisions taken by an agency standing in the shoes of a private corporation are not exercises of the executive power for purposes of Article II.

That conclusion draws significant support from historical practice—"a consideration of great weight" in cases concerning the separation of powers, *NLRB* v. *Noel Canning*, 573 U.S. 513, 524 (2014) (citation omitted). From the founding era to the present day, Congress has vested the power to operate private federally chartered corporations in shareholders, directors, conservators, and receivers who have been appointed and removed outside the strictures of Article II. For example, Congress has granted shareholders, rather than the President, the power to appoint and remove directors. See, *e.g.*, Act of Feb. 25, 1791, ch. 10, §§ 4-5, 1 Stat. 192-193 (First Bank of the United States); Act of Apr. 10, 1816, ch. 44, § 8, 3 Stat. 269-270 (Second Bank of the United States); 12 U.S.C. 1452(a)(2) (Freddie Mac); 12 U.S.C. 1723(b) (Fannie Mae). And of particular relevance here, Congress has long authorized the appointment of private persons to serve as conservators or receivers. See, *e.g.*, Act of June 3, 1864, ch. 106, § 50, 13 Stat. 114-115; 12 U.S.C. 191(a), 203(a); 1 FDIC, *Managing the Crisis: The FDIC and RTC Experience* 212-213 (1998). That traditional practice of allowing private persons to run certain corporations under federal law outside the constraints of Article II shows that the operation of such corporations is not a part of the President's executive power.

FHFA is both a regulator (in which capacity it wields the executive power on behalf of the President) and a conservator (in which capacity it "succeed[s] to" the enterprises' "rights" and "powers" and performs their "functions," 12 U.S.C. 4617(b)(2)(A)(i), (B)(i) and (iii)). FHFA adopted the Third Amendment solely in its capacity as conservator, engaging in the kinds of tasks a private financial manager might undertake and that a private party appointed as conservator equally could have taken: "[r]enegotiating dividend agreements, managing heavy debt and other financial obligations, and ensuring ongoing access to vital yet hard-to-come-by capital." *Perry Capital*, 864 F.3d at 607. Those proprietary tasks lack the essential features of sovereignty and bear no resemblance to the regulatory and enforcement activities that characterize the executive power.

See 31 Op. O.L.C. 73, 77, 89-90 (2007). There is no basis in law or logic to subject those tasks to Article II simply because the conservator standing in the enterprises' shoes also happens to be a regulatory agency.

b. The court of appeals insisted (Pet. App. 62a) that FHFA must be exercising the executive power even when acting as conservator simply because it is "a federal agency, empowered by a federal statute, enriching the federal government." That argument is wrong, because the key question is "the *nature* of the power," not the identity of the body exercising it. *Ortiz* v. *United States*, 138 S. Ct. 2165, 2176 n.5 (2018) (citation omitted). For example, the Bank of the United States was an "instrument * * * of the government," was empowered by federal statute, and served "public and national purposes," *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738, 860-861 (1824)—yet early Americans treated its financial operations as exercises of private rather than executive power, see p. 38, *supra*.

The court of appeals also reasoned that FHFA's actions as conservator must be exercises of the executive power because the conservator may act in the interests of the public, rather than just in the enterprises' interests. See Pet. App. 61a-62a. But merely authorizing a conservator to consider the public interest does not transform the conservator's business decisions into executive actions under Article II. From the beginning, Congress has chartered private corporations to promote public purposes. See *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 407-424 (1819). Here, the enterprises' own charters authorize them to serve public purposes. See 12 U.S.C. 1451, 1716. And "modern corporate law does not require [purely private] corporations to pursue profit at the expense of everything else, and many do not do so." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 711-712 (2014). Simply put, a congressional decision to authorize actors running a private corporation to put the public interest above the shareholders' interests does not somehow convert those actors into federal executive officers.

C. The Invalidation Of The Third Amendment Would Not Be A Proper Remedy For Any Constitutional Violation

Even if the Third Amendment violated the Constitution, it would not follow that a court must automatically set it aside. Ordinary remedial limitations apply to constitutional claims; here, invalidation would be improper under the doctrines of harmless error and laches.

1. Constitutional claims are subject to the usual law of remedies

In general, the Constitution does not itself prescribe any particular remedy for a violation of its provisions. The Constitution instead operates against the backdrop of statutes, rules of procedure, common-law doctrines, and equitable maxims that govern and limit the availability of relief. That law of remedies, in turn, takes significant account of matters such as "the public interest" and "the balance of equities." *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). "[I]n constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable." *New York* v. *Cathedral Academy*, 434 U.S. 125, 129 (1977) (citation omitted).

The shareholders argue (Br. 62) that a plaintiff is automatically entitled to an order remedying the challenged conduct if it can show that the government has violated "the Constitution's structural provisions." But this Court's cases flatly contradict any such *per se* rule.

Consider *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). There, the Court first determined that the withholding of William Marbury's commission violated Article II's Commission Clause. See *id.* at 154-162. Having done so, the Court did not automatically order James Madison to turn over the commission on the ground that the Commission Clause is a "structural" guarantee. The Court instead asked whether Marbury was "entitled to the remedy for which he applies" (a writ of mandamus) under "general doctrines" and "legal principles" governing that writ. *Id.* at 168-169.

Since *Marbury*, this Court has continued to subject structural constitutional claims to the general law of remedies. For example, the Court has held that courts may deny relief on such claims as a result of estoppel, see *Phillips* v. *Payne*, 92 U.S. 130, 134 (1876); the *de facto* officer doctrine, see *Buckley* v. *Valeo*, 424 U.S. 1, 142-143 (1976) (per curiam); ratification, see *Seila Law*, 140 S. Ct. at 2208; failure to make a timely objection, see *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055 (2018); or the grant of a stay, see *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (plurality opinion). The shareholders cite (Br. 62-66) other cases in which the Court has vacated actions taken by unconstitutionally structured agencies, but those cases show only that vacatur is permissible in an appropriate case, not that it is mandatory in every case.

The shareholders separately argue (Br. 74) that the APA requires vacatur of unlawful or unconstitutional actions. But that view defies both the APA's text and this Court's precedents. Most specifically, the APA provides that "due account shall be taken of the rule of prejudicial error." 5 U.S.C. 706. This Court has thus recognized that, "[i]n administrative law, * * * there is a harmless error rule." *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 659-660 (2007) (citation omitted). More generally, the APA provides that the ordinary "form of proceeding" is a traditional action for injunctive or declaratory relief, 5 U.S.C. 703, in which the APA preserves "other limitations on judicial review" as well as "the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground," 5 U.S.C. 702. This Court has thus held that "equitable defenses" such as "laches" "may be interposed" under the APA. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 155 (1967).

Although the shareholders emphasize (Br. 74) the APA's language that a court "shall * * * set aside" unlawful agency action, 5 U.S.C. 706(2), they read too much into those words. Background rules governing remedies remain in force "in the absence of a clear and valid legislative command" to the contrary. *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982) (citation omitted); see Scalia & Garner 318 ("A statute will be construed to alter the common law only when that disposition is clear.") (emphasis omitted). Indeed, just a few years before Congress enacted the APA, this Court held that a provision stating that a court "'shall'" enjoin violations was insufficient to displace the remedial discretion under "the requirements of equity practice." *The Hecht Co.* v. *Bowles*, 321 U.S. 321, 327, 329 (1944) (citation omitted). So too here, the APA's provision that a court "shall" set aside unlawful agency action does not displace traditional remedial restrictions—especially given that the other APA provisions discussed above plainly preserve those defenses.

2. Any constitutional violation was harmless

The APA, as just noted, requires courts to apply the "rule of prejudicial error." 5 U.S.C. 706. And any constitutional violation in the adoption of the Third Amendment was clearly harmless error.

The object of the removal power is to ensure that the President retains the ability to "supervise" the exercise of "executive power on his behalf." *Seila Law*, 140 S. Ct. at 2191. In this case, even assuming that the Third Amendment was an exercise of the executive power and that the Acting Director who approved the Amendment could be displaced only for cause, the President still retained the power to supervise the Amendment's adoption. That is so because FHFA's counterparty to the Amendment was Treasury—an executive department led by a Secretary subject to removal at will by the President. Pet. App. 69a. That power of at-will removal meant that, for constitutional purposes, the Secretary was "the President's *alter ego*." *Myers*, 272 U.S. at 132-133. As the court of appeals correctly held, President Obama, through Secretary Geithner, had "plenary authority to stop the adoption of the [Amendment]," but chose not to do so. Pet. App. 69a. Put simply, "plaintiffs may not sue to invalidate an [action] due to lack of presidential oversight when their allegations show that the President had oversight of the action." *Id.* at 70a n.6.

The shareholders claim (Br. 67) that, in *Seila Law*, this Court ruled for the challenger even though "there was no plausible argument that greater presidential oversight of the CFPB would have changed the agency's decision to investigate a small California law firm." In reality, *Seila Law* says only that a plaintiff seeking to establish "*Article III standing*" need not "show that the challenged act would not have been taken if the responsible official had been subject to the President's control." 140 S. Ct. at 2195-2196 (emphasis added). But even if a plaintiff has standing, it may still be denied retrospective relief if "the government would have made the same decision regardless" of the violation. *Texas* v. *Lesage*, 528 U.S. 18, 21 (1999) (per curiam). And unlike in *Seila Law*, this is "a unique situation where," as the en banc majority below correctly recognized, "we need not speculate about whether appropriate presidential oversight would have stopped the [Third Amendment]. We know that the President, acting through the Secretary of the Treasury, could have stopped it but did not." Pet. App. 69a-70a.

The shareholders more generally contend (Br. 66-70) that the violation at issue here amounts to structural error—*i.e.*, an error requiring automatic reversal without any assessment of harmlessness—because it concerns a structural constitutional protection. This Court, however, has applied "a strong presumption that any * * * constitutional errors that may have occurred are subject to harmless-error analysis," and has "found an error to be 'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases.'" *Neder* v. *United States*, 527 U.S. 1, 8 (1999) (brackets and citations omitted). The Court has deemed errors to be structural where "the effects of the error are simply too hard to measure," *Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1908 (2017), but this is not such a case for the reasons already discussed. The Court also has treated errors as structural where "the error always results in fundamental unfairness." *Id.* at 1908. But there is no such unfairness here; to the contrary, it would be manifestly inequitable to unwind a multibillion-dollar agreement because of the President's purported inability to supervise a transaction from one end that he undoubtedly could supervise from the other end.

Finally, the shareholders contend (Br. 70-72) that the constitutional violation here was not, in fact, harmless. They emphasize (Br. 72-73) that Congress assigned the duty of ensuring the enterprises' soundness to the FHFA Director, not the Treasury Secretary. But if President Obama believed that FHFA should not be agreeing to the Third Amendment, he still could have instructed Secretary Geithner to reject the Amendment; the President's power over the Secretary, after all, was "plenary." Pet. App. 69a. The shareholders also argue (Br. 72-74) that, even if President Obama had complete control over the adoption of the Third Amendment itself, both he and President Trump lacked control over FHFA at other times. But that sort of "butterfly effect" is far too attenuated to justify setting aside the Amendment. To the extent the shareholders object that the President lacked the power to control FHFA's actions before the Amendment, they should have challenged those actions at the appropriate time; now that the APA's six-year statute of limitations has run, they may no longer invoke those actions as a basis for vacating the Amendment. See, *e.g.*, *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977). And to the extent the shareholders object that the President has lacked the power to control FHFA's actions since the adoption of the Amendment, that problem would be solved by affirmance of the ruling below that the President may remove the FHFA Director at will.

3. Laches also precludes the requested relief

As previously noted, "[t]he defense of laches [may] be asserted" in an APA action. *Abbott Laboratories*, 387 U.S. at 155. The defense has two elements: "unreasonable delay and consequent prejudice." *Gutierrez* v. *Waterman Steamship Corp.*, 373 U.S. 206, 215 (1963).

Here, the shareholders unreasonably delayed the filing of this suit. FHFA and Treasury adopted the Third Amendment in 2012, but the shareholders waited until 2016 to bring suit. J.A. 24. The only excuse they muster (Br. 76) for that delay is that the Amendment "has been the subject of active litigation since shortly after it went into effect." Far from excusing their delay, however, this observation highlights their unreasonableness; that other shareholders brought suit soon after the Amendment's adoption shows that these shareholders could and should have done likewise.

The shareholders' delay also prejudiced Treasury. The Amendment rebalanced Treasury's and the enterprises' risks and rewards: Treasury stood to gain billions of dollars if the enterprises began accumulating more in annual net worth than the old $18.9 billion fixed dividend plus commitment fees, but to lose billions of dollars in forgone fixed dividends and commitment fees if they did not. See pp. 19-20, *supra*. Had the shareholders challenged the Amendment in 2012 and a court promptly vacated it, the parties would have equally returned to the status quo. But by delaying suit for four years, the shareholders essentially gave themselves a free option at Treasury's expense: the shareholders allowed Treasury to bear the risk that the deal would end up enriching the enterprises; but now that, in hindsight, the deal has arguably benefited the public (at least so far), the shareholders are belatedly suing to deprive

Treasury of the agreed-upon reward for the risk already incurred. That is precisely the kind of gamesmanship that laches is meant to avoid.

More broadly, a host of entities have relied on the Third Amendment in ordering their affairs in the years since its adoption. The Amendment was a "risk-averse" measure that eliminated the threat that the enterprises' financial obligations would deplete Treasury's remaining capital commitment. *Jacobs*, 908 F.3d at 894. The enterprises and counterparties to their transactions have all made economic decisions for a number of years against the backdrop of the Amendment and its safeguards for the enterprises' financial future. A judicial order invalidating the Amendment now would undo those safeguards, undermining the reliance interests of those who presumed those safeguards' existence.

The shareholders dismiss (Br. 75) those harms by asserting that the defense of laches cannot bar an action brought, as this one was, within the six-year statute of limitations applicable to APA actions, see 28 U.S.C. 2401. To the contrary, however, this Court has held that, even when a plaintiff brings suit within the limitations period, laches may support "curtailment of the relief *equitably* awardable," though it cannot "bar *legal* relief." *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 667, 685 (2014) (citation omitted). The injunctive and declaratory remedies sought here are "equitable," not legal, which explains this Court's statement that "[t]he defense of laches c[an] be asserted" in APA suits. *Abbott Laboratories*, 387 U.S. at 155.

CONCLUSION

The judgment of the court of appeals should be reversed as to the statutory claim and affirmed as to the constitutional claim.

Respectfully submitted.

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