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

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF COURT-APPOINTED *AMICUS CURIAE*

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in preserving the balanced system of government laid out in our nation's charter and accordingly has an interest in this case and particularly the question of whether the Federal Housing Finance Agency's (FHFA's) structure comports with the constitutional separation of powers.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2008, the nation confronted the worst financial disaster since the Great Depression, a crisis that "shattered" lives, "shuttered" businesses, "evaporated" savings, and caused millions of families to lose their homes. S. Rep. No. 111-176, at 39 (2010); *see id.* ("[T]he financial crisis has torn at the very fiber of our middle class."). At the heart of this crisis was the mortgage industry. As the Financial Crisis Inquiry Commission explained, "[l]ending standards collapsed, and there was a significant failure of accountability

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

and responsibility throughout each level of the lending system." Fin. Crisis Inquiry Comm'n, *The Financial Crisis Inquiry Report* 125 (2011). As loan originations and the volume of private-label mortgage-backed securitizations increased, the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) increased their purchases of private-label mortgage-backed securities, including those backed by subprime and Alt-A loans. And at the peak of the crisis, nearly half of the nation's mortgage debt was owned or guaranteed by Fannie Mae and Freddie Mac in the form of whole loans, private-label securities holdings, and guaranteed securities. When home prices declined and delinquencies rose, Fannie and Freddie experienced billions in losses on loans and securities. *Id.* at 309-10.

Unsound practices at Fannie Mae and Freddie Mac in the years leading up to the crisis were made possible by ineffective oversight of the Office of Federal Housing Enterprise Oversight (OFHEO). Fannie and Freddie spent millions of dollars creating a sophisticated lobbying machine with "immense political power," which they used to ensure that this regulatory agency remained "largely toothless." *Id.* at 40, 311. When Fannie and Freddie made business decisions to enhance their growth, market share, and executive compensation, OFHEO simply "took its eye off the ball," failing to rein them in despite their "increasing investments in risky mortgages and securities." *Id.* at 322, 122.

To correct these problems, prevent their reoccurrence, and stem the escalating housing crisis, Congress passed, and President George W. Bush signed, the Housing and Economic Recovery Act (Recovery Act) in July 2008. Key to the legislation was the establishment of a new agency to oversee Fannie and

Freddie, the FHFA. Given the failures of the previous regulatory regime and the disastrous consequences that resulted from those failures, Congress chose to grant the FHFA a degree of independence, providing that it would be led by a director whom the President could remove "for cause," 12 U.S.C. § 4512(b)(2). In that way, Congress sought to ensure that the new agency could fulfill its statutory mandate and safeguard the stability of government-sponsored enterprises (GSEs) like Fannie and Freddie.

Petitioners and the Department of Justice argue that the FHFA's independence violates the Constitution's separation of powers. This argument is wholly without merit. The Framers empowered Congress to "make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers" of the federal government, U.S. Const. art. I, § 8, cl. 18, thus ensuring that future legislators would have the flexibility needed to structure the government so it could respond effectively to new challenges. As Chief Justice John Marshall later observed, the Framers made no "unwise attempt" to dictate "the means by which government should, in all future time, execute its powers." *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819). Their choice reflected an understanding that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs." *Id*. From the earliest days of the Republic, Congress has used this discretion to vary the organization of federal agencies, and to provide officers who implement regulatory statutes a measure of independence from presidential policy control.

Consistent with this constitutional design, this Court has long recognized that Congress may shield the heads of regulatory agencies from removal without cause. *See, e.g.*, *Free Enter. Fund v. Pub. Co.*

Accounting Oversight Bd., 561 U.S. 477, 501 (2010); *Morrison v. Olson*, 487 U.S. 654, 692 (1988); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 631-32 (1935). Last Term, in *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020), this Court nonetheless held that a for-cause removal restriction on the head of the Consumer Financial Protection Bureau (CFPB) violated the separation of powers because the Bureau was "led by a single Director and vested with significant executive power." *Id.* at 2201.

That decision does not dictate the outcome of this case, and this Court should not extend its decision in *Seila Law* to this materially different agency. First, the FHFA Director does not wield "regulatory or enforcement authority remotely comparable to that exercised by the CFPB." *Id.* at 2202. While Congress granted the CFPB roving authority to regulate and adjudicate "any unfair, deceptive, or abusive act or practice" in the consumer-finance market, 12 U.S.C. § 5536(a)(1)(B), as well as the authority to enforce 18 other federal laws, the FHFA's purview is far more limited. Under the Recovery Act, the FHFA regulates only 13 GSEs, including Fannie and Freddie, and its regulation of these entities is carefully delineated by a number of provisions of federal law that limit the FHFA's actions. Moreover, federal law ties the FHFA's actions to the statutory charters of the GSEs, and the GSEs themselves can only act as prescribed by these tightly woven charters. And while the FHFA can also serve as conservator or receiver of the GSEs, the FHFA acts as a private entity in that role, so its actions in that capacity do not implicate the separation of powers. In any event, that role too is constrained to the 13 GSEs and is limited in various ways by federal law. In short, the FHFA does not enjoy anything like

the broad power to regulate the entire marketplace of consumer financial products that the CFPB does.

Second, as this Court recognized, the FHFA "regulates primarily Government-sponsored enterprises, not purely private actors." *Seila Law*, 140 S. Ct. at 2202. Indeed, the GSEs were created by federal statute, are subsidized by the government, and fulfill a public purpose. Moreover, private actors that invest in the GSEs do so voluntarily and with full knowledge that the GSEs are uniquely subsidized and regulated by the government. Because "[t]he structural principles secured by the separation of powers protect the individual," *Bond v. United States*, 564 U.S. 211, 222 (2011), those constitutional constraints are necessarily less relevant in the context of a federal agency like the FHFA that does not exercise coercive sovereign power over any purely private commercial conduct.

In short, this Court's reasoning in *Seila Law* does not apply to the FHFA, and the FHFA's leadership structure does not violate the separation of powers. Congress's considered judgment about how best to structure the FHFA should be allowed to stand.

ARGUMENT

I. CONGRESS HAS BROAD AUTHORITY TO SHAPE THE STRUCTURE OF THE FEDERAL GOVERNMENT AND TO CONFER ON CERTAIN OFFICERS A DEGREE OF INDEPENDENCE FROM THE PRESIDENT.

A. The Constitution gives Congress great flexibility in determining how best to shape the federal government. While the Framers anticipated the creation of "Departments," U.S. Const. art. II, § 2, cl. 1, they left unspecified what those departments would be, how they would be organized, and what connection they

would have to the President. Likewise, while the Framers envisioned that "Officers of the United States" would be "established by Law," *id*. art. II, § 2, cl. 2, they provided few details concerning those officers' relationship with the President. *Cf. id*. art. II, § 2, cl. 1 (the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments").

Significantly, nowhere in the Constitution is the President given the power to remove these officers from their positions. *Seila Law*, 140 S. Ct. at 2205. Indeed, the Constitution addresses their removal only by giving Congress the power to impeach them. U.S. Const. art. II, § 4.

It was no accident that the Constitution left open most questions concerning the federal government's departments and officers. The Framers deliberately rejected a plan that would have delineated in the Constitution the duties of six department secretaries while specifying that each would serve the President "during pleasure." *See* 2 *Records of the Federal Convention of 1787*, at 335-36 (Max Farrand ed., 1911) (proposal specifying duties of six department secretaries, all serving the President "during pleasure"). Instead, the Framers chose to assign Congress broad discretion over the manner in which federal laws are executed, granting it the authority to "make all Laws which shall be necessary and proper for carrying into Execution . . . *all* . . . *Powers* vested by this Constitution in the Government of the United States." U.S. Const. art. I, § 8, cl. 18 (emphasis added); *see* 2 *Records* 345 (this authority includes the power to "establish all offices"). This "is the one and only provision of the Constitution that directly addresses the establishment of the federal government," and it "gives the relevant power expressly to Congress." John F. Manning, *Separation of*

Powers as Ordinary Interpretation, 124 Harv. L. Rev. 1939, 1986 (2011); *see* Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 Yale L.J. 1256, 1271 n.34 (2006) ("the intention was for Congress to shape the executive departments in the exercise of its powers under the Necessary and Proper Clause"). Under the Constitution, therefore, "Congress has plenary control over the salary, duties, and even existence of executive offices," *Free Enter. Fund*, 561 U.S. at 500, wielding broad authority over the structure of federal agencies.

The Constitution does, of course, place the "executive Power" in the President, whom it directs to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 1, cl. 1; *id.* art. II, § 3. But at the Founding, there was no consensus that "executive" power entailed an authority to remove officers, Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L.J. 1725, 1790 (1996), much less an illimitable power to remove them at will. Indeed, "there is no evidence to support the assertion that the removal of executive officers was . . . an inherent attribute of the 'executive power' as it was understood or practiced in England." Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 Stanford L. Rev. (forthcoming 2021) (manuscript at 5) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3428737). To the contrary, throughout English history Parliament freely "altered modes of . . . removing existing officers," "transferred . . . removal power from the king to other officials," and "provided statutory tenure when it wished to make the officer independent of the king or when it had some other political or fiscal reason to do so." *Id.* at 6.

Nor could it be deduced from state constitutions in the Founding era that the power of removal—much

less an illimitable power of removal—was an inherent executive quality. For "in state and colonial governments at the time of the Constitutional Convention," the removal power was typically "lodged in the Legislatures or in the courts." *Myers v. United States*, 272 U.S. 52, 118 (1926); *see* 1 Annals of Cong. 534 (1798) (Joseph Gales ed., 1834) (White) ("This is a doctrine not to be learned in American Governments . . . . Each State has an Executive Magistrate; but look at his powers, and I believe it will not be found that he has in any one, of necessity, the right of appointing or removing officers.").

B. Legislative decisions in the early Republic confirm that Congress enjoys broad freedom to shape the government's administrative structure—and to grant certain officers a measure of independence from the President. *See Harmelin v. Michigan*, 501 U.S. 957, 980 (1991) ("actions of the First Congress" are "persuasive evidence of what the Constitution means").

Founding-era legislation "created commissions and boards outside of any of the major departments" to carry out various functions. Mashaw, *supra*, at 1291. For example, to help effectuate a monetary policy, the First Congress established a committee empowered to purchase public debt. The President could not instigate these purchases, and two of the committee's five leaders were *ex officio* members whom the President could not remove from office—the Vice President (then a political rival, not a running mate) and the Chief Justice. Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186, 186; *see* Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 Notre Dame L. Rev. 101, 137, 142 (2020). This committee was the brainchild of Alexander Hamilton, who consistently advocated its independence to prevent politicians from raiding its

funds "when immediate exigencies press . . . rather than resort to new taxes." Alexander Hamilton, Report on a Plan for the Further Support of Public Credit (Jan. 16, 1795), https://founders.archives.gov/documents/Hamilton/01-18-02-0052-0002.

Similarly, when creating the Treasury Department, Congress recognized that its Secretary—unlike the previously established Secretaries of Foreign Affairs and War—should not be a mere instrument of the President's will. *See* 1 Annals of Cong. 532 (Vining) ("The Departments of Foreign Affairs and War are peculiarly within the powers of the President . . . .").

Whereas Congress simply ordered those other two Secretaries to "perform and execute such duties as shall from time to time be enjoined on or intrusted to him by the President," Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28, 29; *see* Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49, 50, it gave the Treasury Secretary detailed responsibilities that effectuated congressional policies and "made him in part an agent of Congress," David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. Chi. L. Sch. Roundtabe 161, 202 (1995). When the House sought to make the Secretary removable by the President, the Senate balked, leading to an impasse between the bodies. *See* James Hart, *The American Presidency in Action: 1789* 217 (1948) ("[S]enators who had favored presidential removal of the other Secretaries were at first against his removal of the Secretary of the Treasury."). Only the Vice President's tie-breaking vote led the Senate to approve the legislation, while still refusing to explicitly "acknowledge the Power of removal in the President." Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021, 1064 (2006) (quoting Letter from Thomas Hartley to William Irvine (Aug. 17, 1789)).

By no means, therefore, was it generally accepted that every principal office, regardless of its function, was inherently subject to presidential removal—much less an illimitable power to remove at will. This was evident also in the discussions surrounding another officer within the proposed Treasury Department, a Comptroller who would be empowered "to superintend the adjustment and preservation of the public accounts" and to "direct prosecutions . . . for debts . . . due to the United States." Act of Sept. 2, 1789, ch. 12, § 3, 1 Stat. 65, 66. Because the Comptroller's duties would partake "of a judiciary quality as well as executive," Madison argued that there were "strong reasons why an officer of this kind should not hold his office at the pleasure of the executive." 1 Annals of Cong. 636. He explained:

> Whatever . . . may be my opinion with respect to the tenure by which an executive officer may hold his office according to the meaning of the constitution, I am very well satisfied, that a modification by the Legislature may take place in such as partake of the judicial qualities, and that the legislative power is sufficient to establish this office on such a footing as to answer the purposes for which it is prescribed.

Id.

Madison further noted that, given the Comptroller's statutory responsibilities, the office was not intended "merely to assist [the President] in the performance of duties." *Id.* at 638 ("I do not say the office is either executive or judicial; I think it rather distinct from both, though it partakes of each . . . ."). Others advocated that the Comptroller be "appointed for a limited time" and that "during that time he ought to be independent of the Executive, in order that he might not be influenced by that branch of the

Government in his decisions." *Id.* at 637 (Smith). The key point was that "the nature of this office" meant that "a modification might take place." *Id.* at 638 (Madison).

Likewise, when Congress created a new Post Office, it detailed an elaborate set of responsibilities for the Postmaster General and his subordinates, deleting prior references to presidential control. *Compare* Act of Feb. 20, 1792, ch. 7, 1 Stat. 232, 232-39, *with* Act of Sept. 22, 1789, ch. 16, § 1, 1 Stat. 70, 70. In contrast, when creating the Navy Department, Congress simply directed its Secretary "to execute such orders as he shall receive from the President." Act of Apr. 30, 1798, ch. 35, § 1, 1 Stat. 553, 553. Once again, Congress distinguished those departments "exclusively under presidential direction" from those "also directed according to law," Mashaw, *supra*, at 1289, and gave the latter greater independence.

C. Contemporary Attorney General opinions also recognized Congress's power to assign independent decision-making authority to officials besides the President. These opinions are at odds with the notion that the President must exert the type of total policy control over all federal agencies that would demand an illimitable power to remove at will.

As one opinion explained, "[t]he constitution assigns to Congress the power of designating the duties of particular officers: the President is only required to take care that they execute them faithfully." *The President and Accounting Offices*, 1 U.S. Op. Att'y Gen. 624, 625-26 (1823). Thus, where a duty is assigned by statute, the President "is not to perform the duty, but to see that the officer assigned by law performs his duty faithfully—that is, honestly: not with perfect correctness of judgment, but honestly." *Id.* at 626. If the officer entrusted with that duty selects one option

"while the President prefers another, the President cannot interfere . . . because the selection is referred by law to the judgment of the [officer] alone, without any reference to any controlling power in the President." *Id.*; *accord Accounts and Accounting Offices*, 2 U.S. Op. Att'y Gen. 507, 509-10 (1832) (concluding that "the decision of the Comptroller in this case is conclusive upon the executive branch").

To be sure, Attorney General opinions also affirmed the President's power to remove lower-level officers. But they rooted this power in the need to ensure the faithful execution of the laws. *See, e.g.*, *Power of the President Respecting Pension Cases*, 4 U.S. Op. Att'y Gen. 515, 515 (1846) ("the President is to take care that [officers] execute their duties faithfully and honestly," and thus he has "the power of removal" over "unfaithful subordinates"); *The Jewels of the Princess of Orange*, 2 U.S. Op. Att'y Gen. 482, 489 (1831) (if "a district attorney was prosecuting a suit . . . for the purpose of oppressing an individual . . . such a prosecution would not be a faithful execution of the law"); 1 U.S. Op. Att'y Gen. at 626 (if "the postmaster should make a corrupt appointment . . . the laws in such a case have not been faithfully executed"). Consistent with a regime of good-cause tenure, these opinions emphasize that the President need not ensure that an officer tasked with statutory duties acts "with perfect correctness of judgment" in the President's view, but rather that the officer "performs his duty faithfully." *Id.*

* * *

In sum, the Constitution's text, structure, drafting history, and early construction all tell the same story: Congress has considerable latitude when shaping the government's administrative structure. Rather than ossify that structure and foreclose innovation, the Framers empowered future leaders to respond

effectively "to the various *crises* of human affairs." *McCulloch*, 17 U.S. at 415.

II. RESPONDING TO THE DEVASTATING HOUSING CRISIS OF 2008, CONGRESS DETERMINED IT WAS NECESSARY TO ESTABLISH THE FHFA AS A REGULATOR WITH SOME DEGREE OF INDEPDENDENCE.

In 2008, the nation was plunged into the worst financial disaster since the Great Depression. The crisis stemmed from a financial system pervaded by unsustainable risk and incapable of weathering a drop in housing prices. And at the peak of the housing crisis, nearly half of the nation's mortgage debt, including in the form of private securities, was owned or guaranteed by Fannie Mae and Freddie Mac, "the two massive government-sponsored enterprises (GSEs) created by Congress to support the mortgage market." Fin. Crisis Inquiry Comm'n, *The Financial Crisis Inquiry Report* 38 (2011) (hereinafter "*Report*"). Unsound practices—including poor corporate governance and risk management at the GSEs as they prioritized earnings growth—were made possible by ineffective oversight of a weak and politically dependent regulatory agency. *Id.* at 323. By establishing the FHFA to oversee Fannie and Freddie, Congress and President Bush sought to correct these problems, prevent another GSE meltdown, and ensure that the GSEs were acting to further their missions.

Fannie Mae and Freddie Mac were chartered per federal legislation to promote American home ownership by freeing up mortgage capital. By purchasing mortgages from banks, thrifts, and mortgage originators, the GSEs enable those entities to make new loans. *Id.* at 39. Despite the public mandate in their charters, however, Fannie and Freddie are

shareholder-held corporations, giving them "dual missions" that include "maximiz[ing] returns for shareholders." *Id.*

Pursuing shareholder profit, Fannie and Freddie poured immense resources into shaping their regulatory environment during the late twentieth century, building "'the greatest, most sophisticated lobbying operation in the modern history of finance.'" Bethany Mclean, *Fannie Mae's Last Stand*, Vanity Fair (Feb. 2009), https://www.vanityfair.com/news/2009/02/fannie-and-freddie200902-2 (quoting former House Banking and Financial Services Chairman Jim Leach). Through their "well-oiled, well-financed and well-connected lobbying armada," they "spent years nurturing relationships with lawmakers," Jeanne Cummings, *Regulation Comes To Those Who Wait*, Politico (July 9, 2007), https://www.politico.com/story/2007/07/regulation-comes-to-those-who-wait-004835, spending more than $164 million on lobbying between 1999 and 2008, *Report* 41. In short, "Fannie and Freddie accumulated political clout," *id.*, which they used "to stymie effective regulation," Mclean, *supra*.

For instance, while Congress "imposed tougher, bank-style capital requirements and regulations on thrifts" after the savings and loan crisis, it allowed Fannie and Freddie to continue holding lower amounts of capital. *Report* 40. And although Congress established OFHEO as a regulator for Fannie and Freddie, Congress placed it within the Department of Housing and Urban Development and deprived it of "legal powers comparable to those of bank and thrift supervisors." *Id.*

As a result, "OFHEO was structurally weak and almost designed to fail." *Id.* (quoting former director). And fail it did—in part because the "Fannie and Freddie political machine resisted any meaningful

regulation using highly improper tactics." *Id.* at 42. As Fannie Mae's chief operating officer recalled: "The old political reality . . . was that we always won, we took no prisoners . . . we used to . . . be able to write, or have written rules that worked for us." *Id.* at 180. In short, OFHEO was not only a "largely toothless agency," *id.* at 311, but was further cowed by being "constantly subjected to malicious political attacks and efforts of intimidation," *id.* at 42 (quoting another former director).

By the twenty-first century, scandals engulfed Fannie and Freddie as it was discovered that their employees had long "manipulated accounting and earnings to trigger bonuses for senior executives." *Id.* at 180. Furthermore, to compete with Wall Street, Fannie and Freddie also ventured into acquiring subprime and Alt-A private-label mortgage-backed securities and "loosened their underwriting standards, purchasing and guaranteeing riskier loans." *Id.* at 122. But OFHEO could not prevent the danger of these "increasing investments in risky mortgages and securities." *Id.* "The results would be disastrous for the companies, their shareholders, and American taxpayers." *Id.* at 125. As mortgage delinquencies skyrocketed, "both GSEs began to take significant losses," particularly from their purchases of private-label Alt-A securities, and these losses "were ultimately borne by taxpayers." *Id.* at 123, 323. In the end, it was "the risky practices" of Fannie and Freddie, "undertaken to meet Wall Street's expectations for growth," that led to the need for Treasury to provide funding for them. *Id.* at 323.

Although OFHEO knew that "mortgage insurers were already seeing abuses" with these higher-risk loans, the agency regarded the developments as "not a 'significant supervisory concern.'" *Id.* at 123 (quoting

agency report). Thus, even as the GSEs expanded efforts to "increase our penetration into subprime," *id.* at 180 (quoting Fannie Mae's then-CFO), "OFHEO never told the GSEs to stop. Rather, year after year, the regulator said that both companies had adequate capital, strong asset quality, [and] prudent credit risk management." *Id.* Simply put, "OFHEO took its eye off the ball." *Id.* at 322. Without a diligent regulator, Fannie and Freddie were allowed to increase their "investments in risky loans and securities" unchecked. *Id.* at 122.

To stem the escalating crisis across the private-label and GSE-securitized mortgage markets, and to help prevent another similar crisis, Congress and President Bush in 2008 enacted "a sweeping rescue package aimed at resurrecting the housing market from its worst slump since the Great Depression and stabilizing the two largest mortgage finance companies." Jeremy Pelofsky, *Bush Signs Housing Bill as Fannie Mae Grows*, Reuters (July 30, 2008), https://www.reuters.com/article/us-fannie-freddie-bush/bush-signs-housing-bill-as-fannie-mae-grows-idUSN3042756820080730.

Among its key reforms was the establishment of the FHFA to "ensure that the government sponsored enterprises supporting the mortgage markets operate[d] in a safe and sound manner." H.R. Rep. No. 110-142, at 87 (2007). Recognizing that OFHEO's lack of independence had prevented it from robustly enforcing the law—a mistake that led to billions in federal bailouts and was one of the market-wide failures that contributed to the near-collapse of the American economy—Congress provided that the new agency would enjoy some degree of independence from the President. It would be "headed by a Director appointed by the President and confirmed by the Senate for a five-year

term," *id.* at 88, whom the President could only remove "for cause," 12 U.S.C. § 4512(b)(2). As the next Section explains, Congress's choice to impose this for-cause restriction does not offend separation-of-powers principles.

III. CONGRESS ACTED WITHIN ITS CONSTITUTIONAL AUTHORITY IN CONFERRING ON THE FHFA DIRECTOR SOME DEGREE OF INDEPENDENCE FROM THE PRESIDENT.

For over a century, and consistent with constitutional text and history, this Court has repeatedly reiterated that Congress may limit the President's authority to remove certain officers without cause. *See, e.g.*, *Seila Law*, 140 S. Ct. at 2192 ("we need not and do not revisit our prior decisions allowing certain limitations on the President's removal power"); *Free Enter. Fund*, 561 U.S. at 501 (noting that the Court does not "take issue with for-cause limitations in general"); *Morrison*, 487 U.S. at 692 (upholding for-cause removal restrictions for an independent counsel); *Humphrey's Ex'r*, 295 U.S. at 627-28 (upholding for-cause removal restrictions for the members of the Federal Trade Commission); *United States v. Perkins*, 116 U.S. 483, 484 (1886) (upholding for-cause removal restrictions on naval cadet engineers).

To be sure, last Term, this Court held in *Seila Law* that a for-cause restriction on the President's power to remove the CFPB's single Director violates the separation of powers. 140 S. Ct. at 2201. That decision is in tension with both Founding-era history and this Court's prior precedents, as discussed above. But whatever the merits of that decision, this Court should not extend it to the FHFA, which is materially different than the CFPB for at least two reasons. *See generally Humphrey's Ex'r*, 295 U.S. at 631

(constitutionality of removal restrictions "will depend upon the character of the office").

First, the FHFA Director does not wield "regulatory or enforcement authority remotely comparable to that exercised by the CFPB," *Seila Law*, 140 S. Ct. at 2202. In *Seila Law*, this Court explained that the CFPB Director "wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U.S. economy." *Id.* at 2191. Specifically, "Congress transferred the administration of 18 existing federal statutes to the CFPB, including the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and the Truth in Lending Act." *Id.* at 2193. The statutes "cover everything from credit cards and car payments to mortgages and student loans." *Id.* at 2200. Moreover, Congress created a new prohibition on "any unfair, deceptive, or abusive act or practice" in the consumer-finance market. 12 U.S.C. § 5536(a)(1)(B). The CFPB is empowered to promulgate binding regulations enforcing that standard and the other pre-existing statutes within its purview. *Id.* §§ 5531(a)-(b), 5581(a)(1)(A), (b).

On top of that, the Court explained that the CFPB had the authority to enforce these laws by "conduct[ing] investigations, issu[ing] subpoenas and civil investigative demands, initiat[ing] administrative adjudications, and prosecut[ing] civil actions in federal court." *Seila Law*, 140 S. Ct. at 2193. The CFPB can also "seek restitution, disgorgement, and injunctive relief, as well as civil penalties of up to $1,000,000 (inflation adjusted) for each day that a violation occurs." *Id.* In short, the CFPB "acts as a mini legislature, prosecutor, and court, responsible for creating substantive rules for a wide swath of industries, prosecuting violations, and levying knee-buckling penalties against private citizens." *Id.* at 2202 n.8; *id.* at 2204 (Director

"may dictate and enforce policy for a vital segment of the economy affecting millions of Americans").

The powers of the FHFA bear no resemblance to the "significant governmental power" vested in the CFPB, *id.* at 2203. Rather, the FHFA and its regulated entities are sharply constrained in their authorities, activities, and powers by explicit statutory direction from Congress, creating a framework of action far less broad than that of the CFPB.

The FHFA regulates only 13 GSEs, and it has the duty to "oversee the prudential operations of" those entities alone. 12 U.S.C. § 4513(a)(1)(A). Moreover, unlike the statutes governing the CFPB, federal law dictates precisely what the FHFA Director may do in that regulatory role. For instance, federal law provides that the Director "shall establish standards . . . for each regulated entity," and then delineates ten areas that the standards shall cover. *Id.* § 4513b(a). Likewise, the law provides that the Director "shall conduct an ongoing study of fees charged by enterprises for guaranteeing a mortgage," and then spells out seven factors that the study must include. *Id.* § 4514a(a) & (d). Federal law also requires the Director to conduct an annual on-site examination of each GSE, *id.* § 4517, to prohibit compensation to executives at the GSEs that "is not reasonable and comparable with compensation for employment in other similar businesses," *id.* § 4518(a), and to submit annual reports to Congress, *id.* § 4521. In short, unlike the roving authority to police "any unfair, deceptive, or abusive act or practice" in the consumer financial products marketplace that Congress vested in the CFPB Director, *id.* § 5536(a)(1)(B), the FHFA Director's powers are narrowly focused on 13 entities and are carefully defined by statute.

On top of that, Congress also limited the powers of the GSEs themselves, which—again—are the only entities the FHFA has the power to regulate. For instance, Congress has described over many pages of the U.S. Code the precise structure, purposes, and operations of Fannie and Freddie, the two biggest GSEs overseen by the FHFA, as well as limitations on what they can do. *See, e.g.*, *id.* §§ 1717, 1719. Thus, the FHFA is doubly limited in the scope of its powers, both through its own statute and the statutes governing the GSEs.

Furthermore, even the powers of the FHFA that are arguably comparable to the CFPB's powers are circumscribed in ways that the CFPB's are not. For instance, while the CFPB can bring enforcement actions against any person in the consumer financial product marketplace, the FHFA can issue and serve a "notice of charges" against only the regulated entities or their affiliates, and only for specific circumstances enumerated by statute. *Id.* §§ 4581(a), 4631(a). And it is only as part of such a narrowly-delineated enforcement proceeding that the FHFA may issue regulatory subpoenas. *Id.* §§ 4588, 4641. Finally, the FHFA can only fine the regulated entities or their affiliates, and only for specific conduct enumerated by statute. *Id.* §§ 4585(a), 4636.

To be sure, the FHFA may also act as a conservator or receiver of Fannie and Freddie, and—as Petitioners point out—its decisions in this capacity could affect "a major segment of the U.S. economy," Pet'rs Br. 61 (quoting *Seila Law*, 140 S. Ct. at 2200). But where the FHFA acts as conservator or receiver of, for example, Fannie Mae, it steps "into Fannie Mae's private shoes" and "shed[s] its government character" altogether. *Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017) (quotations and alterations omitted).

Thus, when the FHFA acts as conservator or receiver, it is no different from an Article II perspective than the CEOs of Fannie Mae and Freddie Mac. The FHFA's activities as conservator or receiver therefore should not trigger separation-of-powers concerns.

In any event, even if the FHFA's role as conservator or receiver did implicate separation-of-powers limitations, its conservatorship or receivership powers—like its regulatory powers—are focused solely upon the 13 GSEs within its purview, and federal law spells out at length how the FHFA shall exercise those powers. *See* 12 U.S.C. § 4617. In short, at every turn, the powers of the FHFA are narrowly tailored to overseeing the GSEs, and these powers are clearly defined and limited by federal law. The FHFA is thus materially different from the CFPB.

Second, unlike the CFPB, the FHFA "regulates primarily Government-sponsored enterprises, not purely private actors." *Seila Law*, 140 S. Ct. at 2202. That distinction is important. After all, "[t]he structural principles secured by the separation of powers protect the individual." *Bond*, 564 U.S. at 222; *see Seila Law*, 140 S. Ct. at 2202 ("structural protections" are "critical to preserving liberty" (quoting *Bowsher v. Synar*, 478 U.S. 714, 730 (1986))); *Wellness Intern. Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1955 (2015) (Roberts, J., dissenting) ("the values of liberty and accountability protected by the separation of powers belong not to any branch of the Government but to the Nation as a whole").

In fact, in *Seila Law*, this Court contrasted the CFPB with the independent counsel at issue in *Morrison*, noting that although the independent counsel had the power to initiate criminal investigations and prosecutions, its power was "trained *inward* to high-ranking Governmental actors identified by others." 140 S.

Ct. at 2200 (emphasis added). *Seila Law* also distinguished the Office of the Special Counsel, which "exercises only limited jurisdiction to enforce certain rules governing *Federal Government* employers and employees," and "does not bind private parties at all." *Id.* at 2201-02 (emphasis added). By contrast, in the Court's view, the CFPB Director "has the authority to bring the coercive power of the state to bear on millions of private citizens and businesses, imposing even billion-dollar penalties through administrative adjudications and civil actions." *Id.* at 2200-01.

Although the FHFA is a financial regulatory agency, its jurisdiction is much more like that of the independent counsel and the Office of Special Counsel than that of the CFPB. The FHFA regulates *government*-sponsored entities. Indeed, Fannie and Freddie enjoy billions of dollars of effective federal subsidies based on the federal government's implicit backing, *see generally* Wayne Passmore, *The GSE Implicit Subsidy and the Value of Government Ambiguity*, 33 Real Est. Econ. 465, 465-66 (2005), and are exempt from various regulations and tax obligations, *see, e.g.*, 12 U.S.C. § 1719(d) & (e) (GSE securities are "exempt securities within the meaning of laws administered by the [SEC]"). Moreover, they were created by Congress to serve a public purpose: to "provide stability in the secondary market for residential mortgages," to "increas[e] the liquidity of mortgage investments," and to "promote access to mortgage credit throughout the Nation." 12 U.S.C. § 1716; *see id.* § 1717. In short, the only entities over which the FHFA has regulatory authority are themselves created by the government, subsidized by the government, and regulated by the government. The constitutional separation-of-powers are necessarily less relevant where the FHFA does not

regulate "purely private actors," *Seila Law*, 140 S. Ct. at 2202.

To be sure, private individuals, including the private Petitioners here, invest in the GSEs and can therefore be affected by the FHFA's decisions as conservator, receiver, or regulator of the GSEs. But any investment in the GSEs is purely voluntary. And investors in the GSEs are well aware when they invest that the GSEs are government-sponsored and therefore subject to greater governmental regulation and control. In fact, investors likely *relied* on the implicit backing of the United States government—including the possibility that the GSEs would be rescued by the government if they failed—when they invested in them. That makes the FHFA far different from the CFPB, which can regulate "*any* covered person"—that is, "any person that engages in offering or providing a consumer financial product or service," 12 U.S.C. § 5481(6)(A)—who engages in "*any* unfair, deceptive, or abusive act or practice" as the CFPB determines by regulation and adjudication. *Id.* § 5536(a)(1) (emphases added). In short, "[t]he FHFA's relationship with the public . . . ultimately rests on voluntary choices rather than sovereign commands." Br. for Court-Appointed *Amicus Curiae* 30.

* * *

Seila Law does not dictate the outcome here. Unlike the CFPB, the FHFA does not have broad-based power to regulate commercial activities. In fact, it does not have the power to regulate private individuals or entities at all. Rather, its jurisdiction is narrowly focused on regulating, or acting as conservator or receiver for, 13 government-sponsored entities that serve public missions and are themselves carefully regulated by statute. The FHFA therefore does not

"wield[] significant executive power," *Seila Law*, 140 S. Ct. at 2192, and under this Court's decision in *Seila Law*, Congress can choose to impose a for-cause restriction on the President's power to remove the FHFA's Director.

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted,

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