Nos. 2020-1912, 2020-1914, 2020-1934, 2020-1936, 2020-1938, 2020-1954, 2020-1955, 2020-2020, 2020-2037

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

FAIRHOLME FUNDS, INC., ACADIA INSURANCE COMPANY, ADMIRAL INDEMNITY COMPANY, ADMIRAL INSURANCE COMPANY, BERKLEY INSURANCE COMPANY, BERKLEY REGIONAL INSURANCE COMPANY, CAROLINA CASUALTY INSURANCE COMPANY, CONTINENTAL WESTERN INSURANCE COMPANY, MIDWEST EMPLOYERS CASUALTY INSURANCE COMPANY, NAUTILUS INSURANCE COMPANY, PREFERRED EMPLOYERS INSURANCE COMPANY, THE FAIRHOLME FUND, ANDREW T. BARRETT,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Cross-Appellant.

Appeal Nos. 2020-1912, 2020-1914, on appeal from the Court of Federal Claims in No. 1:13-cv-00465-MMS, Chief Judge Margaret M. Sweeney
[Additional captions on the inside cover and following pages]

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

Appeal No. 2020-1934, on appeal from the Court of Federal Claims in No. 1:18-cv-00281-MMS, Chief Judge Margaret M. Sweeney

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MASON CAPITAL L.P., MASON CAPITAL MASTER FUND L.P.,

Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

Appeal No. 2020-1936, on appeal from the Court of Federal Claims in No. 1:18-cv-00529-MMS, Chief Judge Margaret M. Sweeney

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AKANTHOS OPPORTUNITY FUND, L.P.,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

Appeal No. 2020-1938, on appeal from the Court of Federal Claims in No. 1:18-cv-00369-MMS, Chief Judge Margaret M. Sweeney

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APPALOOSA INVESTMENT LIMITED PARTNERSHIP I, PALOMINO MASTER LTD., AZTECA PARTNERS LLC, PALOMINO FUND LTD.,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

Appeal No. 2020-1954, on appeal from the Court of Federal Claims in No. 1:18-cv-00670-MMS, Chief Judge Margaret M. Sweeney

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CSS, LLC,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Appeal No. 2020-1955, on appeal from the Court of Federal Claims in No. 1:13-cv-00371-MMS, Chief Judge Margaret M. Sweeney

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ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, FINANCIAL STRUCTURES LIMITED,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

Appeal No. 2020-2020, on appeal from the Court of Federal Claims in No. 1:13-cv-00698-MMS, Chief Judge Margaret M. Sweeney

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JOSEPH CACCIAPALLE,
Plaintiff-Appellant,

MELVIN BAREISS, on Behalf of Themselves and All Others Similarly Situated, BRYNDON FISHER, BRUCE REID, ERICK SHIPMON, AMERICAN EUROPEAN INSURANCE COMPANY, FRANCIS J. DENNIS,
Plaintiffs,

v.

UNITED STATES,
Defendant-Appellee.

Appeal No. 2020-2037, on appeal from the Court of Federal Claims in No. 1:13-cv-00466-MMS, Chief Judge Margaret M. Sweeney

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INTRODUCTION AND SUMMARY

The United States respectfully submits this supplemental brief to address the impact of *Collins v. Yellen*, 141 S. Ct. 1761 (2020), on the issues presented by these cross-appeals.

Plaintiffs in *Collins* sought to set aside the Third Amendment on various grounds, including on the theory that the Federal Housing Finance Agency (FHFA) acted outside its authority as conservator in entering into the amendment. The Fifth Circuit accepted this contention and accordingly held that the plaintiffs' suit was not barred by the Housing and Economic Recovery Act's provision that "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver." 12 U.S.C. § 4617(f).

The Supreme Court reversed. The Court agreed that application of the bar on review turned on "whether the FHFA was exercising its powers or functions as a conservator when it agreed to the third amendment." *Collins*, 141 S. Ct. at 1776. The Court further concluded that the conservator's exercise of business judgment in entering into the Third Amendment plainly fell within the scope of its authority. Relying on facts not subject to dispute, the Court rejected a series of contentions regarding the reasonableness and legitimacy of the conservator's actions in entering into the Third Amendment that have formed the basis of plaintiffs' narrative in the cases now before this Court. The Court also held that separation-of-powers concerns arising from restrictions on the removal of FHFA's Director had no bearing on the

adoption of the Third Amendment because FHFA was at that time headed by an Acting Director with no removal protections.

The Court's analysis is dispositive of several of plaintiffs' claims. Plaintiffs' illegal exaction claims are premised on contentions that the conservator acted outside the scope of its authority or that separation-of-powers concerns might have called the validity of the Third Amendment into question. These contentions do not survive *Collins*. The decision similarly removes any basis for plaintiffs' contentions that the conservator violated a fiduciary duty purportedly owed to shareholders or that FHFA entered into an unwritten contract which required it to operate the enterprises for the benefit of the enterprises' shareholders.

The Court's decision also bears on two threshold grounds for dismissal. The Court concluded that the Recovery Act's Succession Clause, 12 U.S.C. § 4617(b)(2)(A), did not bar shareholders from pursuing separation-of-powers claims, reasoning that these are claims shareholders hold "in common with all other citizens who have standing to challenge" the statutory provision limiting the President's authority to remove FHFA's confirmed Director. *Collins*, 141 S. Ct. at 1780. The Court emphasized that "the right asserted [was] not one that [was] distinctive to shareholders of Fannie Mae and Freddie Mac; it is a right shared by everyone in this country." *Id.* at 1781. The Court explained that the Succession Clause transfers only the "*rights of 'stockholder[s]* . . . with respect to the regulated entity'" and thus did not "transfer to the FHFA the constitutional right at issue." *Id.* (emphasis added). The

Court's reasoning makes clear that rights that *are* "distinctive to shareholders of Fannie Mae and Freddie Mac" fall within the scope of the Succession Clause. Because the right to bring the claims plaintiffs raise here is distinctive to Fannie Mae and Freddie Mac shareholders and arises out of their status as shareholders, that right was transferred to FHFA by the Succession Clause.

The Supreme Court also addressed the question whether it could disregard the separation-of-powers problems raised by the Recovery Act's removal restriction when the FHFA Director performs the functions of a conservator (as opposed to traditional regulatory functions). Applying principles articulated in its previous separation-of-powers cases, the Court declined to differentiate among the Director's functions for purposes of deciding whether a separation-of-powers problem existed. The Court did not thereby suggest that the conservator should be treated as the government for all purposes regardless of the nature of the action being challenged. Nothing in the opinion indicates that the conservator should be deemed a governmental actor when engaged in the range of business activities that would typically be performed by the enterprises' private managers, a ruling that would constitutionalize disputes regarding business activities conducted by the conservator here as well as other government conservators and receivers. When performing such commercial functions, a conservator or receiver is not a government actor.

BACKGROUND – *COLLINS v. YELLEN*

In *Collins v. Yellen*, 141 S. Ct. 1761 (2020), the Supreme Court affirmed the validity of the Third Amendment to the Preferred Stock Purchase Agreements entered into by FHFA, as conservator for the enterprises, and Treasury. In so doing, it rejected statutory and constitutional challenges to the Amendment brought by the enterprises' shareholders.

The Court first held that the statutory claims were barred by the Housing and Economic Recovery Act's "anti-injunction" provision, which "states that unless review is specifically authorized by one of its provisions or is requested by the Director, 'no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver, '" *Collins*, 141 S. Ct. at 1775-76 (quoting 12 U.S.C. § 4617(f)). The Court explained that this provision "applies only where the FHFA exercised its 'powers or functions' 'as a conservator or a receiver.' Where the FHFA does not exercise but instead exceeds those powers or functions, the anti-injunction clause imposes no restrictions." *Id.* at 1776. Accordingly, to determine whether the provision applied, it was necessary for the Court to "decide whether the FHFA was exercising its powers or functions as a conservator when it agreed to the third amendment." *Id.*

The Court held that "the FHFA did not exceed its authority as a conservator [in agreeing to the Third Amendment], and therefore the anti-injunction clause bars the shareholders' statutory claim." *Collins*, 141 S. Ct. at 1778; *see also id.* at 1775-78.

The Court emphasized that the Recovery Act authorizes the Agency to rehabilitate the enterprises in a manner "beneficial to the Agency and, by extension, the public it serves." *Collins*, 141 S. Ct. at 1776 (citing 12 U.S.C. § 4617(b)(2)(J)(ii)). This authority was "fatal" to the shareholders' statutory claim because the "undisputed" facts "alleged in the [shareholders'] complaint" demonstrated that "FHFA chose a path of rehabilitation that was designed to serve public interests by ensuring Fannie Mae's and Freddie Mac's continued support of the secondary mortgage market." *Id.* at 1776-77.

The Supreme Court based this conclusion on a number of undisputed facts. The Court noted, for example, that, at the time the Third Amendment was adopted, "the companies' liabilities had consistently exceeded their assets over at least the prior three years"; "the companies had repeatedly been unable to make their fixed quarterly dividend payments without drawing on Treasury's capital commitment"; and "the cap on Treasury's capital commitment was scheduled to be reinstated." *Collins,* 141 S. Ct. at 1777. Thus "there was a realistic possibility that the companies would have consumed some or all of the remaining capital commitment in order to pay their dividend obligations, which were themselves increasing in size every time the companies made a draw." *Id.*

In the Third Amendment, FHFA "eliminated th[e] risk" the enterprises would be forced to use Treasury's commitment to pay dividends and "ensured that all of Treasury's capital was available to backstop the companies' operations during difficult quarters." *Collins,* 141 S. Ct. at 1777. FHFA chose a strategy it "reasonably viewed"

as furthering "market stability" by ensuring the enterprises would have the capital they needed to continue to operate in the mortgage market for the foreseeable future. *Id.*

The Court then addressed the constitutionality of the statutory restriction on the President's authority to remove FHFA's Senate-confirmed Director. *Collins*, 141 S. Ct. at 1783-89. That provision states that "[t]he 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). The Court held that, under its prior decision in *Seila Law LLC v. Consumer Financial Protection Board*, 140 S. Ct. 2183 (2020), Congress could not, consistent with the separation of powers, limit the President's authority to remove FHFA's Director, and the restriction was therefore invalid. *Collins*, 141 S. Ct. at 1783-89.

The Court further held, however, that the unconstitutional removal restriction had no bearing on FHFA's agreement in August 2012 to the Third Amendment because FHFA was headed by an Acting Director at the time, and the Acting Director was removable at will by the President. *Collins*, 141 S. Ct. at 1781-83. The Court therefore rejected the shareholders' request to set the Third Amendment aside. *Id.* at 1788.

The Supreme Court also held that, with respect to the later implementation of the Third Amendment by confirmed Directors, there was "no reason to regard any of the actions taken by FHFA in relation to the third amendment as void." *Collins*, 141 S. Ct. at 1787. However, because it remained "possible" that the removal restriction

inflicted harm on the shareholders during the Third Amendment's implementation, the Court remanded the case to the court of appeals for it to decide whether the shareholders were entitled to further relief. *Id.* at 1789; *see also id.* at 1802 (Kagan, J., concurring) (noting that the remand proceedings are likely to be "brief" given that the court of appeals already decided the relevant issue against the shareholders).

ARGUMENT

I. *Collins* Confirms That Several of Plaintiffs' Claims Are Without Basis

The Supreme Court's decision establishes that FHFA acted within the scope of its authority as conservator and that no constitutional separation-of-powers concerns existed at the time of the Third Amendment because the Acting Director was not subject to for-cause removal.

Collins also made clear that—based on facts not subject to dispute—FHFA acted both lawfully and rationally in entering the Third Amendment and that plaintiffs' counter-narrative is without foundation. *See* Gov't Reply Br. 2-4. As the Supreme Court recognized, at the time of the Third Amendment, the enterprises' liabilities had exceeded their assets for several years. *Collins v. Yellen*, 141 S. Ct. 1761, 1776-77 (2020). Because the enterprises had routinely failed to earn sufficient funds to pay the dividends they owed Treasury, they drew on Treasury's soon-to-be-capped funding commitment to make those payments. *Id.* at 1777. Those draws, in turn, increased the amount of future dividends, thus increasing the likelihood of future draws on Treasury's commitment. *Id.*

The Third Amendment ended this draw-to-pay-dividends cycle and ensured that the enterprises "would never again have to use capital from Treasury's commitment to pay their dividends." *Collins*, 141 S. Ct. at 1777. The Amendment thus made sure "all of Treasury's capital was available to backstop the companies' operations during difficult quarters." *Id.* And by safeguarding Treasury's capital commitment, the Third Amendment helped assure that the enterprises would continue to provide vital service to the mortgage market for years to come. *Id.* While plaintiffs believe FHFA should have taken a different path, "the Recovery Act permitted the Agency to reject the shareholders' suggested strategy in favor of one that the Agency reasonably viewed as more certain to ensure market stability." *Id.*

The decision removes any basis for several of plaintiffs' claims.

Illegal Exaction

Plaintiffs' illegal exaction claims are premised on assertions that FHFA's structure at the time of the Third Amendment presented separation-of-powers concerns and that FHFA exceeded its statutory authority in agreeing to the Third Amendment. *See* Appx10-11. *Collins* removes any foundation for either of these assertions. Because FHFA was headed by an Acting Director who was removable at-will, no separation-of-powers concerns were present at the time of the Third Amendment. And the Court made emphatically clear that FHFA acted within its statutory authority in agreeing to the Amendment. *Collins*, 141 S. Ct. at 1775-83.

Common law fiduciary duty

Collins similarly removes any basis for plaintiffs' claims that the Recovery Act imposed a common law fiduciary duty on FHFA as conservator to act in the shareholders' interests. *See* Pls. Cons. Br. 72-80. The Court stressed that, unlike common law conservators, FHFA as conservator is authorized to take actions that advance the interests of the public served by the enterprises that owed their continued existence to Congress's decision to risk hundreds of billions of taxpayer money. *Collins*, 141 S. Ct. at 1776. The Court then held that FHFA did not exceed its statutory authority in agreeing to the Third Amendment because the Agency "could have reasonably concluded that [the Amendment] was in the best interests of members of the public." *Id.* at 1777.

Implied-in-fact Contract Claims

Plaintiffs' implied-in-fact contract claims allege that FHFA and the enterprises' boards entered into an unwritten contract under which FHFA agreed to operate the enterprises during the conservatorship for the benefit of the enterprises' shareholders in exchange for the boards' promise not to challenge the imposition of the conservatorships. *See* Pls. Cons. Br. 70. As the government has explained, plaintiffs' conclusory implied-in-fact contract claim is not supported by any factual allegations and is not plausible for a number of reasons. *See* Gov't Opening Br. 87-91. Among other things, FHFA was not required to obtain the boards' consent to

conservatorship, and it could not and would not have promised to act in a manner inconsistent with its statutory obligations. *See id.*

Collins underscores the implausibility of plaintiffs' alleged implied-in-fact contract. As the Supreme Court explained, the collapse of the housing market in 2008 caused the enterprises "sizeable" losses. *Collins*, 141 S. Ct. at 1771. "In fact, they lost more that year than they had earned in the previous 37 years combined." *Id.* And while the enterprises remained solvent for the time being, "many feared the companies would eventually default and throw the housing market into a tailspin." *Id.* Moreover, immediately after the enterprises were placed into conservatorship, they required a massive infusion of capital from Treasury, in amounts that had to be increased twice in the following years when Treasury's initial multi-hundred-billion-dollar commitment proved "inadequate." *Id.* at 1773. Given the enterprises' dire financial circumstances and the imploding housing market, FHFA had ample reason to place the enterprises into conservatorship, with or without the enterprises' consent. Plaintiffs' allegations to the contrary are not credible. Moreover, as the Supreme Court stressed in concluding that FHFA acted lawfully in agreeing to the Third Amendment, the Recovery Act authorizes FHFA as conservator to operate the enterprises in the public's best interests. *Id.* at 1776-77. Plaintiffs provide no plausible allegation to support the notion that FHFA would forgo this critical statutory authority to obtain the enterprises' unneeded consent to conservatorships.

II. *Collins* Confirms That Plaintiffs' Claims Should Be Dismissed on the Basis of the Government's Threshold Defenses

A. Plaintiffs' Derivative Claims Are Barred by the Recovery Act's Succession Clause

1. The government explained in its briefing that, with minor exceptions, plaintiffs' claims are derivative claims. *See* Gov't Opening Br. 47-85; Gov't Reply Br. 17-26. As such, they are subject to the usual restrictions on the assertion of derivative claims. *See, e.g.*, *Starr Int'l Co. v. United States*, 856 F.3d 953, 965-67 (Fed. Cir. 2017) (concluding that shareholders could not challenge the terms of the government's bailout of AIG); *see also* Gov't Opening Br. 50-52.

The Recovery Act's Succession Clause, which provides that FHFA as conservator "succeed[s] to . . . all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity," 12 U.S.C. § 4617(b)(2)(A), both reflects this corporate-law principle and goes further. Because the right to bring derivative claims on behalf of the enterprises is a stockholder right "with respect to the regulated entity and [its] assets," *id.*, it is a right transferred to FHFA pursuant to the Succession Clause. *See* Gov't Opening Br. 48; *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 623 (D.C. Cir. 2017) (The Succession Clause "plainly transfers [to the FHFA the] shareholders' ability to bring derivative suits."). Thus, pursuant to the Succession Clause, shareholders are barred from asserting derivative claims under any circumstances.

2. Although the Supreme Court had no occasion to address the assertion of derivative claims, its analysis of the separation-of-powers claims presented in *Collins* leaves no doubt that the Succession Clause does not—in direct contradiction of its text—allow the assertion of derivative claims.

In concluding that the plaintiffs in *Collins* could properly assert separation-of-powers claims, the Court was at pains to explain that those claims did not derive from plaintiffs' status as shareholders. The Court emphasized that the separation-of-powers claim is one the shareholders hold "in common with all other citizens who have standing to challenge" the statutory provision limiting the President's authority to remove FHFA's confirmed Director. *Collins*, 141 S. Ct. at 1780; *see also id.* (noting that "the separation of powers is designed to preserve the liberty of all the people"). In other words, "the right asserted [was] not one that [was] distinctive to shareholders of Fannie Mae and Freddie Mac; it is a right shared by everyone in the country." *Id.* at 1781. Because the Succession Clause transfers only the "*rights of 'stockholder[s]* . . . with respect to the regulated entity,'" the Court held that it did not "transfer to the FHFA the constitutional right at issue." *Id.* (emphasis added). The Court explained that "whenever a separation-of-powers violation occurs, any aggrieved party with standing"—including third parties—"may file a constitutional challenge." *Id.* at 1780. The Court further underscored the limited scope of its reasoning by explicitly declining to address whether the Succession Clause barred plaintiffs' statutory claim, which it had rejected on other grounds. *See id.* at 1781 n.16.

In contrast to the separation-of-powers claim at issue in *Collins*, the takings, contract, and fiduciary-duty claims that plaintiffs raise here *are* "distinctive to shareholders of Fannie Mae and Freddie Mac." *Collins*, 141 S. Ct. at 1781. Indeed, plaintiffs' claims here are premised on their status as shareholders. *See, e.g.*, Pls. Cons. Br. 30 (describing the property allegedly taken as "private-shareholder rights to receive dividends and distributions from the Companies"). In contrast to the separation-of-powers claim at issue in *Collins,* these are not claims that the shareholders share in common "with all other citizens who have standing to challenge" FHFA's actions. *Collins*, 141 S. Ct. at 1780.

The differences between claims dependent on a plaintiff's status as a shareholder and the claims at issue in *Collins* are underscored by the nature of the constitutional provisions at issue in the two cases. The separation of powers is "designed to preserve the liberty of all the people." *Collins*, 141 S. Ct. at 1780. In contrast, the Takings Clause ensures that property owners receive adequate compensation when the government appropriates their property. *See* U.S. Const. amend. V.

In short, the Supreme Court concluded that the Succession Clause did not bar the constitutional claim at issue in *Collins* because that claim was not distinctive to shareholders and did not arise out of the shareholders' rights with respect to the enterprises. By contrast, the derivative takings and other claims plaintiffs bring here turn entirely on their status as shareholders and their rights with respect to the

enterprises. *Collins* underscores that the Succession Clause covers such claims.

B. *Collins*' Conclusion That the Director of FHFA Exercises Executive Power for Separation-of-Powers Purposes Is Consistent with the Holdings of Courts of Appeals That FHFA Is Not a Government Actor When Conducting Financial Transactions on the Enterprises' Behalf

For the reasons set forth in the government's briefs, and as numerous courts have held, when FHFA acts as conservator or receiver it generally "shed[s] its government character" and "becom[es] a private party." *Meridian Invs. Inc. v. FHLMC* 855 F.3d 573, 579 (4th Cir. 2017); *see also* Gov't Opening Br. 33-47; Gov't Reply Br. 4-16. Subsequent to the filing of the government's earlier briefs, the First Circuit in *Montilla v. FNMA*, 999 F.3d 751 (1st Cir. 2021), reversed the district court's decision in *Sisti v. FHFA*, 324 F. Supp. 3d 273, 281 (D.R.I. 2018), on which the Court of Federal Claims relied. *See also Boss v. FHFA*, 998 F.3d 532 (1st Cir. 2021). The First Circuit rejected contentions that the plaintiff could assert due process claims against FHFA as conservator in connection with the enterprises' non-judicial foreclosure of plaintiff's mortgages, explaining that in so doing the conservator was not exercising government power. *Montilla*, 999 F.3d at 756-60. Similarly, plaintiffs' claims challenging the conservator's decision to amend a contract are not "claim[s] against the United States," 28 U.S.C. § 1491(a)(1), for Tucker Act purposes. *See* Gov't Opening Br. 33-47; Gov't Reply Br. 4-15.

1. The Supreme Court's conclusion in *Collins* that FHFA wields executive power for purposes of the separation-of-powers claim at issue there does not alter

that conclusion. *See Collins*, 141 S. Ct. at 1785-86. Instead, *Collins* reflects the Court's longstanding approach to separation-of-powers challenges. For purposes of a separation-of-powers analysis, the Court does not look to the nature of the particular actions in question, but to the entire spectrum of functions and powers exercised by the relevant official. *Freytag v. Commissioner*, 501 U.S. 868 (1991), is illustrative. In that case, the plaintiff urged that special tax judges were inferior officers and thus subject to the requirements of the Appointments Clause. The government urged that while the special tax judges were officers with respect to some of their functions, they did not exercise significant government authority (and thus were not inferior officers subject to the Appointments Clause) with respect to the particular action the plaintiffs were challenging. *Id.* at 882. The Court rejected that reasoning, emphasizing that if an individual is an inferior officer for some purposes, "he is an inferior officer within the meaning of the Appointments Clause and he must be properly appointed." *Id.*

The Supreme Court's decision in *Collins* accords with *Freytag*'s framing. In addressing the Court-appointed amicus's argument that Congress may restrict the removal of the FHFA Director because many of FHFA's powers and functions are non-executive, the Court emphasized that FHFA's Director wields executive power at least some of the time, a point the government does not dispute. *See Collins*, 141 S. Ct. at 1785-86; Gov't Opening Brief 35 (acknowledging that FHFA is the government when it conducts "regulatory activities"). The Supreme Court stressed, for instance, that FHFA "does not always act in a [conservator] capacity." *Collins*, 141 S. Ct. at

1785. It acts as a regulator, exercising government power, when it places a "company into conservatorship and simultaneously appoint[s] itself as conservator." *Id.* at 1786. Even when acting as conservator, the Court noted, FHFA can exercise such traditional government functions as issuing "a regulation or order" requiring private parties to take action or issuing subpoenas. *Id.* at 1785-86. Consistent with *Freytag*, the Court was unwilling to parse the FHFA Director's functions when deciding whether the Constitution mandated that the President have the authority to remove him at will.

Outside the separation-of-powers context, however, the Supreme Court employs a different framework, one that focuses on the specific actions being performed by the relevant actor and differentiates between governmental actions that are subject to constitutional requirements and non-governmental actions that are not. As the Supreme Court has explained, when a government body is authorized to operate in a commercial capacity alongside other private actors, it is generally subject to the same legal requirements and obligations "a private enterprise would face in similar circumstances." *Thacker v. Tennessee Valley Auth.*, 139 S. Ct. 1435, 1442 (2019). Constitutional constraints and protections do not apply. *Id.*

The Supreme Court has applied this framework in a number of contexts. For example, the Court has concluded that State governments are subject to the restraints of the Commerce Clause when acting in a regulatory capacity, but are not subject to the Clause when acting in a commercial capacity as "market participants." *See*

Department of Revenue of Ky. v. Davis, 553 U.S. 328, 339 (2008); *see also White v. Massachusetts Council of Constr. Emp'rs, Inc.*, 460 U.S. 204, 208 (1983) ("[W]hen a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause."). Similarly, the Supreme Court has held that actions taken by a State in its regulatory capacity are subject to the Supremacy Clause and may be preempted by federal law, while actions taken by a State in its capacity as a commercial market participant are not. *Building & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.,* 507 U.S. 218, 227-31 (1993); *Building & Constr. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 34–35 (D.C. Cir. 2002) (Principles of preemption under the National Labor Relations Act "come into play only when the Government is regulating within a protected zone, and not when it is acting as a proprietor, interact[ing] with private participants in the marketplace."). The Supreme Court has likewise held that the Tennessee Valley Authority, whose directors are appointed by the President and confirmed by the Senate, qualifies as the government (and can thus invoke sovereign immunity) when it performs "traditionally governmental functions" but is treated as private actor when engaged in "commercial activities." *Thacker*, 139 S. Ct. at 1439, 1443-44.

2. Applying that framework here, it is clear that FHFA is generally not the government when acting as conservator for the enterprises, as numerous courts have held. *See* Gov't Opening Br. 33-34 (citing cases); *supra* p. 14. When FHFA acts as conservator on behalf of the enterprises, it is generally not engaged in traditional

governmental functions. It is instead "perform[ing] [the] functions" of a private financial company, exercising the powers and functions typically employed by the enterprises' private directors, officers, and stockholders. 12 U.S.C. § 4617(b)(2); *see also id.* (the conservator "carr[ies] on the business of the [enterprises]"). At least where FHFA as conservator is engaged in an activity typically performed by the enterprises' private managers, it is properly treated as a private actor for Tucker Act and constitutional purposes. Indeed, as the government explained in its briefs, in agreeing to the Third Amendment on the enterprises' behalf, the conservator exercised a "traditional power of corporate officers or directors"—the "renegotiation of an existing lending agreement." *Jacobs v. FHFA*, 908 F.3d 884, 890 (3d Cir. 2018); *Saxton v. FHFA*, 901 F.3d 954, 960-61 (8th Cir. 2018) (Stras, J., concurring) (FHFA "renegotiat[ed] an existing lending agreement," an action "within the heartland of powers vested in the officers or board of directors of any corporation."); *see* Gov't Opening Br. 34-35; Gov't Reply Br. 13-14. Plaintiffs' claims challenging the Third Amendment are claims against the conservator as a commercial actor, not the United States.

To conclude that FHFA as conservator is at all times the government would have potentially far-reaching consequences, not only for FHFA but also for other government agencies that serve as conservators or receivers. Gov't Opening Br. 33-34 (citing examples of other agencies that function as conservators and receivers). It would potentially subject every action taken by the conservator on behalf of the

enterprises—including routine business transactions—to constitutional limits and government immunity principles. For example, the plaintiffs in *Montilla* "argue[d] that because FHFA is a government agency, any action it takes as conservator, like directing the GSEs to nonjudicially foreclose on appellants' mortgages, is government action subjecting it to appellants' constitutional claims." 999 F.3d at 756. *Collins* did not announce a sweeping transformation of the law governing conservators and receivers that would permit the broad assertion of constitutional claims in such circumstances.

That the conservator could consider whether the Third Amendment was furthering the public interest, *see Collins*, 141 S. Ct. at 1785, does not suggest that its actions in agreeing to the Third Amendment were governmental in character. The charters of Fannie Mae and Freddie Mac have always required the companies and their private directors and officers to pursue public policy goals and objectives. *See* 12 U.S.C. § 4501; *id.* § 1451 note; *id.* § 1716; *see also American Bankers Mortg. Corp. v. Federal Home Loan Mortg. Corp.*, 75 F.3d 1401, 1406-07 (9th Cir. 1996). That the enterprises' private directors must consider broader public interests in carrying out the enterprises' business has never been held to transform the enterprises into government actors. *See* Gov't Opening Br. 35; *see also Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 711-12 (2014) ("[M]odern corporate law does not require [purely private] corporations to pursue profit at the expense of everything else, and many do not do so.").

In concluding that FHFA as conservator does not shed its government character for separation-of-powers purposes, the Supreme Court noted that FHFA's business decisions are protected from judicial review by the Recovery Act's anti-injunction provision and that "FHFA must interpret the Recovery Act" to determine what it can and cannot do. *Collins*, 141 S. Ct at 1785. Neither factor was dispositive in the Court's analysis, and neither differentiates FHFA as conservator from other private actors. As the government explained in its briefing, Congress has shielded the actions of various private commercial actors in whole or in part from judicial review. *See, e.g.*, 42 U.S.C. § 247d-6d (providing immunity from suit to private parties providing "pandemic and epidemic" related products); *see* Gov't Reply Br. 12-13. And every private actor must interpret applicable federal law to determine what it can and cannot do and what "standards . . . govern its work." *Collins*, 141 S. Ct. at 1785.

CONCLUSION

This Court should direct the Court of Federal Claims to dismiss the derivative claims it permitted to go forward and affirm the dismissal of plaintiffs' other claims.

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of this Court's order of July 16, 2021 because it does not exceed twenty pages. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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