

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

PATRICK J. COLLINS, ET AL.,)
)
Petitioners,)
)
v.) No. 19-422
)
STEVEN T. MNUCHIN, SECRETARY)
)
OF THE TREASURY, ET AL.,)
)
Respondents.)

STEVEN T. MNUCHIN, SECRETARY)
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OF THE TREASURY, ET AL.,)
)
Petitioners,)
)
v.) No. 19-563
)
PATRICK J. COLLINS, ET AL.,)
)
Respondents.)

Pages: 1 through 104
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Date: December 9, 2020

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14 PATRICK J. COLLINS, ET AL.,)

15 Respondents.)

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17 Washington, D.C.

18 Wednesday, December 9, 2020

19

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

23

24

25

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9 the Respondents in 19-563.
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P R O C E E D I N G S

(10:00 a.m.)

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

Mr. Mooppan.

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

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

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

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

1 defects that I'll try to address today.

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

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

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

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

9 I welcome the Court's questions.

10 CHIEF JUSTICE ROBERTS: Counsel, you
11 say that the common stockholders' claims can't
12 survive because they're derivative, really
13 claims of the corporation, and -- and then
14 barred by the succession clause.

15 But it seems to me that they're a
16 little different, according to the claims
17 anyway, that their stock value -- their stock
18 was completely wiped out in a unique way
19 compared to the other holders of interests in
20 the enterprises, in other words, that this
21 action was directed at them as distinct from the
22 corporation as a whole; therefore, is not
23 derivative, they claim, and -- and shouldn't be
24 barred. What -- what is your answer to that?

25 MR. MOOPPAN: So, as we cite in our

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

7 CHIEF JUSTICE ROBERTS: Yeah --

8 MR. MOOPPAN: -- effect --

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

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

23 In the cases that we cited in our
24 reply brief, each of those cases involved
25 certain shareholders being treated better than

1 other shareholders, and it shouldn't make any
2 difference for purposes of a derivative claim
3 whether that special treatment occurs pursuant
4 to a side transaction or through a dividend
5 payment. I assume --

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

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

1 That would be exactly like the claims
2 that we cited in our reply brief where you had a
3 side transaction to one shareholder, to the
4 disadvantage of all the other shareholders, and
5 that's -- there's just no difference for
6 purposes of a derivative claim whether the harm
7 to the certain shareholders comes because of a
8 side transaction or pursuant to an amendment to
9 the dividend obligation.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Thomas.

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

15 Well, counsel, would you -- perhaps
16 this is redundant, but give us another example
17 of what a direct would look like rather than a
18 derivative.

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

1 Those -- and the -- the cases that
2 have recognized direct suits where shareholders
3 are harmed tend to be in those sort of contexts
4 where there's a dilution of, for example, voting
5 power. That's what the Delaware Supreme Court
6 laid out in its El Paso case.

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

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

24 So what if -- so what if it was more
25 explicit? What would you say to that?

1 MR. MOOPPAN: So I think that would be
2 different. I think the difference is it's not a
3 question of being explicit versus implicit. In
4 your hypothetical, they are acting directly on
5 the shareholders' contractual right to
6 dividends. That doesn't harm the corporation at
7 all.

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

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

24 And, you know, Judge Posner's opinion
25 in the Seventh Circuit lays this out pretty

1 clearly, that when you have a harm to the
2 corporate assets, it just doesn't matter why the
3 assets have been dissipated, whether it's by
4 theft or a conflict of interest or a side
5 transaction. In all events, the harm is in the
6 first instance to the corporation, not to the
7 shareholders.

8 JUSTICE THOMAS: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Breyer.

11 JUSTICE BREYER: Thank you.

12 I think, in reading this, you could,
13 with trying to simplify as much as possible,
14 view the shareholders' claim as saying we bought
15 into this corporation, it was supposed to be
16 private as well as having a public side, and
17 then the government nationalized it. That's
18 what they did. If you look at their giving the
19 net worth to Treasury, it's nationalizing the
20 company.

21 Now whatever conservators do and
22 receivers do, they don't nationalize companies.
23 And when they nationalized this company,
24 naturally, they paid us nothing and our shares
25 became worthless. And so what do you say?

1 MR. MOOPPAN: Well, Your Honor, what
2 the Third Amendment did is it renegotiated the
3 enterprises' financial obligation. The
4 enterprises were saddled with bigger things --

5 JUSTICE BREYER: No, no, I know that,
6 but what I wonder is can you -- is it fair to
7 characterize it not with this more legal
8 language but just saying, look, they
9 nationalized it, they gave the company away to
10 the Treasury. Who do you think the Treasury is?
11 It's the government of the United States.

12 MR. MOOPPAN: Right. And -- and what
13 I would --

14 JUSTICE BREYER: And, by the way,
15 you'll want to really look into this and you'll
16 discover they didn't get enough money for it,
17 they did it at too cheap a price, they did it
18 dot, dot, dot, and they paid us nothing. All
19 right. But can I view this as nationalization?

20 MR. MOOPPAN: No, Your Honor,
21 because --

22 JUSTICE BREYER: Because?

23 MR. MOOPPAN: -- because what the ---
24 the agreement does is it replaces a 20 billion
25 dollar a year dividend. So the enterprises

1 already owed to the federal government
2 20 billion dollars a year.

3 JUSTICE BREYER: Yeah.

4 MR. MOOPPAN: What the conservator did
5 was say rather than having that --

6 JUSTICE BREYER: Well, that -- that
7 goes to the reasonableness of the agreement.
8 They say, okay, let's have a trial on that.
9 We -- you -- they think it's a very reasonable
10 thing to do. We don't.

11 MR. MOOPPAN: And the point is the
12 anti-injunction clause doesn't expose the
13 conservator's business judgment to
14 reasonableness review.

15 JUSTICE BREYER: All right. Yes.

16 MR. MOOPPAN: The question is whether
17 --

18 JUSTICE BREYER: Correct. If --

19 MR. MOOPPAN: -- they exceeded their
20 powers --

21 JUSTICE BREYER: They say
22 nationalization is not the kind of thing
23 conservators and receivers do and, therefore,
24 you can examine it, and when you examine it, you
25 will see how unreasonable it is.

1 MR. MOOPPAN: Your Honor, what the
2 enterprises did was they renegotiated financial
3 obligations. That is what they did. Whatever
4 label the plaintiffs want to put on it --

5 JUSTICE BREYER: No, that was my
6 fault.

7 MR. MOOPPAN: What the actual power
8 that was exercised here was a renegotiation of
9 financial obligation. That is what conservators
10 do day in and day out.

11 Now the terms of this renegotiation
12 are fairly unique, but that's because the
13 enterprises were in a fairly unique condition.
14 Most companies don't owe 20 billion dollars a
15 year to the federal government.

16 And so, when they switched that and
17 they switched it to -- to ensure that there was
18 no risk to the quarter trillion dollars of
19 capital that Treasury had committed to these
20 enterprises, that is the nature of the agreement
21 here.

22 It is an unusual agreement, but it is
23 still -- at the end of the day, it is a
24 renegotiation of financial obligations that is a
25 heartland exercise of conservatorship power, and

1 if the anti-injunction clause means anything, it
2 means that you don't second-guess whether they
3 could have done it a different way, whether it
4 was a bad deal, whether they did it for bad
5 motives. At the end of the day, what they did
6 is they renegotiated financial obligation.

7 CHIEF JUSTICE ROBERTS: Justice Alito.

8 JUSTICE ALITO: If we agree with you
9 about the removability of an acting director and
10 also agree with you that the only relevant
11 action was one taken by the acting director,
12 would we have any reason to address the question
13 whether the restriction on the removal of a
14 confirmed director is constitutional?

15 MR. MOOPPAN: Well, yes, Your Honor.
16 The court of appeals, in addition to declining
17 to set aside the Third Amendment, did issue a
18 declaratory judgment that prospectively the FHFA
19 removal restriction should be set aside.

20 Petitioners here did file a cert
21 petition where that is the first question
22 presented. We think the Court should confirm
23 that that was a correct holding, that that
24 removal restriction is invalid and shouldn't be
25 applied prospectively, but we do think that it

1 is no basis to set aside the Third Amendment,
2 both because the acting director is, in fact,
3 removable at will --

4 JUSTICE ALITO: Well, perhaps this
5 is -- if it's legally irrelevant, it could be
6 vacated on that basis without reaching the
7 merits of the question.

8 But let me ask you this: What is your
9 response to the argument on the other side that
10 confirms directors took actions pursuant to the
11 amendment and, therefore, we have to consider
12 the status of confirmed directors?

13 MR. MOOPPAN: Your Honor, I don't
14 think they've actually ever challenged any
15 action enforcing the Third Amendment by
16 confirmed directors. And I don't know what
17 those actions would be since there it -- it's
18 ministerial. The Third Amendment requires the
19 dividends.

20 At most, maybe the -- the -- the only
21 thing I can even think they might be talking
22 about, though I'd be curious what they have to
23 say, is whether to pay the dividends under the
24 Third Amendment in cash or, instead, in kind
25 through the liquidation preference. That

1 wouldn't do them any good either way, so I'd be
2 surprised if that's what they're challenging.
3 But, other than that, I don't know what it would
4 be that they'd be referring to.

5 JUSTICE ALITO: If we were to reach
6 the issue of the removability of a confirmed
7 director and if we were to agree with you on
8 that question, what basis do you have for
9 distinguishing between the relief that you think
10 is appropriate in this case and the relief that
11 was provided in cases like *Bowsher*, *Seila Law*,
12 and appointments clause cases where an
13 appointments clause violation was found?

14 MR. MOOPPAN: So I think the most
15 significant difference is the fact that in this
16 case, the Treasury Secretary was a party to the
17 action that's being challenged. Their
18 constitutional claim is a claim that the agency
19 action was unconstitutionally insulated from
20 presidential supervision.

21 And unlike in all of the cases you
22 just mentioned, here, one of the parties to the
23 contract is the Treasury Secretary, who, of
24 course, is removable at will by the President
25 and is the President's right-hand man. So no

1 one can say that the President didn't have
2 sufficient control over this agreement. And
3 that's why, if -- if the APA's presidential
4 error rule means anything, it means you can't
5 set aside a multibillion-dollar agreement on the
6 theory that the President didn't have enough
7 control over it when the President's Treasury
8 Secretary signed it. That's --

9 CHIEF JUSTICE ROBERTS: Just --
10 Justice --

11 JUSTICE ALITO: All right. Thank you.

12 CHIEF JUSTICE ROBERTS: -- Justice
13 Sotomayor.

14 JUSTICE SOTOMAYOR: I just want to
15 make sure that I get the gist of your argument,
16 and I think I have it right. I know you and the
17 shareholders disagree on whether this deal had a
18 reasonable cause, but let's posit a deal that
19 didn't. For no rational base -- reason, the
20 FHFA sold all of Fannie and Freddie's assets in
21 exchange for one dollar to itself. It did
22 exactly what Justice Breyer said. It
23 nationalized things. It nationalized the
24 company. Your position is that there is no
25 court review of a decision by the FFH as

1 conservator that could give shareholders the
2 right to challenge their action?

3 MR. MOOPPAN: So we think -- in -- in
4 a hypothetical like that, we think you could --
5 the -- we don't think the anti-injunction clause
6 would bar a claim that actions were taken that
7 have no objective rational justification of
8 being taken to preserve and conserve assets. We
9 do think that even that claim would be barred by
10 the succession clause because it would still be
11 a derivative suit.

12 But, if you -- if the Court disagreed
13 with us about the succession clause, we don't --
14 we aren't arguing that the anti-injunction
15 clause means that there's no review of anything
16 the conservator does. We are just saying that
17 when the conservator takes action that may be
18 appropriate and necessary to preserve and
19 conserve assets, there's no second-guessing the
20 business judgment. And I think that's an
21 important point here, that --

22 JUSTICE SOTOMAYOR: All right,
23 counsel, let me just stop you there. If the
24 company is still in existence but owned by the
25 FHFA, there is no claim. This -- my colleagues

1 have posited something close to this. But it is
2 the shareholders who have been kicked out for no
3 business reason. I don't see how that's a
4 derivative suit that the succession clause would
5 bar.

6 MR. MOOPPAN: Your Honor, it's because
7 the shareholders' harm is derivative of the harm
8 to the corporation. All they have lost --

9 JUSTICE SOTOMAYOR: No, the -- the
10 corporation's not losing its profit. The
11 corporation's actually made -- may be gaining
12 money by not paying out dividends to the
13 shareholders, but I -- but it's the shareholders
14 and not the company that's being deprived of a
15 profit.

16 MR. MOOPPAN: Well, I -- I don't think
17 that's right, Your Honor. Their -- their claim
18 is that Fannie and Freddie -- FHFA acted
19 improperly in giving away the assets of the
20 corporation.

21 JUSTICE SOTOMAYOR: All right,
22 counsel, I just want to get in one last
23 question. Your argument is that the FHFA is
24 unconstitutionally structured given this Court's
25 decision in Seila Law.

1 I see vast differences between the
2 FHFA and the F -- CFPB. The FHFA's most notable
3 power and the reason we are here today is that
4 they can put certain government-affiliated
5 companies under conservatorship.

6 Conservatorships are -- are never
7 thought of, in my experience, as an executive
8 power. It's historically been an adjunct to the
9 judicial power. So why isn't that -- and -- and
10 this is not a wide-reaching power that affects
11 many entities. It's one company at a time
12 essentially, unlike in the CFPB. So why can't
13 we say that this is an exception to Humphrey's
14 Estate or Morrison versus Olson?

15 CHIEF JUSTICE ROBERTS: Briefly,
16 counsel.

17 MR. MOOPPAN: The question is whether
18 it's significant executive power, and the
19 authority to decide whether to put Fannie and
20 Freddie into conservatorship or receivership, a
21 decision that affects the entire mortgage market
22 and thus the home equity of every homeowner in
23 this country, is unquestionably a significant
24 executive power.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Kagan. Justice Kagan?

3 JUSTICE KAGAN: Sorry.

4 Mr. Mooppan, can I take you back to
5 your answers to Justice Alito? If -- if I
6 understood you right, you said that the only
7 final action that's being challenged here is the
8 Third Amendment. So I'm going to repeat his
9 question to you because I -- I wasn't quite sure
10 I got your answer.

11 If that's the case, that that's the
12 only final action challenged here, what basis
13 would we have to do anything more than issue a
14 -- a -- a declaratory judgment about the
15 validity of that amendment?

16 MR. MOOPPAN: So I don't think you
17 have it quite right. The plaintiffs in this
18 case did seek a declaratory judgment that the
19 structure of the FH -- FHFA was
20 unconstitutional, and the Fifth Circuit granted
21 them that relief. And there is a cert petition
22 that raises -- that was granted that includes
23 that question. So we do think it would be
24 appropriate for this Court to confirm that that
25 aspect of the judgment is correct.

1 JUSTICE KAGAN: Well, I know that they
2 asked for it, but usually, if you bring an APA
3 challenge, you know, you have to point to a
4 final agency action that you think is wrong in
5 some sense. And -- and, here, the Third
6 Amendment was done by the acting director. If
7 you are right about that, it doesn't raise the
8 removal issues. So what does raise the removal
9 issues?

10 MR. MOOPPAN: So it's just like Free
11 Enterprise Fund, Your Honor. They are entitled
12 to bring a prospective suit saying that the
13 ongoing regulatory power of the agency over
14 them, even absent a concrete final agency
15 action, they could seek prospective relief
16 against that because, of course, the FHFA, as a
17 regulator, has the authority to decide whether
18 these entities will continue to be in
19 conservatorship or not or whether they could be
20 put into receivership. They -- the shareholders
21 here have the ability to say that that decision
22 should be made only by a regulator that's
23 constitutionally structured, just like --

24 JUSTICE KAGAN: You're saying that --
25 you're saying that that's true even if they are

1 not -- they're not pointing to any particular
2 actions in the period when there was a confirmed
3 director that they object to?

4 MR. MOOPPAN: Well, it's a prospective
5 suit, Your Honor, so it -- their -- their point
6 is that every regulatory decision FHFA makes
7 going forward, including, most obviously, most
8 importantly, whether to keep the entities in
9 conservatorship or receivership, just like in --
10 in Free Enterprise Fund, the Court allowed a
11 prospective suit even though, by then, the
12 investigation was basically done.

13 The -- the point is that you got a
14 regulator and a regulated entity or the
15 shareholders of a regulated entity can bring a
16 claim to say that that regulator is
17 unconstitutionally structured as a prospective
18 matter. But you are right --

19 JUSTICE KAGAN: Thank you --

20 MR. MOOPPAN: -- and --

21 JUSTICE KAGAN: -- Mr. Mooppan.

22 Thanks.

23 CHIEF JUSTICE ROBERTS: Justice
24 Gorsuch.

25 JUSTICE GORSUCH: I -- I guess,

1 counsel, I'm -- I'm a little confused at this
2 declaratory judgment as to -- with respect to
3 future actions, it seems to me like it would be
4 appropriate for hanging on the wall but not much
5 else. The plaintiffs here have sought
6 declaratory judgment in aid of further remedies
7 retro- -- retroactive remedies that might
8 actually do them some good, and -- and -- and
9 that's the Third Amendment.

10 And I guess I'm a little confused why
11 we wouldn't proceed to hold that the Third
12 Amendment was void from the beginning by virtue
13 of the appointments clause problem. It's pretty
14 much what we did in Lucia, as you'll recall,
15 where -- where we vacated the -- the ALJ's
16 decision. Why wouldn't we do the same here?

17 MR. MOOPPAN: Well, again, because
18 their claim is that the Third Amendment was
19 unconstitutionally insulated from presidential
20 supervision. That claim is clearly wrong on the
21 merits because it -- the Third Amendment was
22 signed by the Treasury secretary, who is before
23 --

24 JUSTICE GORSUCH: So it's a merits --
25 a merits determination then?

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

2 JUSTICE GORSUCH: Okay.

3 MR. MOOPPAN: -- seeking a standing
4 argument. We're saying that --

5 JUSTICE GORSUCH: And then -- and
6 then, with respect, if it is, then -- then --
7 then why -- why isn't it your -- it's a harmless
8 error argument as I understand it, but we don't
9 do harmless error in -- in structural
10 constitutional cases typically, and if we did,
11 isn't it rather speculative to say what would
12 have happened here if -- if we would have had a
13 different director who is actually subject to
14 presidential oversight in the political process,
15 especially when Congress insulated this person
16 in theory from that process? Isn't that a
17 degree of speculation that is quite beyond us?

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

22 JUSTICE GORSUCH: I understand --

23 MR. MOOPPAN: The Treasury secretary
24 --

25 JUSTICE GORSUCH: -- I -- I

1 understand that point, but Congress decided to
2 put this person separate from the political
3 process for a reason, and it might have been to
4 insulate them all from the blowback that might
5 come. Who knows? I don't know, you don't know,
6 none of us knows. Isn't that -- isn't that the
7 whole point?

8 And -- and what do we do again, just
9 to return to my fundamental question, why isn't
10 this void? When -- when we have the Federal
11 Vacancies Reform Act, for example, it says that
12 an action taken by somebody who's without power
13 is void, not just voidable, not ratifiable, it's
14 void. Why wouldn't the same be true here?

15 MR. MOOPPAN: So, in addition to my
16 point about the Secretary of the Treasury, I
17 guess I would say even from the other side of
18 the coin this was one done by an acting
19 director, and an acting director is also
20 removable at will by the President.

21 JUSTICE GORSUCH: I understand that
22 argument. Put that argument aside. Put that
23 argument aside and your harmless error argument
24 aside. Why wouldn't this be void?

25 MR. MOOPPAN: Your Honor, if you

1 reject all the arguments we've made, then I
2 suppose we would probably lose. But --

3 JUSTICE GORSUCH: Okay. All right.
4 Thank --

5 MR. MOOPPAN: -- to say that the
6 contract --

7 JUSTICE GORSUCH: No, no, no. So I've
8 got it. It's -- it's a harmless error argument
9 on the one -- one hand, and I -- I've got it.
10 Okay, those are your two arguments. That's it.
11 After that, it's void.

12 MR. MOOPPAN: Well, in addition to
13 our, you know, antecedent arguments about the
14 succession clause, which I -- I -- I --

15 JUSTICE GORSUCH: Correct, correct.

16 MR. MOOPPAN: -- but I want to focus
17 on the merits because I know --

18 JUSTICE GORSUCH: But -- but -- but --
19 I got that. But -- but, when we come to
20 remedies, it's -- it's either the acting
21 director is -- is -- is -- is -- is reportable
22 to the President or it's harmless error. I've
23 got it.

24 MR. MOOPPAN: And -- and --

25 JUSTICE GORSUCH: Thank you, counsel.

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

2 CHIEF JUSTICE ROBERTS: Justice
3 Kavanaugh.

4 JUSTICE KAVANAUGH: Thank you, Chief
5 Justice.

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

8 MR. MOOPPAN: Yes. So I -- I would
9 like to talk a little bit about the acting
10 director point because I think it is an
11 important point and it avoids some of Justice
12 Gorsuch's concerns about the Treasury
13 secretary's side.

14 The statute does not expressly provide
15 that the acting director is subject to the same
16 clause protections as the confirmed director,
17 and this Court should not read a statute to
18 create constitutional problems. It normally
19 reads statutes to avoid constitutional problems.

20 So the -- an easy solution that avoids
21 all the concerns about structural error and
22 speculation and all the rest is to simply say
23 that under this statute, the acting director,
24 who is the official who took this decision on
25 behalf of HF -- FHFA is, in fact, removable at

1 will by the President, and so there's no problem
2 to begin with.

3 JUSTICE KAVANAUGH: Is that true of
4 all acting officials?

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

8 JUSTICE KAVANAUGH: Well, I guess, is
9 it true -- is -- is your principle that you're
10 asserting there that acting officials are
11 presumptively removable at will by the President
12 unless the statute with respect to the acting
13 director or acting official himself or herself
14 specifically puts restrictions on the
15 removable -- removability?

16 MR. MOOPPAN: Yes, I -- I -- I -- I --
17 our general position is that you should not
18 leapfrog from any clause restriction for a
19 confirmed official and assume that that extends
20 to an acting official. You would have to always
21 look at the provisions that govern the acting
22 official and see whether there is a removal
23 restriction for them. That's both as a matter
24 of constitutional avoidance and as a matter of
25 the Shurtleff clear statement requirement and as

1 a matter of simple common sense.

2 You know, Congress might have very
3 good reasons for why it wouldn't impose a
4 removal restriction on an acting official than
5 it did for a confirmed official, namely, that
6 the Senate has actually confirmed the person, so
7 then, at that point, they might be willing to
8 give them tenure protection. But someone that
9 has never gone through the gauntlet of Senate
10 confirmation, Congress might well be unwilling
11 to provide them with tenure protection.

12 So both as a matter of text and common
13 sense and structural constitutional provisions
14 and constitutional avoidance, you shouldn't read
15 the statute to create a constitutional problem,
16 let alone to set aside a multibillion dollar
17 contract.

18 JUSTICE KAVANAUGH: Well, those are
19 good points, and I guess the one point that's in
20 tension with that is that Congress also
21 designated it an independent agency, and if the
22 official, even though acting, running it is
23 removable at will, the agency's no longer
24 independent.

25 MR. MOOPAN: So I'll make two points

1 about that, Your Honor.

2 The first is that Congress often
3 designates agencies as -- as an independent
4 establishment even when they're concededly not
5 subject to any clause restrictions at all. The
6 best example of that I can give you is if you
7 look at Swan versus Clinton, the agency there
8 was described as independent, but an earlier
9 iteration of that agency was removable expressly
10 at will by the President.

11 The second point I would make is that
12 the fact that the agency is independent, even if
13 it had said something about clause restrictions,
14 it's one thing to say that they're independent
15 when they've got a confirmed director. It
16 doesn't necessarily mean that they're
17 independent when they have an acting director.

18 And we know that for this statute
19 itself because, if you look at this statute,
20 before the first confirmed director, there was a
21 transitional period and the head of the FHFA
22 during that transitional period was an officer
23 in HUD who was not subject to any clause
24 restriction.

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett.

3 JUSTICE BARRETT: Mr. Mooppan, let's
4 say that we agree with you that the Third
5 Amendment was entered into by an acting director
6 who was removable at will by the President, and
7 so the entry into the Third Amendment, let's
8 say, was valid. He had the -- there was no
9 constitutional problem with it.

10 Let's say that we also agree with you
11 that there was a problem with the confirmed
12 director because he was removable only for
13 cause. So the confirmed director was
14 administering the Third Amendment, administering
15 the conservatorship, and passing along all the
16 earnings from the GSEs into the Treasury.

17 Would that create a structural problem
18 because even though perhaps the Third Amendment
19 at its inception was valid, could the
20 administering of the Third Amendment by an
21 unconstitutional executive official contaminate
22 it with structural errors such that the whole
23 Third Amendment would have to be set aside?

24 MR. MOOPPAN: I don't think so, Your
25 Honor, because, again, the only -- there's not

1 some discretionary decision within the Third
2 Amendment other than perhaps whether the
3 dividends that are owed are paid in cash or
4 instead paid as a liquidation preference,
5 neither of which would do the plaintiffs here
6 any good, and that's not the claim that they're
7 bringing. Their claim isn't that the Third
8 Amendment is valid, but the money should all be
9 paid in liquidation preferences. Their claim is
10 that the Third Amendment itself should be set
11 aside.

12 JUSTICE BARRETT: Well, so who decides
13 when the Third Amendment -- when this
14 arrangement should come to an end, if ever?
15 Because, you know, Treasury viewed it as winding
16 down the GSEs, winding down their assets,
17 although, you know, it's been characterized not
18 as a receivership but as a conservatorship.

19 Could the confirmed director have
20 said, okay, listen, now this is no longer
21 serving to make the GSEs solvent, and so it's
22 time to shift arrangements? Did the confirmed
23 director have that authority under the Third
24 Amendment.

25 MR. MOOPPAN: So, yes, just like the

1 Second Amendment and the First Amendment and
2 everything else that the agency does. That's
3 why we think that they're entitled to relief
4 prospectively that the FHFA director should be
5 removable at will. And then, if the FHFA
6 director wants to change any of these agreements
7 and can get Treasury --

8 JUSTICE BARRETT: But --

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

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

14 MR. MOOPPAN: Again, it's not -- it's
15 just not a problem with the Third Amendment any
16 different than everything else, all right? That
17 -- that is essentially a challenge to agency
18 inaction, the failure to amend the contract.

19 On that theory, all of the agreements
20 would have to go, not just the Third Amendment,
21 the Second Amendment, the First Amendment, the
22 original amendment. So you would have to --
23 they -- Fannie and Freddie would have to lose
24 all of the money Treasury had ever given them
25 and all of the capital that is backed by them.

1 That's not the claim they've brought, and it
2 would be disastrous.

3 JUSTICE BARRETT: Let me just ask you
4 one last quick question. This is shifting gears
5 to the distinction between direct and derivative
6 suits.

7 I'm having a hard time understanding
8 why the corporate law distinction matters in
9 this APA claim, why we can import those concepts
10 from corporate law into the APA, because it
11 seems to me that the shareholders have Article
12 III standing. They've suffered a pocketbook
13 injury. You haven't contended, I don't think,
14 that they're not within the zone of interest of
15 the statute. And the APA gives a direct cause
16 of action for someone aggrieved by agency
17 action. So why do we even care about the
18 direct/derivative distinction?

19 CHIEF JUSTICE ROBERTS: Briefly,
20 counsel.

21 MR. MOOPPAN: Because the APA doesn't
22 displace traditional corporate law. It
23 incorporates it. And that's why in the 70-year
24 history of the APA plaintiffs haven't been
25 able to cite a single case that has allowed a

1 shareholder to bring what would otherwise be a
2 derivative suit.

3 CHIEF JUSTICE ROBERTS: You have a
4 minute to wrap up, counsel.

5 MR. MOOPPAN: The Third Amendment
6 should not be set aside. If the APA's
7 prejudicial error rule means anything at all,
8 courts cannot set aside a multibillion dollar
9 contract on the ground that it was
10 unconstitutionally insulated from presidential
11 supervision even though both of the officials
12 who signed it were removable at will by the
13 President.

14 If the Recovery Act's anti-injunction
15 clause means anything at all, courts cannot set
16 aside a conservator's renegotiation of complex
17 financial obligations by second-guessing the
18 conservator's statutory exercise of business
19 judgment. And in all events, the Recovery Act's
20 succession clause bars both claims.

21 No change in the history of the APA or
22 American corporation law appears to allow a
23 shareholder to claim direct rather than
24 derivative injury merely because the
25 corporation's assets allegedly were dissipated

1 unlawfully to another shareholder.

2 Accordingly, this Court should reject
3 the challenges to the Third Amendment but uphold
4 the determination that the FHFA director's
5 removal restriction is unconstitutional yet
6 severable.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Nielson.

10 ARGUMENT OF AARON L. NIELSON,
11 COURT-APPOINTED AMICUS CURIAE

12 MR. NIELSON: Mr. Chief Justice, and
13 may it please the Court:

14 There is a very easy way to answer the
15 constitutional question in this case. The Court
16 should hold that unless Congress says so in a
17 statute, an acting director does not have tenure
18 full stop.

19 I agree with the Solicitor General on
20 this in all respects but one. Because an acting
21 director is removable at will, this part of the
22 case should be over. As the United States
23 explained below, plaintiffs do not, in fact,
24 challenge ongoing action by the FHFA. That,
25 rather than the government's latest position, is

1 correct. I urge the Court to read J.A. 117.
2 There is no reference to any prospective suit or
3 anything like that in the complaint here.

4 If the Court chooses to tackle the
5 harder question, it should still reverse.
6 First, for the reasons this Court gave in *Seila*
7 *Law*, the FHFA does not wield significant
8 executive power because it does not regulate
9 purely private actors. Even the Department of
10 Justice concedes that conservatorship is not an
11 exercise of executive power.

12 By itself, this is another reason to
13 reverse. Regardless, neither party undermines
14 *Seila Law*'s observation that the FHFA isn't in
15 the same league as the CFPB when it comes to
16 liberty.

17 Second, the Court should focus on the
18 actual text of the statute, which the parties
19 essentially ignored. Neither party meaningfully
20 disputes that for cause provides the weakest
21 protection in removal law and can easily be read
22 to allow removal based on policy disagreement
23 with the President. The parties say that even
24 that is unconstitutional.

25 But their argument makes a hash out of

1 the take care clause, and it would also have
2 far-reaching consequences. Under their logic,
3 the Social Security Administration, the Office
4 of Special Counsel, the Federal Reserve, the
5 civil service, will all be subject to
6 constitutional attack, and that's just the
7 beginning. Neither party offers this Court a
8 coherent mind.

9 I welcome the Court's questions.

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

20 How does that work? What are the
21 consequences, particularly for the payments that
22 take place under the jurisdiction of the
23 unconstitutionally appointed director?

24 MR. NIELSON: I agree with the
25 Solicitor General's answer on this point. The

1 Third Amendment is not ongoing agency action.
2 It is a discrete thing. It is a contract. And
3 that is what is challenged. That's the decision
4 of the Haynes majority of the Fifth Circuit en
5 banc decision. That is the discrete thing being
6 challenged. There is not ongoing discretion
7 that might affect the interests of the
8 plaintiffs here. It's a contract, and that
9 contract is -- is what governs.

10 CHIEF JUSTICE ROBERTS: Well, there
11 were contracts before the Third Amendment too
12 and they were significantly altered, but I guess
13 my question is what if the complaining
14 stockholders here, you know, sent a letter to
15 the director, the confirmed one, and said we
16 want you to get out of this agreement because
17 it's unfair to us, and the director said no?

18 That would be action by the regular
19 director and, certainly, it would seem to me
20 could be challengeable under the -- given that
21 unconstitutionality.

22 MR. NIELSON: Well, I guess two
23 points, Your Honor.

24 First, nothing like that is in the
25 complaint. There's no complaint about this

1 taint theory. So, you know, this is all
2 hypothetical.

3 But, beyond that, this isn't an
4 ordinary agency action where you could, like,
5 file a petition for rulemaking or something like
6 that. It's a contract, and, sure, the parties
7 could renegotiate the contract, but it takes two
8 to tango, and it's not just the decision of the
9 -- of the FHFA.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Thomas.

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

15 Counsel, usually, when you have an
16 agency action, it's an enforcement action or
17 something that affects a particular party.

18 Here, you're talking about a major
19 change in an -- in -- in an entity in which the
20 parties -- the plaintiffs are invested. Now
21 they do -- I know you want to keep us at the --
22 sort of the initial stage of Amendment III, or
23 the Third Amendment, but there are -- as Justice
24 Barrett noted, what about the administration of
25 it now? It's still in existence. It affects

1 them. And what about the future administration?
2 It will have a continuing effect. This is
3 unlike other agency actions.

4 How do you address that?

5 MR. NIELSON: Well, first, I would
6 again point the Court to the actual complaint
7 here. It's on page J.A. 117 is the relevant
8 count, and there's no ongoing taint theory here,
9 so all of this is hypothetical.

10 But, again, this is a contract, and
11 with a contract, sure, you might be unhappy with
12 it, but it was entered into by a conservator who
13 wasn't even exercising executive power, and the
14 FHFA as regulator can't just undo a contract.
15 It takes a decision from the FHFA and the
16 Treasury Department.

17 JUSTICE THOMAS: So the mere fact that
18 it was -- it was fortuitous and not for a -- an
19 acting director to do this insulates it from a
20 -- from a -- a challenge?

21 MR. NIELSON: Well, with respect, Your
22 Honor, I don't think it's this side that is
23 relying on a fluke. The -- the idea that the
24 acting -- that the for cause provision has
25 anything whatsoever to do with the Third

1 Amendment is entirely implausible, and that's
2 why none of the other complaints or -- or counts
3 that raise this in other -- in other courts even
4 raise this as an issue, because it just didn't
5 have anything to do with it.

6 JUSTICE THOMAS: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Breyer.

9 JUSTICE BREYER: Thank you.

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

18 MR. NIELSON: Well, this is different
19 because the thing that is being challenged here,
20 leaving aside the acting point, is an act of a
21 conservator, and that isn't even executive
22 power. The Department of Justice, which is
23 about the most vigorous defender of presidential
24 power on earth, concedes that this is not
25 executive power. So that's one way to -- to

1 distinguish this entire issue. This is not --
2 doesn't raise any of those types of issues in
3 this case.

4 JUSTICE BREYER: Well, what if it --
5 it -- it's not part of the Article III
6 judiciary?

7 MR. NIELSON: No, Your Honor.

8 JUSTICE BREYER: It's not part of the
9 Article I legislature, and what does that leave?
10 It leaves Article II.

11 MR. NIELSON: Well, no, Your Honor,
12 the Court has not been clear if it's private
13 power or simply nonsovereign power. My gut says
14 it's nonsovereign power because it's an agency
15 that's doing it. But, if a private person can
16 do it, the government can do it too, and that
17 doesn't take executive power to get there, no
18 different than, you know, ordering books or
19 anything like that that the Court does. That
20 didn't make ordering books a judicial power.
21 It's just something the government can do to
22 function.

23 JUSTICE BREYER: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice Alito.

25 JUSTICE ALITO: We've said many times

1 that structural provisions of the Constitution,
2 like the appointments clause and rules about the
3 removal of executive officers, are ultimately
4 important because they affect ordinary people,
5 they affect liberty, as you just mentioned, and
6 they affect democratic accountability.

7 The argument against your position
8 here includes the -- the proposition that the
9 way in which the agency carries out its
10 responsibility as conservator has a profound
11 effect on the housing market and, therefore, a
12 profound effect on ordinary people.

13 What's your answer to that?

14 MR. NIELSON: The Court needs to
15 decide what type of power conservatorship is,
16 and once you know the answer to that, then the
17 logic all falls into place. Conservatorship is
18 not executive power. There are things that have
19 vast significance for the economy that are not
20 executive power. I point the Court to the Bank
21 of the United States, which surely was even more
22 consequential than this, but it wasn't executive
23 power because banking was not understood as
24 executive power.

25 So too here. Essentially, being a

1 conservator for a government insurer is not
2 executive power. It's just outside of Article
3 II even though it has significant effect on the
4 economy.

5 JUSTICE ALITO: All right. Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor.

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

17 MR. NIELSON: Mostly correct. I -- I
18 think that you could look at the type of power
19 for a broader range of things, so if we're
20 talking about the agency as regulator, you would
21 look --

22 JUSTICE SOTOMAYOR: Well, if it's not
23 --

24 MR. NIELSON: -- at the agency
25 director.

1 JUSTICE SOTOMAYOR: -- I -- I think
2 one of my colleagues asked this. If the FHFA is
3 not an executive agency, what is it? Put aside
4 the conservatorship part of it. Is it or is it
5 not an executive agency?

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

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

16 MR. NIELSON: Well, I would point the
17 Court -- if we're looking at the powers as
18 regulator, they are not significant executive
19 power. They exist, but Con- -- but Congress has
20 essentially given the FHFA, you know, a recipe
21 book, this is what you're supposed to do.

22 It's almost binary, and that easily
23 allows for cause to control the exercise of this
24 power because it doesn't have the sort of
25 discretion that the CFPB did.

1 JUSTICE SOTOMAYOR: That's actually
2 the point I was raising with the government
3 earlier, but I still see that as a different
4 argument.

5 So, if the shareholders -- if the
6 shareholders have argued that the director's for
7 cause removal is a structural error, that has to
8 do with Justice Alito's question and Justice
9 Gorsuch's earlier questioning of the government.

10 If they're correct, do we have
11 discretion against enjoining the Third Act? How
12 do we get from a structural error to a harmless
13 error? What do we consider to do that? In
14 which situations are we permitted to do that?

15 MR. NIELSON: Well, it certainly would
16 be the case when you're talking about
17 conservatorship. I know that that isn't exactly
18 the question, but, here, if we're talking about
19 a discrete act which is the thing that they have
20 challenged and that act did not require any
21 executive power whatsoever, it's hard for me to
22 see how you even get into the question of, you
23 know, is it harmless error. There was no
24 constitutional violation at the threshold.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Kagan.

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

17 So how can you say this?

18 MR. NIELSON: Again, my answer to this
19 would be I understand all of that. I think
20 you're always safe going with the majority, and
21 the majority says that it's not a lot of power.

22 But your point is well taken. I think
23 the way that you reconcile the dissent and the
24 majority is the dissent is saying, look how much
25 effect it has in the real world, and the

1 majority is saying, but look at how much power
2 it actually exercises.

3 The difference between this agency and
4 the CFPB is the CFPB has vast discretion,
5 whereas, if you go through the statute here,
6 it's true they can do certain things but only in
7 a very, very limited way. Congress has
8 essentially said, here is the instruction
9 manual, go forth and do it.

10 And for something as reticulated as
11 that, if the agency doesn't do it correctly, the
12 President can say that's cause. That's the
13 easiest type of cause there is. You're supposed
14 to have a report. I don't have a report.
15 You're out the door.

16 JUSTICE KAGAN: But wait, wait.
17 You're -- you're suggesting that there's a
18 difference between just saying for cause and --
19 and saying inefficiency, neglect, or
20 malfeasance, but -- but where do we get that? I
21 mean, once again, the majority said we don't
22 want to really parse the language that way, and
23 the defense just assumed that these were
24 essentially coterminous restrictions.

25 MR. NIELSON: Well, the easiest way to

1 look at this is, if these are companion agencies
2 and Congress uses one language in Dodd-Frank and
3 the other language in the Recovery Act, we
4 ordinarily assume they mean different things.

5 And for all the reasons that Dean
6 Manning explains in his article, Kent Barnett
7 explains in his article, the ordinary meaning of
8 "for cause," at least with constitutional
9 avoidance, allows that type of removal.

10 JUSTICE KAGAN: Thank you, Mr.
11 Nielson.

12 CHIEF JUSTICE ROBERTS: Justice
13 Gorsuch.

14 JUSTICE GORSUCH: Good morning, Mr.
15 Nielson. A -- a lot of your remedial argument
16 seems to hinge on the happenstance that we had
17 an acting director at the time of the Third
18 Amendment's adoption. I -- I'd like to
19 highlight two potential difficulties with that
20 and ask for your thoughts.

21 The first is the assumption that the
22 acting director is answerable to the President
23 while the director is not. Under the statute
24 creating this outfit, the director appoints
25 deputy directors, the director, not the

1 President. It appears that those deputy
2 directors would be insulated from the President
3 therefore.

4 And when -- when the director steps
5 aside, he names the acting director, or, rather,
6 he gives a pool of three of his deputies and the
7 President chooses which of those three. But the
8 director appointed all three of them.

9 So I'm not sure in what sense or where
10 we get the inference or how we generate from
11 some penumbra emanating somewhere that the
12 President has the removal power over this acting
13 director. That's one.

14 And two is, let's -- let's box in
15 that, let's assume that's the case. So what?
16 The -- the plaintiffs here challenged actions
17 after -- during this whole period, including
18 after a period in which the acting director
19 disappeared and we now have a director.

20 You say, well, that -- that -- that
21 doesn't matter because the amendment is a thing
22 that was adopted by the acting director. But
23 the plaintiffs are challenging the director's
24 actions as void because he is unanswerable to
25 the President.

1 So why wouldn't we at least be able to
2 provide relief voiding the director's actions
3 once we had a -- a -- a Senate-confirmed
4 director in 2014?

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

7 As to the acting point, the -- the
8 premise of the other side's argument is that the
9 Vacancies Act doesn't apply. I don't see the
10 basis for that. That's not consistent with how
11 courts have read it in analogous circumstances.

12 But even beyond that, merely because
13 -- assuming that the President could only pick
14 among those three, that says nothing about
15 whether the President can remove them.

16 Ordinarily, the power to designate
17 includes the power to undesignate, and, here,
18 the statute says nothing whatsoever to prevent
19 the ordinary operation of -- of that background
20 principle.

21 As to the "so what," I would point the
22 Court again to J.A. 117, which is the actual
23 complaint here. There isn't this ongoing theory
24 that, you know, we're challenging a -- a future
25 action. All they were challenging was the Third

1 Amendment.

2 You know, you could maybe make an
3 argument that the Third Amendment should be, you
4 know, undone or something like that, but that's
5 not even pleaded, and the idea that agency
6 inaction or, you know, merely defending
7 something that was constitutional when done
8 becomes unconstitutional really has no limiting
9 principle.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Kavanaugh.

13 JUSTICE KAVANAUGH: Thank you, Chief
14 Justice.

15 Good morning, Mr. Nielson. Is there
16 anything more you wanted to say in response to
17 Justice Gorsuch?

18 MR. NIELSON: Yeah, I would also like
19 to talk about the acting point a little bit
20 more. One of the arguments that the other side
21 makes is that the President could use the acting
22 to try to get away from ever having Senate
23 confirmation, and that -- there -- there's two
24 reasons why that isn't so.

25 One is that Congress has many tools to

1 try to stop presidential shenanigans like that.
2 But, more than that, there is an appointments
3 clause backstop to all of this. The head of an
4 agency is supposed to be a Senate-confirmed
5 officer. You can have a temporary, non- -- you
6 know, non-Senate-confirmed officer heading an
7 agency, but the appointments clause is a firm
8 backstop against that kind of chicanery that the
9 -- that the -- the plaintiff posits.

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

18 But then you went on to name
19 multi-member agencies in the federal and civil
20 service. And my understanding of the principle
21 that would be applicable here would be that
22 single director independent agencies are not
23 historically rooted, as the Court said in Seila
24 Law, and that's all we would be saying and
25 applying here.

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

8 I have a theory for why that isn't
9 unconstitutional. I don't think that power is
10 significant. I also don't think you should
11 start inferring removal protections. But, under
12 their theory, why is that -- why would that be
13 constitutional, how could that be
14 constitutional?

15 JUSTICE KAVANAUGH: And --

16 MR. NIELSON: Likewise for the civil
17 service, you know, in Seila Law, the Court says
18 we're not going to, you know, recognize an
19 exception for inferior officers that make real
20 policymaking powers, or we -- we haven't
21 recognized one yet.

22 Well, if that's the case, all the
23 plaintiff has to do is throw on, as a last count
24 to a complaint, a challenge to somebody who's a
25 -- a member -- member of the civil service who

1 may have been involved and say that person
2 really is an inferior officer, and the whole
3 thing comes crashing down.

4 JUSTICE KAVANAUGH: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Barrett.

8 JUSTICE BARRETT: So, Mr. Nielson, I
9 would have come away from Seila Law thinking
10 that there were two exceptions to this rule,
11 Humphrey's Executor and Morrison versus Olson.

12 But it seems to me -- and this goes
13 back to some of the questions that Justices
14 Sotomayor and Kagan were pressing you on -- it
15 seems to me that you're kind of arguing for a
16 third ground here, which is, well, then we take
17 a look at what is the executive official really
18 doing. Does this really seem like a lot of
19 executive power or a little executive power,
20 something that looks more like private power?
21 It strikes me as a pretty hard test to
22 administer. So could you say a little bit more
23 about that?

24 MR. NIELSON: Sure. "Significant," of
25 course, is not my word. That's what the Court

1 used numerous times in Seila Law itself. So I
2 look to Seila Law to understand what the Court
3 means by "significant." And I think Seila Law
4 makes plain that "significant" captures the
5 liberty and accountability concerns that require
6 plenary control. The Court focused on two
7 things, whether private citizens are being
8 regulated and whether there is substantial
9 policy discretion.

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

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

24 JUSTICE BARRETT: Thank you,
25 Mr. Nielson.

1 CHIEF JUSTICE ROBERTS: A minute to
2 wrap up, Mr. Nielson.

3 MR. NIELSON: Thank you, Your Honor.

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

13 Is it the take care clause? If so,
14 how could a provision that allows for removal
15 for insubordination prevent the President from
16 faithfully executing the law?

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

21 These are all hard questions that have
22 significance far beyond this appeal.
23 Thankfully, however, the Court doesn't need to
24 answer any of them because an acting director
25 doesn't have tenure to begin with.

1 Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Thompson.

5 ORAL ARGUMENT OF DAVID H. THOMPSON
6 ON BEHALF OF THE PETITIONERS IN 19-422
7 AND THE RESPONDENTS IN 19-563

8 MR. THOMPSON: Mr. Chief Justice, and
9 may it please the Court:

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

19 And the claim that only FHFA may sue
20 FHFA for nationalizing Fannie and Freddie is
21 contrary to this Court's decision in American
22 Power, decades of precedent on the lenient
23 zone-of-interest test, and the strong
24 presumption favoring judicial review of agency
25 action. Congress enacted the APA to make

1 judicial review widely available to anyone who
2 is aggrieved within the meaning of a relevant
3 statute. And shareholders are aggrieved by the
4 Net Worth Sweep.

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

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

21 The Net Worth Sweep needlessly
22 dissipated the assets of the companies FHFA is
23 charged with rehabilitating. And FHFA's
24 sweeping claims to unlimited standardless
25 discretion powerfully illustrate the framers'

1 wisdom in refusing to vest executive authority
2 in an unaccountable fourth branch of government.

3 I welcome the Court's questions.

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

10 But I checked this morning, and Fannie
11 Mae was trading at \$2.69 and Freddie Mac at
12 \$2.56, and your shares are not worthless.
13 They're worth something, presumably, largely
14 based on judgments about what the future holds.
15 So doesn't that run -- render your sort of
16 nationalization rhetoric just that, rhetoric?

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

21 It's true that there's value in the
22 shares, but that's attributable to two factors,
23 number one, this lawsuit, and, number two, that
24 there is ongoing political discussion about what
25 to do with these companies, and maybe one day in

1 the future the government will abandon the Net
2 Worth Sweep. But, right now, it's in force and
3 effect, and the companies have been
4 nationalized.

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

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

16 MR. THOMPSON: Well, Your Honor, so,
17 first of all, respectfully, I don't think the
18 Court should put aside the lawsuit. That's an
19 important driver, obviously, in the value of the
20 stock. But, in terms of the lifeline, Your
21 Honor, I -- I would just point out that the Net
22 Worth Sweep exposed that line of commitment to
23 maximum vulnerability because the companies can
24 never build up capital to absorb losses.

25 So, if there had not been a Net Worth

1 Sweep, there would be 124 billion dollars of
2 capital on the balance sheet today standing
3 between future losses and the line of
4 commitment. The -- the Net Worth Sweep took
5 away that ability to rebuild capital and has
6 exposed that lifeline to maximum vulnerability.

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

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

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

24 MR. THOMPSON: Well, that -- that we
25 are challenging the regulatory action of the

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

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Thomas.

11 JUSTICE THOMAS: Thank you, Mr. Chief
12 Justice.

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

20 But would you spend a few minutes on
21 that, should -- as to how we read in continuing
22 implementation of the amendment and future
23 implementation of the amendment when you only
24 complain of the adoption of the amendment?

25 MR. THOMPSON: Thank you, Your Honor.

1 We -- we do complain about the adoption, but we
2 also note throughout the complaint the
3 overpayments that were being made. We calculate
4 those overpayments to be 124 billion dollars,
5 and each one of those overpayments was an
6 implementation of the Net Worth Sweep. So that
7 theme really runs throughout our complaint.

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

16 JUSTICE THOMAS: Would it have
17 affected your separation of powers argument if
18 the President, together with the director, a --
19 a sub -- a -- a future or subsequent director,
20 and the Secretary of the Treasury fully endorsed
21 Amendment III, openly endorsed and endorsed it
22 in writing? In a sense -- in essence, if all
23 three ratified what has been done with this
24 amendment, would it change your complaint at
25 all?

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

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

22 The administration had ongoing fights
23 with Mr. DeMarco. It led -- we put this in our
24 red brief at page 72 -- to calls for Mr. DeMarco
25 to be fired, and the administration said, we

1 don't have the authority to fire him.

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

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

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

24 And in response to our preferred
25 remedy, the government and FHFA said precisely

1 nothing. They did not object. They had no
2 practical concerns that they gave voice to.

3 JUSTICE THOMAS: Thank you.

4 MR. THOMPSON: And it's an accounting
5 adjustment.

6 CHIEF JUSTICE ROBERTS: Justice --
7 Justice Breyer.

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

13 Well, why didn't you bring a takings
14 claim?

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

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

24 MR. THOMPSON: Yes, Your Honor.

25 JUSTICE BREYER: -- and this seems

1 like a takings claim, why should we stretch out
2 of recognition or stretch or try to draw lines
3 unnecessarily on the question of derivative
4 actions?

5 MR. THOMPSON: Well, I think it's
6 basic --

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

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

23 But also, if the Court were to apply
24 traditional measures of derivative/direct, we
25 say we win. We would point to the Alleghany

1 case.

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

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

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

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

21 On your APA claim, my cousin, Joe,
22 whom I love dearly, I give to him a piece of
23 land and I assign to him -- though I can retain
24 ownership, I assign to him all rights to bring
25 any lawsuit, defend lawsuits, I have no rights

1 left in respect to that land. I gave them all
2 to Joe. And if Bill comes along and cuts the
3 tree illegally, it's Joe who can sue, not me,
4 right? And as long as that's so, why is the APA
5 any different?

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

10 MR. THOMPSON: Well, Your Honor --

11 JUSTICE BREYER: And if that's right,
12 how is this any different?

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

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

23 JUSTICE BREYER: I'm thinking of
24 the -- I'm thinking of the anti-injunction
25 clause, you see, or I'm thinking of both

1 clauses. Look, Joe can't sue because I assigned
2 to Joe -- I mean, I can't sue because I gave all
3 those rights to Joe. Now is the APA any
4 different if that's Joe's claim?

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

14 JUSTICE BREYER: I thought that --

15 CHIEF JUSTICE ROBERTS: Justice Alito.

16 JUSTICE BREYER: All right. Thank
17 you.

18 JUSTICE ALITO: Counsel, let me give
19 you this hypothetical situation. A director is
20 appointed and, upon appointment, the director
21 and the President have a joint news conference.
22 The President says, I know the statute says that
23 you are removable only for cause, but that's
24 unconstitutional. Under the Constitution, I can
25 remove you at will, and I will proceed on that

1 basis. And the director says, I agree, and I
2 will conduct myself on that understanding, and,
3 in fact, I will verify every single morning that
4 you still want me in office and you don't, as a
5 matter of whim, want me to leave.

6 Would it follow that everything done
7 thereafter by the director is ab -- is void ab
8 initio?

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

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

21 JUSTICE ALITO: Well, I -- I do think
22 we have to answer that question in order to
23 determine whether it follows that the -- the
24 identification of an unconstitutional
25 restriction on removal necessarily means,

1 because it is a structural defect, that
2 everything done by that officer is void ab
3 initio.

4 MR. THOMPSON: Well, Your Honor, we do
5 think that this qualifies under Weaver for being
6 a structural error for two reasons.

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

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

23 JUSTICE ALITO: Well, it is hard to
24 measure the -- the -- the effects, but sometimes
25 we have to do things that are hard.

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

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

21 Of course, there would be the statute
22 of limitations in Article III that would limit
23 what would have to be thrown out, and, of
24 course, in Noel Canning, this Court invalidated
25 20 months of the NLRB's activities.

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

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

12 JUSTICE ALITO: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Sotomayor.

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

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

23 First, the argument is that this
24 decision was entered into by two entities under
25 the complete control of the President. There is

1 no dispute that the Treasury had -- treasurer is
2 removable at will. So we know what the
3 President would have wanted because he had an
4 agency he fully and unequivocally controlled
5 entering this agreement.

6 And then, secondly, we have an acting
7 director, which almost logically means that he
8 could be removable entering it.

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

15 MR. THOMPSON: Well, Your Honor --

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

22 MR. THOMPSON: Your Honor,
23 respectfully, we don't know what the President
24 wanted. We know the President was willing to
25 sign this deal; otherwise, the Secretary of

1 Treasury wouldn't have signed it.

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

11 And, presumably, that's because of
12 4511(a) that says it shall be an independent
13 agency of the federal government. And under
14 this interpretation that the acting director can
15 be fired, it would toggle back from being a
16 radically independent agency to a radically
17 dependent agency.

18 My friend on the other side points to
19 the Swan case. But, there, that was the NCUA
20 and there were three Board members, and the fact
21 that one of them became dependent didn't
22 transform the agency radically.

23 Here, when you have a single director
24 and you say that the acting director can be
25 fired at -- at will, then you just radically

1 transform the nature of it.

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

7 So, for all of those reasons, we --
8 we're entitled to relief. Certainly,
9 backward-looking relief was given in the Bowsher
10 case as well.

11 JUSTICE SOTOMAYOR: You argue that the
12 APA eliminates any need to look into whether a
13 shareholder's injury is derivative of an injury
14 suffered by the corporation.

15 So I take it that you're taking the
16 position that anyone holding a single share in a
17 company can challenge any agency action or
18 rulemaking that affects the company's stock
19 price?

20 MR. THOMPSON: Well, Your Honor --

21 JUSTICE SOTOMAYOR: That would seem to
22 me as a sea change in how administrative law
23 challenges are litigated.

24 MR. THOMPSON: Your Honor, this was a
25 concern that the American Power dissent

1 articulated, and 75 years later, it hasn't come
2 to fruition and I think because of cases like
3 Air Courier.

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

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

22 CHIEF JUSTICE ROBERTS: Justice Kagan.

23 MR. THOMPSON: -- for getting
24 proceeds.

25 JUSTICE KAGAN: Mr. Thompson, I -- I

1 just go back to Justice Alito's question about
2 the Social Security Administration. I'll put
3 some scary sounding numbers on this.

4 The SSA has been led by a single
5 commissioner since 1994 and ever since then,
6 it's rendered 650,000 decisions every year, so
7 that's about 17 million decisions.

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

16 So are we really going to void all of
17 those decisions?

18 MR. THOMPSON: Well, Your Honor, a few
19 points. Number one, there's the statute of
20 limitations and the Article III limitations.

21 There's also the fact that the SSAA is
22 different than the FHFA. We don't think it
23 makes a constitutional difference, but it -- it
24 has much more limited jurisdiction. It's not
25 running multi-trillion dollar companies.

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

9 JUSTICE KAGAN: Don't you think it's a
10 little bit odd because, I mean, none of us
11 really think that any of those decisions would
12 be different if there were a different level of
13 presidential supervision, do we?

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

19 JUSTICE KAGAN: No, I -- I mean, I
20 think Lucia is a different question. It's an
21 appointments clause question. We can come back
22 to that.

23 But, I mean, are you really making a
24 good faith argument that if there were at -- if
25 there were for cause -- excuse me, if there were

1 at will removal of the Social Security
2 Administration that these 17 million decisions
3 would come out differently or, indeed, that any
4 of them would?

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

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

19 JUSTICE KAGAN: I mean, in a case like
20 this, Mr. Thompson, where we're trying to figure
21 out the proper remedy, I mean, it's -- it's --
22 it's a -- it's a kind of equitable question,
23 isn't it, and we're trying to figure out what
24 position you would have been in absent a
25 constitutional violation. Why -- why isn't that

1 the right question?

2 MR. THOMPSON: Well, I think Footnote
3 12 of Free Enterprise and Seila Law just last
4 term rejected that. They said plaintiffs don't
5 have to try to recreate a but-for world. And,
6 here, if we -- it shows why. We'd have to go
7 back to 2009 and see what would have happened if
8 Director Watt, for example, had been there
9 throughout the entire time and, you know, would
10 the President have preferred to keep the money
11 at Fannie and Freddie and spend it on affordable
12 housing rather than send it all to the
13 Republican-controlled House of Representatives
14 and the Treasury?

15 So that's a difficult --

16 JUSTICE KAGAN: Does that mean,
17 Mr. Thompson, that we have to do a great deal
18 more than invalidate the -- the -- the Third
19 Amendment and everything that follows from it?
20 I mean, why shouldn't we go back to the -- the
21 -- the -- the -- the First or the Second?

22 MR. THOMPSON: Well, Your Honor, we
23 focused on the Third Amendment because that's
24 the -- the feature of this that rearranged the
25 capital structure, but, as we made clear to the

1 Fifth Circuit Court of Appeals, we are perfectly
2 content with all of these arrangements, which,
3 as we say in the complaint, were a concrete
4 life-preserver. It's like getting a credit card
5 with a double-digit interest rate that you can't
6 repay the debt on. It's not debt, but you can't
7 pay the money back, and so --

8 JUSTICE KAGAN: Thank you,
9 Mr. Thompson.

10 MR. THOMPSON: -- we would be
11 perfectly content with it being thrown out.

12 CHIEF JUSTICE ROBERTS: Justice
13 Gorsuch.

14 JUSTICE GORSUCH: Counsel, your
15 remedial ask is a big one and -- and hard --
16 hard for us to swallow, I know. And -- and I --
17 I -- I -- I -- I want to -- I want to focus on a
18 couple aspects of it that -- that we -- we've --
19 that are particularly important.

20 The -- the first is that once we had a
21 new director in 2014, we -- we've heard a
22 suggestion that -- that you haven't complained
23 about actions taken after 2014 in your
24 complaint, and the only complaint has to do with
25 the entry into the Third Amend -- Amendment,

1 which took place during the pendency of a prior
2 director. I'd like your -- I'd like to
3 understand your thoughts about that first.

4 And, second, whether a new
5 constitutionally correct director that we ordain
6 today could ratify the actions of an
7 unconstitutional arrangement previously. Why
8 would it have to be void?

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

18 And so we've complained in the
19 complaint that, but for each and every one of
20 those payments, there'd be 124 billion dollars
21 of extra capital at the company. Obviously, the
22 implication of that calculation in our complaint
23 is we're not satisfied that any of these
24 payments were made.

25 Now, as for the Court's second

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

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

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

23 JUSTICE GORSUCH: And I guess I'm
24 asking why not. I mean, I understand, like, the
25 Federal Vacancy Reform Act says that can't be

1 done when its terms apply, and -- but why -- why
2 couldn't we as some sort of equitable, remedial
3 dodge do that here?

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

11 JUSTICE GORSUCH: No, I -- that --
12 that really wasn't my question.

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

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

22 MR. THOMPSON: Well, at -- at -- at
23 this point, the Vacancies Act did not apply
24 because it had been more than 210 days since the
25 Senate had rejected the nominee that President

1 Obama had sent up. And so the -- the FVRA just
2 had no application at the time of the Net Worth
3 Sweep.

4 JUSTICE GORSUCH: Any reason why just
5 that we shouldn't, as a background principle,
6 assume that the President could?

7 MR. THOMPSON: Well, one reason would
8 be Wiener. Wiener said that you look at the
9 nature of the function of the office that's
10 vested in the officer. And I know some might
11 think Wiener wasn't correctly decided as an
12 original matter, but Congress is entitled to
13 legislate against the backdrop of this Court's
14 precedents.

15 And -- and so the Wiener precedent
16 said here's how you can apply it, look to the
17 act -- to the nature of the functions. It's
18 identical, the powers of the acting director and
19 the regulated director. And we've got the plain
20 language of 4511(a), which says it shall --

21 JUSTICE GORSUCH: Thank you.

22 MR. THOMPSON: -- shall be done.

23 JUSTICE GORSUCH: Yeah. Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Kavanaugh.

1 JUSTICE KAVANAUGH: Thank you.

2 And good morning, Mr. Thompson.

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

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

21 MR. THOMPSON: Well, number one, they
22 haven't invoked, for example, the de facto
23 officer doctrine. They haven't invoked that in
24 this Court, so they -- they have waived that.
25 The only thing they --

1 JUSTICE KAVANAUGH: No, you -- your
2 reaction to the general catalogue of principles
3 outlined by the Solicitor General.

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

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

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

25 MR. THOMPSON: We certainly did not

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

9 JUSTICE KAVANAUGH: Okay.

10 MR. THOMPSON: -- exercised --

11 JUSTICE KAVANAUGH: Sorry, can I stop
12 you there?

13 MR. THOMPSON: Please.

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

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

24 JUSTICE KAVANAUGH: And then the
25 amicus says, on -- on a different front, that

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

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

16 JUSTICE KAVANAUGH: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett.

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

1 director is the one who was in charge for --
2 say, you know, up until six months ago, up until
3 last year, and then we had a confirmed director.

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

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

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

1 no problem, if the Third Amendment was entered
2 into by the acting director with no
3 constitutional problem, you're still saying that
4 the participation of the confirmed director was
5 a structural error that invalidated the Third
6 Amendment and everything with it, correct?

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

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

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

23 JUSTICE BARRETT: And so we would then
24 have to parse through and figure out what was
25 done by the constitutionally problematic officer

1 and what was fine because it was done by the
2 acting director?

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

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

15 MR. THOMPSON: No -- no -- no, Your
16 Honor. So this is very important. We're
17 seeking two things. Number one, we're seeking
18 prospective relief so that in your hypothetical
19 the Senate-confirmed director would be enjoined
20 from making any future sweep dividend, approving
21 any future sweep dividend payment; and, number
22 two, we're asking to go back and have the
23 overpayments, over and above the 18.9 billion
24 dollars, to be treated as a pay-down of
25 principal. And that would essentially deem the

1 government paid back.

2 JUSTICE BARRETT: Thank you.

3 CHIEF JUSTICE ROBERTS: A minute to
4 wrap up, Mr. Thompson.

5 MR. THOMPSON: Yes, Your Honor.

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

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

1 We agree. Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Rebuttal, Mr. Mooppan.

5 REBUTTAL ARGUMENT OF HASHIM M. MOOPPAN ON
6 BEHALF OF THE FEDERAL PARTIES

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

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

21 On the other side of the transaction,
22 it's undisputed and indisputable that the
23 Treasury Secretary signed the agreement and, of
24 course, is removable at will by the President.
25 His only argument on that side is to say, well,

1 maybe the contract wouldn't have happened
2 because of other things that happened earlier.

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

13 That's not the way this Court's
14 judicial review works. The question is what --
15 whether the agency action that's being
16 challenged was insulated from the President.
17 And, here, because the Secretary of the Treasury
18 and the acting director are the ones who entered
19 into the Third Amendment, it was.

20 So then, if we assume the Third
21 Amendment is valid as a constitutional matter,
22 his fallback argument is to suggest, well, the
23 implementation of the Third Amendment at least
24 can be challenged. And the reason that doesn't
25 work is because, once the Third Amendment is

1 valid, the money is owed.

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

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

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

24 Finally, on the anti-injunction
25 clause, which we didn't have too much time to

1 discuss this morning, I guess the key point I
2 would try to make is that this wasn't a
3 nationalization; it was a renegotiation of
4 dividend obligation. And as all the courts of
5 appeals before the court below recognized, and
6 as Judge Stras and Judge Bevis explained, the
7 Court shouldn't second-guess that under the
8 anti-injunction clause.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

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

18 The case is submitted.

19 (Whereupon, at 11:41 a.m., the case
20 was submitted.)

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Official - Subject to Final Review

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\$2.56 ^[1] 64:12	15	advice ^[1] 45:13	94:14,17,23 95:15,25 104:12
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