No. 19-563

In the Supreme Court of the United States

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

v.

PATRICK J. COLLINS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The shareholders agree that this Court should grant review of the first question presented in the government's petition for a writ of certiorari: whether the anti-injunction clause of the Housing and Economic Recovery Act of 2008 (Recovery Act or Act), Pub. L. No. 110-289, 122 Stat. 2654, precludes courts from setting aside the Third Amendment to certain agreements between the Federal Housing Finance Agency (FHFA) and the Department of the Treasury. The shareholders agree that the question is the subject of a circuit conflict and that the practical effects of the conflict are sufficiently important to warrant this Court's immediate intervention.

The shareholders contend that this Court should deny review of the government's second question presented: whether the succession clause of the Recovery Act precludes the shareholders from challenging the Third

Amendment. That contention is unconvincing. The shareholders concede that the second question presented is also the subject of a circuit conflict. And the first and second questions are so closely connected—they involve related procedural restrictions on the same statutory challenge to the same act taken by FHFA—that it makes little sense to grant review of the first while refusing to review the second.

Finally, the shareholders contend that this Court should also grant review of their own petition for a writ of certiorari, which raises the question whether FHFA's structure violates the separation of powers and, if so, what remedy to award for the violation. Unlike the government's petition, however, the shareholders' petition seeks this Court's intervention on matters that are not the subjects of circuit conflicts, that raise a series of complex threshold procedural problems, and that overlap with another case in which this Court has already granted review—*Seila Law LLC* v. *CFPB*, No. 19-7 (oral argument scheduled for Mar. 3, 2020). This Court should therefore grant review of both questions presented in the government's petition, but deny the shareholders' petition. And given the practical importance of the case, the government respectfully requests that the Court resolve this case this Term. See Pet. 15.

A. This Court Should Grant Review Of The First Question Presented

The shareholders agree (Br. in Opp. 16-25) that this Court should grant a writ of certiorari to review the government's first question presented: whether the Recovery Act's anti-injunction clause precludes a federal court from setting aside the Third Amendment. The court of appeals, the government, and now the shareholders all agree that that question has divided the lower courts.

See Pet. App. 50a-51a; Pet. 23-24; Br. in Opp. 23. The shareholders also "agree with [the government] about the practical effects of 'prolonged uncertainty concerning the validity of the Third Amendment,'" and further "agree that the Court should grant [the government's] petition and eliminate that uncertainty." Br. in Opp. 17-18 (quoting Pet. 26) (brackets omitted).

On the merits, the shareholders do not meaningfully dispute that, in adopting the Third Amendment, FHFA engaged in the kind of activity in which the statute authorizes it to engage as conservator—namely, renegotiating the structure of dividend payments owed to a significant investor, with the effect of protecting the long-term viability of the capital commitment provided by the investor. See Pet. 17. The shareholders instead question FHFA's *motive* for adopting the Third Amendment, and they accuse the government of overlooking "detailed factual allegations in the complaint in this case showing that * * * 'worry about the Companies exhausting Treasury's funding commitment was not the true reason for the [Third Amendment].'" Br. in Opp. 14 (citation omitted); see *id.* at 20-22. The government, however, has already addressed (Pet. 23-24) those allegations. It has explained, and other courts of appeals have recognized, that "nothing . . . in the Recovery Act * * * hinges FHFA's exercise of its conservatorship discretion on particular motivations." Pet. 24 (quoting *Perry Capital LLC* v. *Mnuchin*, 864 F.3d 591, 612 (D.C. Cir. 2017), cert. denied, 138 S. Ct. 978 (2018)). The shareholders never persuasively address the government's central argument that the Recovery Act makes motive legally irrelevant.

B. This Court Should Grant Review Of The Second Question Presented

The shareholders urge (Br. in Opp. 25-31) this Court to deny review of the government's second question presented: whether the Recovery Act's succession clause precludes the shareholders from challenging the Third Amendment. The shareholders' reasons for denying review are unpersuasive.

1. The shareholders concede (Br. in Opp. 31) that the second question presented is "the subject of * * * [a] circuit split," but incorrectly attempt to minimize the extent of that conflict. As the government has explained (Pet. 24-25), the Fifth Circuit's decision in this case conflicts with both the Seventh Circuit's decision in *Roberts* v. *FHFA*, 889 F.3d 397 (7th Cir. 2018), and the D.C. Circuit's decision in *Perry Capital*. The shareholders acknowledge the conflict with the Seventh Circuit, but they emphasize (Br. in Opp. 26) that the Seventh Circuit's decision was "an alternative holding." So it was, but that neither undermines the decision's precedential force nor lessens the degree to which it conflicts with the Fifth Circuit's decision in this case. "[F]or where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other.'" *United States* v. *Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924) (citation omitted).

The shareholders also deny that the decision below conflicts with the D.C. Circuit's decision in *Perry Capital*, going so far as to contend that *Perry Capital* "*supports* the Fifth Circuit's ruling on the succession clause." Br. in Opp. 26 (emphasis added). That simply is not so. The D.C. Circuit held in that case that "the Succession

Clause transfers to the FHFA without exception the right to bring derivative suits," and that an action is derivative where the suing shareholders "d[o] not seek relief that would accrue directly to them." *Perry Capital*, 864 F.3d at 624, 626. In this case, the relief the shareholders seek would accrue to the corporation rather than directly to the shareholders. See Pet. 21-22; Resp. C.A. Supp. Br. 29-32. Therefore, the succession clause would bar this challenge to the Third Amendment under the rule the D.C. Circuit adopted in *Perry Capital*—though not under the rule the Fifth Circuit adopted in this case.

Finally, the shareholders argue (Br. in Opp. 26, 31) that the circuit conflict is "shallow[]," suggesting that this Court should allow the issue to percolate further so that it can have the "benefit" of "appellate opinion[s]" responding to "the Fifth Circuit's reasoning." But the shareholders do not identify any other pending cases that would present an opportunity for other courts to address the Fifth Circuit's reasoning. And the Court already has the benefit of three court of appeals opinions addressing the issue. Moreover, the conflict in this case concerns an important issue of federal law, affects agreements involving hundreds of billions of dollars, and has significant financial implications for the federal government and for participants in the national housing finance market. See Pet. 25. The shareholders already recognize (Br. in Opp. 20) that immediate review of the first question presented is warranted "given the practical effects of uncertainty over the [Third Amendment's] legal status." Those practical consequences are no less important with respect to the succession clause than the anti-injunction clause.

2. The shareholders also argue (Br. in Opp. 27) that this Court's review is unwarranted because the Fifth Circuit's ruling on the second question presented "[i]s clearly correct." To the contrary, the Fifth Circuit's decision is erroneous.

The shareholders do not dispute that, as a general matter, the succession clause prohibits shareholders from pursuing derivative actions on behalf of the enterprises during the conservatorship. See Pet. 14, 20-23. The shareholders also do not dispute that, as a general matter, a lawsuit's status as a direct or derivative action turns on whether (1) the corporation, rather than the suing shareholder, suffered the alleged harm and (2) recovery would flow to the corporation rather than to individual shareholders. See Pet. 21. Nor do the shareholders dispute that their lawsuit rests on an allegation that the Third Amendment "forc[ed] * * * [the] *Companies* to turn over their entire net worth" and "pushes the *Companies* to the edge of insolvency by stripping the capital out of the *Companies* on a quarterly basis." C.A. ROA 8, 22 (emphasis altered); see Pet. 21. Nor, finally, do the shareholders dispute that any relief invalidating the corporations' dividend payments to the Treasury might put more money in the corporations' bank accounts, but would not directly affect the shareholders' bank accounts. See Pet. 21-22. Under ordinary legal principles, then, this is a derivative lawsuit, which means that it is barred by the succession clause.

The shareholders argue (Br. in Opp. 26-27), however, that those legal principles are "inapplicable" here because they have sued under the Administrative Procedure Act (APA), 5 U.S.C. 702. That is wrong. That the shareholders have sued under the APA changes neither the fact that the case rests on an allegation of harm to

the corporations nor the fact that any relief would flow directly to the corporations. As a result, nothing about the APA makes the shareholders' claims any less derivative. Moreover, the APA provides that "[n]othing [t]herein * * * affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702(1). The government has explained that, under the express terms of the statute, nothing in the APA even "affects"—much less displaces—the succession clause's bar on derivative actions during the conservatorship. Pet. 23 (citation omitted). The shareholders have no response to that textual point.

The shareholders emphasize (Br. in Opp. 26) that, in their view, they fit "within the zone of interests protected by the statute they claim FHFA violated." The zone-of-interests standard, however, sets forth "an additional test" that a litigant must satisfy in order to bring a lawsuit under the APA, over and above other applicable procedural requirements. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 567 U.S. 209, 224 (2012). It does not displace those other requirements. The zone-of-interests test thus neither supersedes the succession clause nor converts this lawsuit from a derivative into a direct action.

The shareholders assert (Br. in Opp. 30) that reading the succession clause to bar their statutory challenge would "raise grave doubts about whether the succession clause is constitutional." In this case, however, the succession clause merely prevents the shareholders from using a derivative action to assert a claim that belongs to the corporation; it does not bar them from asserting a claim that belongs to the shareholders themselves.

Far from raising constitutional doubts, that result accords with "the rule that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski* v. *Tesmer*, 543 U.S. 125, 129 (2004) (citation omitted). The shareholders' constitutional argument is all the more unpersuasive with respect to the statutory challenges at issue here. This Court has held that Congress may altogether preclude review of a statutory claim. See, *e.g.*, *Cuozzo Speed Techs., LLC* v. *Lee*, 136 S. Ct. 2131, 2139-2142 (2016). It follows that Congress may take the lesser step of restricting a shareholder's ability to bring a derivative statutory claim on behalf of a corporation, as it has done in this case.

3. Finally, the shareholders argue (Br. in Opp. 29) that the second question presented "is plainly not certworthy" because it raises issues of "state law." That is incorrect. The government's second question presented asks whether the succession clause of the Recovery Act, 12 U.S.C. 4617(b)(2)(A), bars the shareholders' challenge to the Third Amendment. That is an issue of federal law, not an issue of state law. Moreover, the court of appeals held, and the shareholders maintain, that this lawsuit satisfies the succession clause simply because the shareholders have sued under "the APA" and "fit within the zone of interests protected by the 'relevant statute.'" Br. in Opp. 28; see Pet. App. 27a-28a. That is an error of federal law, not an error of state law.

The shareholders persist (Br. in Opp. 28) that, "[i]f the Court were to reject the Fifth Circuit's framework for deciding whether the succession clause bars [their] statutory claim," the Court's "next task would be to apply [state] caselaw on the distinction between direct and derivative claims to the facts of this case." That, too, is

incorrect. It is well established that, "in suits in which the rights being sued upon stem from federal law, federal law will control the issue whether the action is derivative." 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1821, at 11 (3d ed. 2007). To be sure, a federal court may "look to state law" for relevant guidance, but that does not change the reality that the applicable rule "is necessarily federal in character." *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97-98 (1991).

Even accepting the shareholders' view regarding the role of state law in this case, this Court should still grant review of the government's second question presented. The Court has previously considered subsidiary issues of state law that arise in the course of deciding cases arising under federal law. See, *e.g.*, *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 756-766 (2005) (interpreting state law to determine whether the State had created a property right protected by the Due Process Clause). The Court could follow a similar course here. Alternatively, once the Court rejects the Fifth Circuit's framework and specifies the correct federal-law framework for applying the succession clause, it could remand the case to the Fifth Circuit to resolve any remaining subsidiary state-law issues and to apply the framework to the facts of this case. Either way, the possibility that this case may raise state-law issues at some later stage should not prevent the Court from correcting the Fifth Circuit's error of federal law at this stage.

4. In all events, "when [this Court] do[es] grant certiorari on a question for which there is a 'compelling reason' for [its] review, [it] often also grant[s] certiorari on attendant questions that are not independently 'certworthy,' but that are sufficiently connected to the

ultimate disposition of the case that the efficient administration of justice supports their consideration." *City & Cnty. of San Francisco* v. *Sheehan*, 135 S. Ct. 1765, 1779 (2015) (Scalia, J., concurring in part and dissenting in part). If this Court grants review of the government's first question presented, the efficient administration of justice would support also granting review of the second question presented, regardless of whether the second question would warrant review standing alone. The two questions involve related procedural restrictions on the same statutory challenge to the same act taken by the same entity during the course of the same conservatorships. Resolving either question in the government's favor would eliminate the necessity of reaching the other question. Resolving either question in the government's favor would also address the uncertainty created by the Fifth Circuit's decision regarding the validity of the Third Amendment—a major alteration to a set of financial agreements involving hundreds of billions of taxpayer dollars. See Pet. 25. Granting review of both questions would thus ensure that this Court retains maximum flexibility in resolving this case.

C. This Court Should Deny The Shareholders' Petition For A Writ Of Certiorari

The shareholders urge this Court also to grant their own petition for a writ of certiorari, which raises the questions whether FHFA's structure violates the separation of powers and, if so, what remedy a court should award for that constitutional violation. See Pet. at i, *Collins* v. *Mnuchin*, No. 19-422 (Sept. 25, 2019). But the shareholders overlook a number of important differences between the government's petition and their petition. First, the government's petition presents questions that are the subjects of circuit conflicts. The

shareholders' petition, in contrast, seeks review of the Fifth Circuit's constitutional and remedial holdings in the absence of any circuit conflict on those issues. See Br. in Opp. at 26, *Collins*, *supra* (No. 19-422). Second, the shareholders identify no procedural obstacles that would prevent this Court from addressing the questions presented in the government's petition. In contrast, the government has identified numerous procedural obstacles that would prevent the Court from addressing the questions presented in the shareholders' petition. See *id.* at 18-19, 25-26. Third, this Court has already granted review in *Seila Law*, which overlaps with the shareholders' petition. The Court, by contrast, has not already granted review in another case that overlaps with the government's petition.

The shareholders principally argue (Br. in Opp. 17-18) that this Court should grant their petition in order to eliminate uncertainty regarding the validity of the Third Amendment. That argument is mistaken. The Fifth Circuit's outlier *statutory* holdings undoubtedly create uncertainty warranting this Court's intervention. Other courts of appeals have held that the Recovery Act's anti-injunction and succession provisions foreclose statutory challenges to the Third Amendment, but the Fifth Circuit has allowed such a challenge to proceed, raising the prospect that the Third Amendment might be modified or invalidated and casting a cloud over key aspects of ongoing efforts aimed at comprehensive reform of the national housing finance market. See Pet. 25-26. In contrast, the Fifth Circuit's *constitutional* holding does not create any similar uncertainty. The Fifth Circuit accepted that the Constitution does *not* require the invalidation of the Third Amendment, see Pet. App. 65a-72a, and no other court at any level has held otherwise.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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Acting Solicitor General

DECEMBER 2019

* The Solicitor General is recused in this case.