No. 19-422

In the Supreme Court of the United States

PATRICK J. COLLINS, ET AL., PETITIONERS

v.

STEVEN T. MNUCHIN, SECRETARY, U.S. DEPARTMENT OF TREASURY, ET AL.

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

BRIEF FOR BLACKWELLS CAPITAL LLC AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Blackwells Capital LLC ("Blackwells") is an alternative investment manager. Blackwells holds significant amounts of stock issued by the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac"), and has a substantial interest in this Court's review of the issues presented by this case. More broadly, Blackwells has a strong interest in this Court's review of the Net Worth Sweep, in this Court's wider clarification that bedrock constitutional norms protecting the rule of law and private property still apply even when the federal government acts in times of financial instability, and in preserving the integrity of the broader U.S. credit and capital markets.

SUMMARY OF ARGUMENT

This Court should grant review, affirm the Fifth Circuit's holding that the Federal Housing Finance Agency ("FHFA") is unconstitutionally structured, and reverse the Fifth Circuit's decision to deprive the petitioners of a meaningful remedy. FHFA's structure violates the separation of powers because it unconstitutionally insulates FHFA from presidential oversight without the countervailing checks and balances built into traditional multimember independent agencies.

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[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No entity or person, aside from the *amicus curiae* and its counsel, made any monetary contribution for the preparation or submission of this brief. Counsel for the parties received timely notice and consented in writing to this filing.

As this Court explained in *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477, 497-498 (2010), the importance of preventing undue dilution of the removal power is fundamentally about ensuring government accountability—not just agencies' direct accountability to the President, but the government's ultimate accountability to the public.

This case is an apt vehicle to address the questions presented. Petitioners' lawsuit does not concern a mere hypothetical risk of unaccountable and out-of-control administrative power (cf. Pet. 23), but the realization and exercise of such power—through a massive confiscation of private wealth by an unconstitutionally structured agency that has asserted virtually unlimited and unchecked authority. One federal appellate judge described the spectacle of Fannie Mae and Freddie Mac's *de facto* nationalization as appropriate only for "a banana republic." *Perry Capital LLC* v. *Mnuchin*, 864 F.3d 591, 648 (D.C. Cir. 2017) (Brown, J., dissenting in part), cert. denied, 138 S. Ct. 978 (2018). Another has observed that "Congress, intentionally or otherwise, may have created a monster" in FHFA. *Saxton* v. *FHFA*, 901 F.3d 954, 963 (8th Cir. 2018) (Stras, J., concurring). This may be the most flagrant case in decades of an agency pursuing a course of constitutional and statutory "off-road driving." Philip Hamburger, *Is Administrative Law Unlawful?* 2 (2014).

The flaws in FHFA's structure are just the proverbial tip of the iceberg. In defending its *ultra vires* agreement to the complete expropriation of Fannie Mae and Freddie Mac's economic value, FHFA has "continu[ally] * * * insist[ed] its authority is *entirely*

without limit and argue[d] for a complete ouster of federal courts' power to grant injunctive relief to redress *any action* it takes while purporting to serve in the conservator role," *Perry Capital*, 864 F.3d at 635 (Brown, J., dissenting in part), thereby seeking to extinguish any meaningful accountability for its actions in court. And FHFA has done so in the service of a *de facto* nationalization whose true nature and consequences the government has continually resisted acknowledging in an open and transparent way, diluting proper accountability to the public.

Indeed, despite effectively nationalizing Fannie Mae and Freddie Mac—which own or guarantee over *$5 trillion* of mortgages—the federal government refuses to include these companies' massive liabilities in the federal budget, thus avoiding fiscal and political accountability for the full implications of the Net Worth Sweep. Treasury intentionally and specifically structured the Preferred Stock Purchase Agreements ("PSPAs") and the Net Worth Sweep to provide political "cover" for the true implications of the government takeover of Fannie Mae and Freddie Mac. This degree of governmental subterfuge is unprecedented. On every level then, the Net Worth Sweep reflects the hazards of placing expediency and force over procedural stability and public accountability. This Court's intervention is urgently needed.

ARGUMENT

I. FHFA'S NOVEL STRUCTURE RENDERS IT UNACCOUNTABLE AND ENCOURAGES INEQUITABLE ACTION

In enacting the Housing and Economic Recovery Act of 2008 ("HERA"), Congress placed "vast regulatory power over our Nation's housing finance system" in the hands of FHFA's single director "without accountability to the President." Pet. 16. "But even in a time of exigency," Congress must stay within bedrock "constitutional parameters." *Perry Capital*, 864 F.3d at 635 (Brown, J., dissenting in part). By creating an independent agency headed by a *single* director removable only "for cause by the President," 12 U.S.C. § 4512(b)(2), Congress stepped out of constitutional bounds, "unconstitutionally dilut[ing] the President's Article II authority." Pet. 7; see also Pet. 19. An agency led by a single director insulated from presidential removal "poses a far greater risk of arbitrary decisionmaking and abuse of power * * * than a multimember independent agency," because (among other things) "multiple commissioners or board members" can "check one another" and thus have a natural tendency toward moderation and stability that single-director agencies lack. *PHH Corp.* v. *Consumer Fin. Prot. Bureau*, 881 F.3d 75, 166, 177 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).

"The ultimate purpose of th[e] separation of powers is to protect the liberty and security of the governed." *Metropolitan Washington Airports Auth.* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). And the logic animating this Court's decision

in *Free Enterprise Fund* is that there is a "nexus between constitutionally mandated democratic accountability and presidential removal authority." Aziz Z. Huq, *Removal as a Political Question*, 65 Stan. L. Rev. 1, 18 (2013). Close scrutiny of "novel" agency structures that significantly depart from historical norms is therefore needed to guard against the growth and abuse of arbitrary power. *Free Enterprise Fund*, 561 U.S. at 496; see *id.* at 505 ("Perhaps the most telling indication of [a] severe constitutional problem * * * is the lack of historical precedent * * * ." (citation omitted)).

As this Court has explained, "diffusion of power carries with it a diffusion of accountability," and grants of executive power without due presidential oversight subvert not only "the President's ability to ensure that the laws are faithfully executed," but also "the public's ability to pass judgment on his efforts." *Free Enterprise Fund*, 561 U.S. at 497-498; cf. *Printz* v. *United States*, 521 U.S. 898, 922 (1997) (noting Framers' "insistence * * * upon unity in the Federal Executive—to ensure both vigor *and accountability*" (emphasis added)); *Clinton* v. *Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring in the judgment) (similar). In short, "presidential leadership enhances transparency, enabling the public to comprehend more accurately the sources and nature of bureaucratic power," while also "establish[ing] an electoral link between the public and the bureaucracy, increasing the latter's responsiveness to the former." Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2331-2332 (2001); accord Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1242 (2014) ("Removal reinforces the chain

of command and the President's accountability for decisions within the executive branch.").

To a unique degree, Congress' "harrowing[ly]" broad delegation of unaccountable power to FHFA threatens the constitutional values of adequately checked and publicly accountable power. *Saxton*, 901 F.3d at 960 n.8 (Stras, J., concurring). This Court's review is necessary—both to confirm the limits on Congress' authority to insulate executive agencies headed by a single director from presidential oversight, and to vindicate petitioners' right to a meaningful remedy for the expropriation of their investments through FHFA's actions. Moreover, this case is an apt vehicle for addressing these issues because the legal and factual setting—the takeover and *de facto* nationalization of Fannie Mae and Freddie Mac—so well embodies the hazards of inadequately checked government power, amounting to a veritable saga of *non*-accountability and *non*-transparency.

II. THE GOVERNMENT HAS TAKEN STEPS TO BLOCK PUBLIC ACCOUNTABILITY FOR THE NET WORTH SWEEP

The government's actions surrounding the Net Worth Sweep have demonstrated that it desires to avoid public accountability for its actions vis-à-vis Fannie Mae and Freddie Mac. For one thing, FHFA's actions in the litigation arising out of the Net Worth Sweep indicate that the agency views itself as unaccountable in any way to individual stakeholders or the general public for the *de facto* nationalization of Fannie Mae and Freddie Mac. FHFA's position heightens the need for this Court to review the questions presented in the petition. Put plainly, this case does not

present only the *potential* for out-of-control, unaccountable administrative power. Rather, FHFA has affirmatively—and aggressively—gone out of its way to test the constitutional boundaries of unchecked power.

Further, despite effectively nationalizing Fannie Mae and Freddie Mac, and despite its role as the implicit guarantor for the companies' *$5 trillion* in mortgage-related exposure, the government has engaged in a massive accounting sleight-of-hand that keeps this liability off the federal budget and thus hidden from public view. The government's failure to reckon forthrightly with the budgetary impact of large-scale mortgage defaults effectively shields trillions of dollars of potential liability from the democratic process and due scrutiny by the taxpaying citizens who ultimately stand to pay the price. This too reflects the fundamental abuse of governmental power embodied by the Net Worth Sweep.

A. In Defending The *Ultra Vires* Appropriation Of Private Property Under The Net Worth Sweep, FHFA Has Tried To Block Accountability In Court

In 2012, after four years of conservatorship, the Net Worth Sweep was imposed, requiring "Fannie and Freddie to pay Treasury their entire net worth on a quarterly basis, minus a small capital buffer." Pet. 13 (emphasis omitted). This led to a deluge of litigation, including (among others) claims under the common law of contracts and the Administrative Procedure Act. Despite the diversity of claims raised, the basic question was whether FHFA was entitled to allow "Treas-

ury * * * to loot the Companies to the guaranteed exclusion of all other investors," *Perry Capital*, 864 F.3d at 644 (Brown, J., dissenting in part), and deliberately ensure that Fannie Mae and Freddie Mac remain financially crippled wards of the state for the indefinite future—all while acting as their ostensible conservator. But see 12 U.S.C. § 4617(b)(2)(D) (granting FHFA power "as conservator" to put the companies "in a sound and solvent condition" and "preserve and conserve [their] assets"); accord Black's Law Dictionary 382 (11th ed. 2019) (defining "conservator" as "[a] guardian, protector, or preserver").

In response to the lawsuits seeking to challenge this striking misuse of power, FHFA has pressed "one common theme": that "no[] one * * * is entitled to recover *anything* in these cases * * * in light of the extensive powers that HERA vests in FHFA." Richard A. Epstein, *The Government Takeover of Fannie Mae and Freddie Mac: Upending Capital Markets with Lax Business and Constitutional Standards*, 10 N.Y.U. J. L. & Bus. 379, 382 (2014) (Epstein) (emphasis added). And FHFA has done so by consistently pressing a maximalist interpretation of HERA that, if accepted, would eliminate nearly any viable avenue to challenge the Net Worth Sweep in court.

The Fifth Circuit correctly rejected FHFA's extreme interpretation of HERA, according to which the statute effectively "hand[ed] a blank check" to the agency "to do almost anything" with "trillions of dollars in assets * * * in its own best interests—apparently to the exclusion of the interests of the American people, Fannie and Freddie, and their shareholders," and without meaningful judicial review. *Saxton*, 901

F.3d at 960 (Stras, J., concurring); see Pet. App. 56-57. But FHFA's persistent efforts to avoid accountability in court by advancing a virtually limitless interpretation of its own authority starkly demonstrate the need for this Court's review—both to enforce the separation-of-powers principles designed to cabin such assertions of unaccountable power, and to provide a meaningful remedy for the violation of those principles in the unprecedented circumstances of the Net Worth Sweep.

B. Nationalizing Fannie Mae And Freddie Mac While Keeping Them Off The Federal Balance Sheet Further Dilutes Accountability To The Public

The last bulwark of protection against the misuse of administrative power is the voting public. But the *de facto* nationalization of Fannie Mae and Freddie Mac has been structured to keep up the charade that the companies are still private in a meaningful sense—making it more difficult for the public to understand what has actually occurred, and diluting even this last form of accountability. *Amicus* submits that so long as the federal government has effectively nationalized Fannie Mae and Freddie Mac, the very least it must do is acknowledge these enterprises as *part of the federal government* for accounting purposes, admit that their privately held shares are now worthless, and account for the financial liabilities honestly and transparently. Such candor would, if nothing else, dispel the illusion that nationalizing the companies is a free lunch for taxpayers. And, unlike the current approach, such a realistic budget policy would place substance over form, recognizing—consistent with princi-

ples of congruency—that entities effectively under permanent government control belong on the federal balance sheet. Yet the government has carefully avoided admitting the reality of *de facto* nationalization for budgetary purposes, insisting to this day that Fannie Mae and Freddie Mac are still functional private entities.

Although FHFA in 2008 took total control over Fannie Mae and Freddie Mac's operations (at least for the time being), President Bush and his administration wanted to avoid anything that smacked of nationalization. See Henry M. Paulson, Jr., *On the Brink: Inside the Race to Stop the Collapse of the Global Financial System* 5 (updated trade ed. 2013) (Paulson); cf. *id.* at 323, 337. Thus, the conservatorships were explicitly framed as a temporary measure, and the PSPAs were structured "to avoid placing the assets and liabilities of the GSEs in the federal budget." Laurie S. Goodman, Urban Inst., *A Realistic Assessment of Housing Finance Reform* 8 (Aug. 2014), https://urbn.is/2BcQtP1 (Goodman).

It was understood at the time that "conservatorship [w]as essentially a 'time out,' or a temporary holding period, while the government decided how to restructure * * * Fannie and Freddie." Paulson at xxxii. That was consistent with Congress' intent in enacting HERA. See Michael Krimminger & Mark A. Calabria, *The Conservatorships of Fannie Mae and Freddie Mac: Actions Violate HERA and Established Insolvency Principles* 10 (Cato Working Paper No. 26, 2015), https://bit.ly/2MfJWJM (Krimminger & Calabria) (conservatorships under HERA were "intended to be

relatively short-term proceedings" culminating in either a return to solvency under "private control" or "relatively prompt appointment of a receiver").[2]

Yet the conservatorships proved *not* to be temporary in any meaningful sense, and the notion that Fannie Mae and Freddie Mac had not been nationalized for all practical purposes became increasingly implausible. The conservatorships dragged on for years—now for over a decade. Observers increasingly took to characterizing the companies as "effectively nationalized at the current point in time." Viral V. Acharya et al., *Guaranteed to Fail: Fannie Mae, Freddie Mac and the Debacle of Mortgage Finance* 5 (2011) (Acharya et al.). Many called for their "operations [to] be reflected in the federal budget." *Fannie Mae, Freddie Mac, and*

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[2] Moreover, it was no accident that the PSPAs granted Treasury warrants to purchase up to 79.9% of the companies' common stock at a nominal price. See Pet. 11-12; Pet. App. 15-16. "If the US government were to own more than 80 percent of either enterprise, there was a sizable risk that the enterprises would be forced to consolidate onto the government's balance sheet," Goodman at 8—something the government "was loath[] to do." Epstein at 425; see Viral V. Acharya et al., *Guaranteed to Fail: Fannie Mae, Freddie Mac and the Debacle of Mortgage Finance* 92 (2011). Indeed, commentators have observed that the PSPAs stopped short of "nationalizing" Fannie Mae and Freddie Mac "as a technical matter" only, "possibly because policymakers found the prospect of taking on an additional $5 trillion in mortgage-backed securities, of which $1.6 trillion was debt, unappealing given the proximity of the government to its debt ceiling." Steven Davidoff Solomon & David Zaring, *After the Deal: Fannie, Freddie, and the Financial Crisis Aftermath*, 95 B.U. L. Rev. 371, 382-383 (2015). Cf. *Starr Int'l Co.* v. *United States*, 121 Fed. Cl. 428, 443 & n.8 (2015) (discussing similar point as to AIG takeover), aff'd in part, vacated in part, 856 F.3d 953 (Fed. Cir. 2017).

FHA – Taxpayer Exposure in the Housing Markets: Hearing Before the H. Comm. on the Budget, 112th Cong. 2 (2011) (statement of Deborah J. Lucas, Assistant Director for Financial Analysis, Congressional Budget Office), https://bit.ly/2oym2jT; see also Acharya et al. at 92 (stating that although "the U.S. government * * * does not technically have to consolidate the GSEs' accounts into the federal budget," "it should do so"). Nonetheless, while the terms of the pre-Net Worth Sweep arrangement with Treasury "were certainly dilutive of the existing shareholders' interests in the Companies," they were at least "*consistent* with a potential return to full private control." Krimminger & Calabria at 15 (emphasis added). Indeed, "the Companies began to recover" and "were able to announce net profits for the first quarter of 2012." *Id.* at 16.

The Net Worth Sweep, however, dramatically "narrow[ed] the difference between conservatorship and nationalization, by transferring essentially all profits and losses from the firms to the Treasury." W. Scott Frame et al., *The Rescue of Fannie Mae and Freddie Mac* 21 (Fed. Reserve Bank of N.Y. Staff Report No. 719, 2015), https://nyfed.org/1TDvs0T. "[B]ecause the [Net Worth Sweep] deprives Fannie and Freddie of 100% of their net worth"—minus a small capital reserve—it "consciously prevented accumulation of any buffer against future losses," thus "ensuring that taxpayers will * * * bear the risks." Krimminger & Calabria at 7, 12.

This has been the reality for over seven years. If the government were to be candid about the real-world significance of its actions, it would treat Fannie Mae

and Freddie Mac as part of the government for budgetary purposes, consolidate their assets and liabilities onto the federal government's balance sheet, and admit that the common and junior preferred stock are now worthless.

But that is not what the federal government did. Instead, the "Office of Management and Budget treat[ed] the GSEs as off-budget entities because they [we]re considered separate private entities under *temporary* federal conservatorship." Heritage Foundation, *Blueprint for Balance: A Federal Budget for Fiscal Year 2018* at 217 (2017), https://herit.ag/35SWEpU (*Blueprint for Balance*); see also *Herron* v. *Fannie Mae*, 857 F. Supp. 2d 87, 91 (D.D.C. 2012), aff'd, 861 F.3d 160 (D.C. Cir. 2017).[3] Indeed, seven years after the Net Worth Sweep wiped out the private shareholders and effectively nationalized Fannie Mae and Freddie Mac, OMB's budget has "continue[d] to treat these two GSEs as non-budgetary *private entities* in conservatorship rather than as Government agencies," and "reflects all of the GSEs' transactions with the public as non-budgetary." Office of Mgmt. & Budget, Exec. Office of the President, *Analytical Perspectives, Fiscal Year 2020 Budget of the U.S. Government* 128 (2019),

[3] A draft of an internal Treasury "PSPA Amendment Q&A," originally produced under seal in the Court of Federal Claims but later released to the public, shows that Treasury knew the federal budget would continue to maintain the non-budgetary presentation for Fannie Mae and Freddie Mac in the wake of the Net Worth Sweep, as well as the political significance of that presentation. See Draft PSPA Amendment Q&A at 5-6, Fannie & Freddie Secrets, https://bit.ly/35F9B6t (last visited Oct. 28, 2019); cf. Pltfs.' Mot. for Judicial Notice at 4, 7 & Ex. D, *Jacobs* v. *FHFA*, No. 15-cv-708, 2017 WL 5664769 (D. Del. Nov. 27, 2017), aff'd, 908 F.3d 884 (3d Cir. 2018).

https://bit.ly/31j4Mwn (OMB Analytical Perspectives) (emphasis added).[4]

As a result, "[g]overnment financial statements exclude $5 trillion in outstanding mortgage backed securities issued by Fannie Mae and Freddie Mac," Marc Joffe, *The Federal Government's Finances Are a Total Wreck*, Reason (Feb. 22, 2018), https://bit.ly/2MMgiee—even though the government "would undoubtedly cover any shortfalls they experience with taxpayer money," *ibid.*, given that the Net Worth Sweep has rendered it impossible for the companies to accumulate sufficient capital to absorb significant future losses. Cf. Gov't Accountability Office, GAO-19-239, *Housing Finance: Prolonged Conservatorships of Fannie Mae and Freddie Mac Prompt Need for Reform* 45 (2019), https://bit.ly/2MgBsSO (chart of outstanding Fannie Mae and Freddie Mac mortgage-backed securities held by external investors). This has allowed the government to give the impression that it is reaping "billions of dollars in seeming windfall payments" through the Net Worth Sweep, *Blueprint for Balance* at 217, while "kicking the * * * can" of potential losses "down the road" indefinitely. Acharya et al. at 107.[5]

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[4] Tellingly, the Congressional Budget Office takes a different approach, "treating [Fannie and Freddie] as budgetary Federal agencies." OMB Analytical Perspectives at 128; see also Cong. Budget Office, *The Budget and Economic Outlook: 2019 to 2029* at 73 n.11 (2019), https://bit.ly/2IT1Dgk.

[5] Regarding efforts to avoid public accountability, it is also noteworthy that the federal government has strongly resisted disclosures to both litigants and the public in the ongoing Court of Federal Claims litigation over the Net Worth Sweep, "misus[ing] * * *

"The practical reality * * * is that the government effectively controls Fannie Mae and Freddie Mac permanently" and completely. *Sisti* v. *FHFA*, 324 F. Supp. 3d 273, 280 (D.R.I. 2018). "The Treasury largely owns and controls the [companies] after taking [them] * * * under conservatorship," and "[t]his arrangement will continue for the indefinite future" because there is no firm "exit clause" from the PSPAs and the Net Worth Sweep. *Blueprint for Balance* at 217. Rather, the "decision to end the conservatorship is left * * * to the discretion of the government." *Sisti*, 324 F. Supp. 3d at 280.

Thus, consistent with sound principles of government accounting, the companies should be treated as part of the federal government for budgetary purposes. Cf. *Blueprint for Balance* at 217 ("According to the 1967 Commission on Budget Concepts, inclusion of an entity's assets and liabilities in the federal budget depends on three basic factors: ownership, control, and permanence."). Indeed, "[i]n [the Congressional Budget Office]'s judgment, Fannie Mae and Freddie Mac are effectively part of the government" and this reality should be reflected in their "budgetary treatment." Cong. Budget Office, *Accounting for Fannie Mae and Freddie Mac in the Federal Budget* 1 (Sept.

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a protective order as a shield to insulate public officials from criticism," *Fairholme Funds, Inc.* v. *United States*, No. 13-465C, 2016 WL 1551672, at *2 (Fed. Cl. Apr. 11, 2016), and—in the words of a leading separation-of-powers scholar—invoking executive privilege on "a massive, unprecedented scale" to "shroud the truth" about its "seizure of private property." Saikrishna Prakash, *Another Sweeping Rebuke of Government Secrecy*, Inv. Bus. Daily (Nov. 22, 2016), https://bit.ly/32p2ugy.

2018), https://bit.ly/2NguxYT; see *supra* note 4. *Amicus* submits that failure to treat the companies as part of the government for budgetary purposes can only reflect a desire to cloud politically inconvenient realities at the expense of fiscal transparency.

The point is quite practical—and it has consequences for public accountability. The government has taken for itself all the financial upside of the companies, rendering the private shares worthless. And as a practical matter the Net Worth Sweep makes it impossible for anyone but taxpayers to foot the bill for losses if the companies encounter trouble again. The government should acknowledge as much, because taxpayers deserve candor about the fact that they are essentially "on the hook" for the "future losses" (Krimminger & Calabria at 7) of companies that "own[] or guarantee[] *$5.5 trillion* of mortgages." Katy O'Donnell, *This Could 'End Very Badly': Trump Officials Warn on Mortgage Finance*, Politico (Sept. 10, 2019), https://politi.co/2Wd5wSC (emphasis added). The government should expose itself to the uncomfortable—but vital—public accountability that allows our constitutional republic to function.

To be sure, on September 5, 2019, Treasury released a plan for "ending the conservatorships" of Fannie Mae and Freddie Mac "upon the completion of specified reforms," potentially including new legislation. U.S. Dep't of Treasury, *Housing Reform Plan* 1 (Sept. 2019), https://bit.ly/2lFeMR8. But the timeline and details are opaque, undefined, and contingent on future events that may never occur. See, *e.g.*, *id.* at 27 (discussing a range of widely different "[p]otential * * *

options" for recapitalizing the companies as a prerequisite to ending the conservatorships). It therefore is hardly certain that the government's "plan" to release the companies from conservatorship will ever actually come to fruition. Until such time, the federal government should candidly acknowledge the practical reality that it has nationalized Fannie Mae and Freddie Mac, as well as the financial consequences of that *de facto* nationalization for taxpayers.

III. THE FIFTH CIRCUIT WAS WRONG TO DENY THE PETITIONERS A MEANINGFUL REMEDY FOR THE UNPRECEDENTED CONFISCATION OF THEIR WEALTH

This Court's precedent on remedies where a party is injured by the action of an unconstitutionally structured agency is not extensive. The question at least arguably touches on fundamental jurisprudential questions regarding the scope of judicial authority, see *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1485-1487 (2018) (Thomas, J., concurring), and the need for further guidance from this Court is highlighted by the en banc Fifth Circuit's sharp 9-7 division on the issue. For present purposes, however, it bears emphasis how monumental the stakes are.

As explained above, the Net Worth Sweep is one of the most stunning exercises of unchecked administrative power in recent memory, amounting to the seizure of billions of dollars of wealth by an unconstitutionally structured agency. Under these extraordinary circumstances, the consequences of the Fifth Circuit majority's approach to crafting a remedy—"sever[ing] the 'for cause' restriction on removal of the FHFA director

from the statute" (Pet. App. 73) and leaving the challenged agency action in place—are especially troubling. Moreover, this is not a case where granting meaningful relief would require wreaking havoc on an otherwise well-functioning regulatory scheme, or vacating an agency action that would be statutorily proper in the ordinary course. All it would entail is making several accounting adjustments on the books of the companies and Treasury. Vacatur of unlawful agency action is a common remedy under the Administrative Procedure Act, see 5 U.S.C. § 706(2), and in this case that remedy is warranted. This Court should grant the petition and give petitioners the meaningful relief they seek.

CONCLUSION

For these reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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