

## VII. *Is Collins the Nail in the Coffin for Single Director Independent Agencies?*

### A. Introduction

The Federal Housing Finance Agency (FHFA) was created in the wake of the 2008 Financial Crisis in response to a failing housing market and national economy. Among other things, the FHFA promotes market stability and increases liquidity in the American housing market, and the government-sponsored enterprises serve as a stable source of funding regardless of the economic climate.<sup>1</sup> The Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) are both privately-owned enterprises created by Congress that have been under a government conservatorship since 2008 due to the fallout from losses in the sub-prime mortgage market.<sup>2</sup> Collectively known as the government-sponsored enterprises (GSEs), Fannie and Freddie flood the housing market with liquidity through their ability to remain highly leveraged and undercapitalized.

Fannie and Freddie are both privately owned and have shares trading on the New York Stock Exchange but are publicly run.<sup>3</sup> Post-

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<sup>1</sup> FHFA, *About Us* (Oct. 5, 2020), <https://www.fhfa.gov/AboutUs> [hereinafter FHFA, *About Us*] (“The Federal Housing Finance Agency (FHFA) was established by the Housing and Economic Recovery Act of 2008 (HERA) and is responsible for the effective supervision, regulation, and housing mission oversight of Fannie Mae, Freddie Mac ... and the Federal Home Loan Bank System, which includes the 11 Federal Home Loan Banks (FHLBanks) and the Office of Finance.”).

<sup>2</sup> Winston Sale, *Effect of the Conservatorship of Fannie Mae and Freddie Mac on Affordable Housing*, 18 J. AFFORDABLE HOUS. & CMTY. DEV. L. 287, 289–91 (2009) (detailing the origins of Fannie Mae and Freddie Mac and their role in the housing market).

<sup>3</sup> FHFA, *Fannie Mae and Freddie Mac* (Oct. 5, 2020), <https://www.fhfa.gov/SupervisionRegulation/FannieMaeandFreddieMac/Pages/About-Fannie-Mae--Freddie-Mac.aspx> (“Fannie Mae was first chartered by the U.S. government in 1938 to help ensure a reliable and affordable supply of mortgage funds throughout the country. Today it is a shareholder-owned company that operates under a congressional charter ... Freddie Mac was chartered by Congress in 1970 as a private company to likewise help ensure a reliable and affordable supply of mortgage funds throughout the country. Today it is a shareholder-owned company that operates under a congressional charter.”).

2008, Fannie and Freddie realized losses of more than \$58.7 billion<sup>4</sup> and \$50.1 billion<sup>5</sup> respectively. As part of the agreement to a government bailout, Fannie and Freddie were drawn into a government conservatorship.<sup>6</sup> In 2012, the FHFA along with the United States Treasury Department amended the Senior Preferred Stock Purchase Agreements (PSPAs) to change the calculation of dividends paid to the Treasury to what is now known as a net worth sweep.<sup>7</sup> Private shareholders of the GSEs are challenging the FHFA's authority to enact the Third Amendment, which allows the GSEs to forego paying dividends to their shareholders and instead paying them to the Treasury Department in the case *Collins v. Mnuchin*, currently before the Supreme Court.<sup>8</sup> The shareholders want the Court to vacate the Third Amendment entered into by the FHFA as conservator and the Treasury Department, to issue an injunction against the Treasury to return all net worth sweep dividends, and to prevent further net worth sweeps.<sup>9</sup> Most notably they want the Court to find the underlying structure of the FHFA unconstitutional.<sup>10</sup>

In the recent case of *Seila Law v. CFPB*, the Supreme Court found the single director structure of the Consumer Financial

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<sup>4</sup> Fed. Nat'l Mortgage Ass'n, Form 10-K, U.S. SEC. & EXCH. COMM'N, <https://www.fanniemae.com/media/28221/display>.

<sup>5</sup> Fed. Home Loan Mortgage Corp., Form 10-K, U.S. SEC. & EXCH. COMM'N, [http://www.freddiemac.com/investors/financials/pdf/10k\\_021109.pdf](http://www.freddiemac.com/investors/financials/pdf/10k_021109.pdf).

<sup>6</sup> See FHFA, *About Us* ("Since 2008, FHFA has also served as conservator of Fannie Mae and Freddie Mac.").

<sup>7</sup> FED. NAT'L MORTGAGE ASS'N, THIRD AMENDMENT TO AMENDED AND RESTATED SENIOR PREFERRED STOCK PURCHASE AGREEMENT (2012), [https://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/FNM/SPSPA-amends/FNM-Third-Amendment-to-the-Amended-and-Restated-SPSPA\\_08-17-2012.pdf](https://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/FNM/SPSPA-amends/FNM-Third-Amendment-to-the-Amended-and-Restated-SPSPA_08-17-2012.pdf); FED. HOME LOAN MORTGAGE CORP., THIRD AMENDMENT TO AMENDED AND RESTATED SENIOR PREFERRED STOCK PURCHASE AGREEMENT (2012), [https://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/FRE/SPSPA-amends/FRE-Third-Amend-to-the-Amended-Restated-SPSPA\\_08-17-2012.pdf](https://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/FRE/SPSPA-amends/FRE-Third-Amend-to-the-Amended-Restated-SPSPA_08-17-2012.pdf).

<sup>8</sup> 938 F.3d 553 (5th Cir. 2019) (finding the single-director structure of the FHFA unconstitutional).

<sup>9</sup> *Id.* at 568 ("The Shareholders seek a declaration that the net worth sweep violates HERA and is arbitrary and capricious; a declaration that FHFA's structure violates the separation of powers; an injunction against Treasury net-worth-sweep dividends ...").

<sup>10</sup> *Id.* ("In Count IV, [the Shareholders] allege FHFA violates Article II, §§ 1 and 3 of the Constitution because, among other things, it is headed by a single Director removable only for cause.").

Protection Bureau unconstitutional because it violated the separation of powers set forth in the first article of the Constitution.<sup>11</sup> However, the Court acknowledged that while the director-structure of both the CFPB and the FHFA are the same, the CFPB regulates mainly private action and the FHFA has a much more limited legislative purpose, regulating the GSEs.<sup>12</sup> The action challenged in *Collins* involves the Secretary of the Treasury, who is a member of the President's cabinet and thus removable at the will of the President, potentially weakening the argument that the actions taken by the FHFA are too far removed from the executive branch. This article discusses the creation of the FHFA, its role in regulating the GSEs, and what impact the forthcoming ruling in *Collins v. Mnuchin* will have on the authority of the FHFA, the dividends paid to private shareholders, and the overall impact on the national housing market.

### **B. The Great Recession and the Creation of the FHFA**

The 2008 Financial Crisis, one of the biggest economic downturns since the Great Depression, had widespread impacts on both the American and international economy. The downturn began in the secondary mortgage market but eventually spread throughout the entire financial sector and beyond.<sup>13</sup> Between 1997 and 2006, housing prices across America nearly doubled and there was a massive increase in residential construction.<sup>14</sup> Financial institutions also increasingly engaged in predatory lending practices and by 2006, nearly one-quarter of American mortgages were subprime mortgages.<sup>15</sup> Subprime mortgages typically entail high or adjustable rates of interest over the term of the loan to account for the low credit scores of the qualified

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<sup>11</sup> 140 S. Ct. 2813 (2020).

<sup>12</sup> *Id.* at 2202 (“[The FHFA] is essentially a companion of the CFPB, established in response to the same financial crisis ... It regulates primarily Government-sponsored enterprises, not purely private actors.”).

<sup>13</sup> Mark Totten, *The Enforcers & the Great Recession*, 36 CARDOZO L. REV. 1611, 1615 (2011) (“Although the crisis eventually touched very area of the economy, it began in the financial sector, and in particular within the system of residential mortgage lending.”).

<sup>14</sup> ECON. REP. PRES., RESCUING THE ECONOMY FROM THE GREAT RECESSION 39–40 (2010).

<sup>15</sup> Totten, *supra* note 11, at 1617 (“In 1995 subprime lending accounted for \$65 billion in loans and by 2006 it accounted for \$600 billion and 24% of all mortgage originations.”).

buyers.<sup>16</sup> These mortgages were marketed to individuals who did not qualify for the “gold-standard” prime mortgage, which was hallmarked by a 20% down payment and principal to be paid back with a fixed interest rate over thirty years.<sup>17</sup> Instead, subprime mortgages were available to individuals who had poorer credit or lack of ability to prove income, both of which are criteria for obtaining a fixed-rate mortgage loan.<sup>18</sup>

### 1. *The Securitization of Mortgages*

At the same time, private financial institutions like Goldman Sachs and J.P. Morgan, as well as Fannie Mae and Freddie Mac, began packaging prime mortgages into securities and issuing those securities to the investing public as mortgage-backed securities (MBSs).<sup>19</sup> The holders of these securities were entitled to the cash flows from the underlying mortgages and in this way the financial institutions writing the loans could rid their balance sheets of the liabilities.<sup>20</sup> Originally, these MBSs only contained prime mortgages, but as the securitization of mortgages increased in popularity, institutions began to package and securitize subprime mortgages as well.<sup>21</sup> One system fueled the other, as riskier mortgages were immediately sold by financial institutions on the secondary market to be packaged into these securities, which only motivated them to underwrite to riskier and riskier populations.<sup>22</sup> While Fannie and Freddie did not issue subprime mortgage-backed securities like private lenders, they did carry many of these MBSs in their portfolios.<sup>23</sup> Beginning in 2007, housing prices that had been

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<sup>16</sup> *See id.* at 1616.

<sup>17</sup> *See id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1618.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* (“[T]he rise of mortgage securitization fueled the entire enterprise as it provided demand and financing for new mortgages, especially the higher risk Alt-A and subprime loans.”).

<sup>23</sup> Fannie and Freddie did underwrite and package their own mortgage-backed securities, but they had much more stringent standards for the mortgages that went into them. This resulted in only about one-sixth of the number of foreclosures on mortgages contained in their securities compared to other packaged securities by private lenders. However, Fannie and Freddie still invested in some of these subprime mortgage-backed securities and were far from immune from the pressure the tanking housing market was putting on all

rising steadily for the past decade began to decline.<sup>24</sup> Between January and June of 2007, the housing price index fell 3.5%, which had even larger impacts in the subprime mortgage market.<sup>25</sup> As mortgage default rates rose, financial institutions including Fannie and Freddie began to suffer losses.<sup>26</sup> Many financial institutions, including big players Lehman Brothers and Merrill Lynch, faced the threat of closing for good, seeking government assistance, or merging with more stable institutions.<sup>27</sup>

## 2. *Fannie and Freddie's Role*

By the end of 2007, Fannie and Freddie had exposure of more than \$127.8 billion and \$267 billion, respectively.<sup>28</sup> The entire American economy had fallen into a recession, and many Americans were losing their homes in part due to the predatory lending practices that plagued the early 2000s.<sup>29</sup> In 2008, Congress passed the Housing and Economic Recovery Act (HERA) which, among other things, created the FHFA.<sup>30</sup> Both Fannie Mae and Freddie Mac were placed into a government conservatorship with the FHFA acting as their federal regulator.<sup>31</sup> This meant that the FHFA assumed control of the

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financial institutions. For a more in-depth explanation, see Christopher L. Peterson, *Fannie Mae, Freddie Mac, and the Home Mortgage Foreclosure Crisis*, 10 LOY. J. PUB. INTEREST L. 149, 154 (2009).

<sup>24</sup> 2010 ECON. REP. PRES., *supra* note 12, at 41.

<sup>25</sup> *Id.*

<sup>26</sup> Peterson, *supra* note 19, at 167.

<sup>27</sup> 2010 ECON. REP. PRES., *supra* note 12, at 42 (describing how Lehman Brothers was forced to declare bankruptcy while other large financial institutions turned to government aid or mergers with stronger institutions to survive).

<sup>28</sup> Peterson, *supra* note 19, at 163 (describing how Freddie Mac increased its holdings from \$25 billion in 1998 to \$267 billion in 2007; and Fannie Mae increased its holdings from \$18.5 billion in 1997 to \$127.8 billion in 2007).

<sup>29</sup> *See id.* at 164 (explaining that while it did not take a lot of sophistication to notice what was happening to the quality of loans being issued, no key players questioned these practices and by the time regulators picked up on the red flags, it was too late).

<sup>30</sup> *See* 12 U.S.C. §§ 4511 et seq. (2018) (creating the Federal Housing Finance Agency as an independent agency and placing Fannie and Freddie in a government conservatorship).

<sup>31</sup> W. Scott Frame, *The 2008 Federal Intervention to Stabilize Fannie Mae and Freddie Mac* (Fed. Rsrv. Bank of Atlanta, Working Paper Series, Paper

boards of Fannie and Freddie, had the ability to replace the current CEOs of the GSEs, and stopped the payment of dividends to the private shareholders of the GSEs.<sup>32</sup>

Given the role that Fannie and Freddie play in ensuring the liquidity within the mortgage market and the financial distress they found themselves in, a government bailout was essential to prevent further damage. The GSEs create a secondary mortgage market by purchasing qualifying mortgages from the lenders who issued the original loan and providing financial support to multifamily housing projects, which in turn increases the liquidity and available capital of mortgage lending institutions, allowing them to write more loans.<sup>33</sup> In this way, the federal government can indirectly encourage lending institutions to increase access to stable, fixed-rate mortgages to individuals who previously might not have qualified.<sup>34</sup> In 2008, the GSEs guaranteed an estimated 40% of all outstanding American home loans, making them two of the largest players in the national housing market.<sup>35</sup> The GSEs are funded by private shareholders, whose investments are essentially guaranteed by the federal government.<sup>36</sup> Fannie and Freddie were initially bailed out by the government for \$200 billion in 2008, the largest government bailout to date.<sup>37</sup> In December

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No. 2009-13, Apr. 2009), available at: <https://www.frbatlanta.org/-/media/documents/research/publications/wp/2009/wp0913.pdf>.

<sup>32</sup> *Id.* at 16–17.

<sup>33</sup> Andrea J. Boyack, *Laudable Goals and Unintended Consequences: The Role and Control of Fannie Mae and Freddie Mac*, 60 AM. U. L. REV. 1489, 1495 (2011) (explaining the role the GSEs play in the overall mortgage market as well as their ability to purchase mortgages given by certain lenders to encourage more equitable lending and access to mortgages).

<sup>34</sup> *See id.* (describing the government’s effort to promote residential national mortgage lending and home ownership by establishing the enterprises).

<sup>35</sup> Diane Olick, *Decade after Housing Crash, Fannie Mae and Freddie Mac are Uncle Sam’s Cash Cows*, CNBC (Sept. 5, 2018, 1:56 PM), <https://www.cnbc.com/2018/09/05/fannie-mae-freddie-mac-are-uncle-sams-cash-cows-a-decade-after-crash.html> (“Outstanding loan portfolios of approximately \$5 trillion were in danger of default, and debate raged over whether to save the institutions that owned or guaranteed about 40 percent of all home loans and helped so many average Americans buy residences.”).

<sup>36</sup> *See* Thomas H. Stanton, *Federal Supervision of Safety and Soundness of Government-Sponsored Enterprises*, 5 ADMIN. L.J. 395, 400 (1991).

<sup>37</sup> Boyack, *supra* note 26, at 1526 (discussing the 2008 \$700 billion Wall Street bailout plan including \$200 billion going to Fannie and Freddie with the goal of “infusing fresh liquidity” into a rapidly declining housing market).

of 2009, the Obama administration uncapped the size of the GSE bailout and pledged to cover their losses no matter the amount.<sup>38</sup> Some financial experts hypothesized the cost of covering the GSEs' losses could amount to \$1 trillion if the economy continued to trend downwards, or potentially less if it recovered quickly.<sup>39</sup> However, some experts believe that the bailout of the GSEs has financially benefited the federal government.<sup>40</sup>

### 3. *The FHFA as Conservator*

Since 2008, there has been a lot of debate surrounding the ongoing conservatorship and the FHFA's role in regulating the GSEs. The shareholders of Fannie Mae and Freddie Mac have sued to try and stop the net worth sweeps, which are the sweeps of enterprise profits by the Treasury department rather than paying out dividends to the enterprise shareholders. These shareholders are seeking an injunction with the goal of once again receiving dividends from the now-recovered GSEs.<sup>41</sup> Recently the Director of the FHFA, Mark Calabria, along with the United States Treasury amended the PSPAs again to allow Fannie and Freddie to retain their earnings to increase the capital

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<sup>38</sup> Corbett B. Daly, *Treasury Uncaps Credit Line for Fannie, Freddie*, REUTERS (Dec. 24, 2009), <https://www.reuters.com/article/us-fanniemaefreddiecredit/treasury-uncaps-credit-line-for-fannie-freddie-idUSTRE5BN2ZI20091224>.

<sup>39</sup> Lorraine Woellert & John Gittelsohn, *Fannie-Freddie Fix at \$160 Billion With \$1 Trillion Worst Case*, BLOOMBERG (June 13, 2010), <https://www.bloomberg.com/news/articles/2010-06-13/fannie-freddie-fix-expands-to-160-billion-with-worst-case-at-1-trillion> (“The cost of fixing Fannie Mae and Freddie Mac, the mortgage companies that last year bought or guaranteed three-quarters of all U.S. home loans, will be at least \$160 billion and could grow to as much as \$1 trillion after the biggest bailout in American history.”).

<sup>40</sup> See Olick, *supra* note 28 (explaining that Fannie Mae drew \$119.8 billion in bailout funds in the few years following 2008 and has paid the government back \$167.3 billion as of 2018; Freddie Mac drew \$71.6 billion in bailout funds and has since paid back more than \$112.4 billion).

<sup>41</sup> See *Collins*, 938 F.3d at 568; see generally Olick, *supra* note 28 (“The biggest losers in the story are shareholders of Fannie and Freddie stock. Many of them invested after the conservatorship went into effect and they are holding virtually worthless paper. They have challenged the dividend sweep in court, but so far to no avail.”).

of the GSEs until they reach 4% in tier one capital.<sup>42</sup> The outcome of *Collins v. Mnuchin* may have a large impact on the role of the FHFA as conservator because the current director is seeking to end the conservatorship and will remain in his role until 2024 if found to be insulated from removal. The Court may also consider whether the FHFA had the authority to enact the Third Amendment net worth sweeps in the first place, and whether the dividends paid to the Treasury should be paid back to private shareholders as a result.<sup>43</sup>

### C. The Separation of Powers and the Rise of the Independent Agency

The Constitution lays out clearly the role of each of the three branches of government, but scholars have noted over the past couple of decades the rise of an unofficial fourth branch of government, the administrative state.<sup>44</sup> The administrative agencies created by Congress frequently exercise substantial powers, whether it be performing adjudications or promulgating rules and regulations. The President the sole executive has the power to appoint and remove at will the principal officers of the executive branch, including the heads of many administrative agencies.<sup>45</sup>

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<sup>42</sup> Press Release, FHFA, FHFA and Treasury Allow Fannie Mae and Freddie Mac to Continue to Retain Earnings (Jan. 14, 2021); Press Release, FHFA, FHFA Announces Final Capital Rule for the Enterprises (Nov. 18, 2020).

<sup>43</sup> See *Collins*, 938 F.3d at 568 (stating shareholders are seeking payment of past dividends redirected to Treasury).

<sup>44</sup> See generally Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Donald S. Dobkin, *The Rise of the Administrative State: A Prescription for Lawlessness*, 17 KAN. J.L. & PUB. POL'Y 362 (2008).

<sup>45</sup> U.S. CONST. art. II § 1, §2 (“The executive power shall be vested in a President ... and [the President] shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States.”); see *Myers v. United States*, 272 U.S. 52 (1926) (holding that cabinet members and other agency heads with terms not statutorily established by Congress hold their offices at the pleasure of the President and are removable at his will).



1. *The Creation of Independent Executive Agencies*

Since the Supreme Court decided the case of *Myers v. United States*, there has been a drastic increase in the number of independent administrative agencies, which are agencies that are outside the Office of the President or those that are not headed by a member of the President's Cabinet.<sup>46</sup> Such independent regulatory agencies include the Securities and Exchange Commission, the Federal Trade Commission, the Consumer Financial Protection Bureau, the Federal Deposit Insurance Corporation, and the Federal Housing Finance Agency along with others.<sup>47</sup> The heads of these agencies are often insulated to an extent from removal by the President because their enabling statutes contain removal provisions only for negligence, malfeasance, or neglect of duty.<sup>48</sup>

2. *The False Analogy Between the CFPB and the FHFA*

Legal scholars often view these independent agencies as a class of agencies comprising the executive branch. This is increasingly true for the CFPB and the FHFA, both of which were created in the wake of the 2008 Financial Crisis to address different calls for regulation.<sup>49</sup> While many are quick to draw comparisons between the

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<sup>46</sup> For a discussion on the general distinction between independent agencies and other executive departments, see MARSHALL J. BERGER & GARY J. EDLES, *INDEPENDENT AGENCIES IN THE UNITED STATES: LAW, STRUCTURE, AND POLITICS* 6–7 (2015) (“We should note that economists and political scientists often use what they call a functional approach, which suggests that ‘any agency outside the [Executive Office of the President] or Cabinet is an independent agency ... [w]hen Congress chooses to use the phrase ‘independent agency in the executive branch,’ or other some such, when it creates an agency or commission, that phrase certainly suggests congressional desire that the agency be independent of the president, but it has no legal effect.”).

<sup>47</sup> Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified at 44 U.S.C. §§ 3501–3521 (1980)).

<sup>48</sup> *See, e.g.*, 12 U.S.C. § 4617(b)(2)(A)(i) for an example of such removal provision, this one regarding the director of the independent FHFA.

<sup>49</sup> The CFPB and the FHFA are uniquely alike in that they are both independent agencies with single directors rather than multi-member bipartisan commissions. The CFPB was created post-2008 to protect private consumers from unfair or deceptive practices by companies within the financial sector,

two agencies, the regulatory authority they have is quite different. The CFPB exercises authority over private individuals and private entities, whereas the FHFA acts as conservator whose main concern is the financial soundness of the GSEs Fannie and Freddie.<sup>50</sup>

In its role as conservator, the FHFA works closely with the Treasury and its head, the Treasury Secretary, who is a member of the President's cabinet. The Treasury Secretary is removable at the will of the President at any time for any reason. It would be much harder to argue that the President does not exercise executive control over the FHFA, albeit indirectly, through his appointment power as well as his removal power of the Treasury secretary. In *Seila Law*, the Supreme Court held that the single director structure of the CFPB was unconstitutional and violated the separation of powers because that the executive power is vested solely in the President.<sup>51</sup> The Fifth Circuit rejected the argument trying to differentiate the CFPB and the FHFA and found the single director structure unconstitutional.<sup>52</sup>

#### **D. Future Implications of the *Collins* Decision**

The forthcoming Supreme Court decision in *Collins* could have far-reaching implications, either narrowly affecting the rights of GSE private shareholders or more broadly impacting the national housing market. This section will discuss these effects.

##### *1. Implications for Private Shareholders*

Perhaps the most tangible effect of the *Collins* case will be on the shareholders of Fannie and Freddie. If the shareholders succeed in the Supreme Court, they could potentially begin receiving dividends from GSE profits again. The Third Amendment previously imple-

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while the FHFA was created specifically to regulate the quasi-governmental entities of Fannie and Freddie to stabilize the American housing market. *See generally Seila Law*, 140 S. Ct. at 2202 (“The only remaining example is the Federal Housing Finance Agency (FHFA), created in 2008 to assume responsibility for Fannie Mae and Freddie Mac. That agency is essentially a companion of the CFPB, established in response to the same financial crisis [citation omitted]. It regulates primarily Government-sponsored enterprises, not purely private actors. And its single-Director structure is a source of ongoing controversy.”).

<sup>50</sup> *See Seila Law*, 140 S. Ct. at 2202.

<sup>51</sup> *See id.*

<sup>52</sup> *See Collins*, 938 F.3d 553.

mented by the FHFA and the Treasury converted a fixed dividend to shareholders to net worth sweeps paid to the Treasury quarterly.<sup>53</sup> Since the beginning of the agreement, the GSEs have paid more than \$300 billion to the Treasury Department instead of dividends which could now be paid out once again to shareholders.<sup>54</sup> The FHFA and the Treasury announced the pausing of the net worth sweeps on January 14, 2021. Six days later, the Biden administration was sworn in and a new Treasury Secretary was appointed. The Biden administration is expected to support the ongoing conservatorship and ensure that Fannie and Freddie are meeting their over-arching goals of promoting equality and affordable housing finance options.<sup>55</sup>

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<sup>53</sup> See CONG. RESEARCH SERV., FANNIE AND FREDDIE INVESTORS TURN TO CONGRESS AFTER S. CT. DECLINES TO RESURRECT THEIR LEGAL CLAIMS 2 (2018).

<sup>54</sup> Greg Stohr, *Fannie-Freddie Profit Sweeps Draw U.S. Supreme Court Review*, BLOOMBERG (July 9, 2020, 2:12 PM), <https://www.Bloomberg.com/news/articles/2020-07-09/fannie-freddie-profit-sweep-draws-u-s-supreme-court-review>.

<sup>55</sup> Jacob Passy, *What a Biden Administration Will Mean for Housing-Finance Reform*, MARKETWATCH (Nov. 9, 2020, 7:16 AM), <https://www.marketwatch.com/story/how-biden-and-trump-differ-on-housing-finance-reform-2020-10-26> (“Most observers expect that Biden will move to replace [current director] Calabria, especially if granted the ability to fire him by the Supreme Court. Whoever he installs will likely take an approach similar to the Obama administration in holding Fannie and Freddie responsible for advancing certain affordable-housing goals.”). Additionally, the previous administration in which President Biden served was a proponent of federal involvement in the regulation of Fannie and Freddie. Press Release, The White House, Remarks by the President on the Mortgage Crisis (statement by then-President Barack Obama) (Feb. 18, 2009) <http://www.whitehouse.gov/the-press-office/remarks-by-the-president-on-the-mortgage-crisis/> (“Through its existing authority, Treasury will provide up to \$200 billion in capital to ensure that Fannie Mae and Freddie Mac can continue to stabilize markets and hold mortgage rates down. And we’re also going to work with Fannie and Freddie on other strategies to bolster the mortgage markets, like working with state housing finance agencies to increase their liquidity. And as we seek to ensure that these institutions continue to perform what is a vital function on behalf of middle-class families, we also need to maintain transparency and strong oversight so that they do so in responsible and effective ways.”).

2. *Implications on the Biden Administration's Policy Goals*

While the Biden administration hasn't spoken directly about their specific housing goals and planned initiative, many housing experts expect the administration to support the ongoing conservatorship of the GSEs, at least for now.<sup>56</sup> The current director of the FHFA is an advocate for ending the conservatorships and decreasing the role that the GSEs play in the secondary mortgage market.<sup>57</sup> This is likely contrary to the policy goals of the Biden administration, which may look similar the Obama administration that put the GSEs into the conservatorships in the first place. The Biden administration has influence over housing policy through appointments to Housing & Urban Development, the FHFA when appropriate, as well as other executive appointments or executive orders. The FHFA permitting Fannie and Freddie to hold higher levels of capital has its benefits and its drawbacks. The main benefit to holding higher levels of capital would be that the GSEs would be less leverage and would give them a bit more to fall back on given an economic downturn.<sup>58</sup> This could increase the financial stability of the GSEs and prevent future government bailouts. However, the main drawback to that financing structure is that the GSEs were created with the goal of infusing liquidity into the housing market by purchasing mortgage loans from primary lending institutions, which has justified their highly leveraged business model in the past. If the GSEs increase their levels of liquidity, there are less resources to put towards purchasing the qualifying mortgages from lending institutions, specifically mortgages which promote affor-

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<sup>56</sup> See Hannah Lang, *Is GSE Reform Dead on Arrival under Biden?*, AM. BANKER (Nov. 18, 2020, 9:00 PM) (“But similar to some other Democrats, Biden might view the status quo of conservatorship as tenable, and could choose to prioritize housing in a much different way than the Trump administration has, said Tim Mayopoulos, former Fannie CEO and now president of Blend, a digital lending platform.”); see generally Passy, *supra* note 48.

<sup>57</sup> Saleha Mohsin & Joe Light, *Biden's Team Explores Ways to Oust Fannie-Freddie Regulator*, BLOOMBERG (Jan. 11, 2021, 1:28 PM), <https://www.bloomberg.com/news/articles/2021-01-11/biden-s-team-explores-ways-to-replace-fannie-freddie-regulator>.

<sup>58</sup> See Passy, *supra* note 48 (“Allowing Fannie and Freddie to retain their profits and recapitalize is meant to ensure that they have resources to fall back on were they to encounter another financial downturn.”).

dable housing and an increase in availability of loans in previously underserved areas of the country.<sup>59</sup>

It seems likely that the Court will follow the precedent set by *Seila Law* and find the single director structure of the FHFA is unconstitutional. However, the Court during oral argument seemed to push back strongly against declaring the entire agency itself invalid.<sup>60</sup> This holding would make the current FHFA director removable at the will of President Biden, which would give the administration more control over the policy goals of the FHFA. President Biden likely views the GSEs as a “tool to help with racial justice and economic inequality.”<sup>61</sup> However, if the Court does not find the structure of the FHFA unconstitutional and the director remains insulated from presidential removal but for cause, the Biden administration will have a more difficult time influencing housing policy decisions and the regulation of Fannie and Freddie. With COVID-19 creating even further inequality in the housing market, the role of Fannie and Freddie is even more important. In July 2020, more than 4.3 million borrowers were in forbearance on their mortgage loans, and by November of 2020 that number had only decreased to 3 million.<sup>62</sup> The willingness of the GSEs kept these borrowers in their homes and provided them with much needed relief, but their highly-leveraged position keeps them vulnerable during severe housing market downturns.<sup>63</sup> Whether Biden is able to appoint a new director or work with the current one remains to be seen, but the decision in *Collins* will have important repercussions not only for the Biden administration and the GSEs, but also on the broader housing market and the inequities within.

### 3. *Implications on the American Housing Market Overall*

The Biden administration will probably seek to expand the affordable housing goals upon which the FHFA was founded. These

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<sup>59</sup> *Id.*

<sup>60</sup> See Transcript of Oral Argument at 57–59, *Collins v. Mnuchin*, No. 19-422 (U.S. Dec. 9, 2020).

<sup>61</sup> Passy, *supra* note 48.

<sup>62</sup> *Id.* (“As of now, some 3 million homeowners are still in forbearance on their mortgages as a result of the pandemic—but at the height of the forbearance wave back in June, as many as 4.3 million borrowers were in forbearance, according to data from the Mortgage Bankers Association.”).

<sup>63</sup> *Id.*

goals include supporting mortgage lending, community investment, and providing affordable rental funding and down payment assistance through the Federal Home Loan Banking System.<sup>64</sup> Through these programs, the FHFA can reach previously underserved communities and encourage more people to become first-time home buyers. They encourage lending institutions to provide buyers with steady low-rate mortgages which Fannie and Freddie will buy up, taking the risk away from the original institution and giving them further capital to underwrite more loans. Often buyers in underserved areas have never owned homes or have not been able to obtain the mortgage needed to become a homeowner, which is now more readily available.<sup>65</sup>

The higher levels of capital Fannie and Freddie are able to retain, the smaller the number of mortgages they are able to buy from lending institutions, which may cause lending institutions to take less risk because the loans may not be purchased by the secondary mortgage market. Taking less risk may increase the very housing inequalities the FHFA set out to ameliorate. In turn, this could have a widespread impact across the American housing market because Fannie, Freddie, and the FHFA currently provide more than \$6.3 trillion in funding for the mortgage markets and financial institutions.<sup>66</sup> Only time will tell, as the COVID-19 pandemic has had such a broad impact on home ownership. Some communities, particularly suburban ones, have seen home prices soar in what has been a great year for sellers. In others, people are fighting to pay rent in the face of great economic loss. If there was ever a time to address the inequities present in the housing system, it would be now.

Much of the political strategy and the logistics of how to pursue these housing goals rests on the decision of the Court in *Collins*.

Lydia Cuddeback<sup>67</sup>

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<sup>64</sup> FHFA, *About Us*, *supra* note 1.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

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