

September 22, 2020

# Housing

## Government Poised to Lose SCOTUS GSE Case

**Executive Summary:** We examine possible judicial outcomes for the GSEs in *Collins v. Mnuchin* which is before the Supreme Court in the light of the passing of Justice Ginsburg and the changed composition of the Court.



### Issue

The new Supreme Court vacancy resulting from the passing of Justice Ginsburg on Friday has changed the count and improved the chances of a positive outcome for GSE shareholders in *Collins v. Mnuchin*. There are multiple issues being reviewed by the Supreme



### Impact

We believe that there are at least 4 votes on the Court in favor of shareholders. Additionally, it is widely believed that Ginsburg would have voted in favor of the government on both counts. Therefore, we believe her departure from SCOTUS will result in either a 5-3 or 4-4 in favor



### Next Steps

ACG Analytics views the change in the Court as only positive as there is 1 less vote against shareholders. As outlined below, we believe an unwinding of the NWS is almost assured given the change in SCOTUS.

Court of the United States (SCOTUS): (1) whether the structure of the Federal Housing Finance Agency (FHFA) violates the separation of powers and if so, what an appropriate (forward) remedy might be; and (2) the legality of the Net Worth Sweep (NWS) under *The Housing and Economic Recovery Act* (HERA) that authorized FHFA as conservator (potential backwards remedy). The Court will also consider whether HERA's anti-injunction language prevents judicial review.

of shareholders. Should there be a tie, the ruling in the lower court, the 5th Circuit in this case, stands.

## More Information, Below

A win in any of the scenarios with an asterisk results in an unwinding of the NWS. We believe there is a 95% chance a scenario with an asterisk occurs, assuming there is no settlement prior to a decision.

In the case of the constitutionality of FHFA's structure:

*Scenario 1:* The court finds that FHFA is unconstitutional and affirms the 5<sup>th</sup> circuit *en banc* and keeps remedy as forward looking (does not unwind NWS);

\**Scenario 2:* The court finds that FHFA is unconstitutional but reverses the lower court ruling in part, and sets the stage for a potential backwards-looking remedy (sends the case back to the lower court to apply the remedy, unwinding the NWS);

*Scenario 3:* The Supreme Court ties 4-4, affirming the 5<sup>th</sup> circuit ruling, resulting in prospective remedy only (does not unwind NWS).

In the case of the NWS as a violation of *HERA* under *The Administrative Procedures Act* (APA) challenge:

*\*Scenario 1:* If the court ties 4-4 it would affirm the 5<sup>th</sup> Circuit decision (sends the case back to the lower court for trial or summary judgment, and then applies the remedy, unwinding the NWS);

*\*Scenario 2:* The court rules that the NWS was illegal (sends the case back to the lower court for trial or summary judgment on the facts, and then applies the remedy, unwinding the NWS);

*Scenario 3:* The court rules that the NWS was legal.

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