UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

ATIF F. BHATTI, TYLER D. WHITNEY, and MICHAEL F. CARMODY,

Plaintiffs,

-vs-

THE FEDERAL HOUSING FINANCE AGENCY, SANDRA L. THOMPSON, in her official capacity as Acting Director of the Federal Housing Finance Agency, THE DEPARTMENT OF THE TREASURY, and JANET L. YELLEN, in her official capacity as Secretary of the Treasury,

Defendants.

Case No: 17-CV-02185-PJS-HB

JOINT STATUS REPORT

On December 10, 2021, the Court directed that following the filing of Plaintiffs' Second Amended Complaint on January 26, 2022, the parties should meet and confer and report to the Court by this date on a schedule "for fact and/or expert discovery (as appropriate) and dispositive motion practice, as well as . . . opportunities to avoid duplication of effort by coordination with other pending cases raising the same or similar issues."

The parties agree that no immediate steps are needed to coordinate discovery in this case with discovery in any other cases that concern the same or related issues. The

parties will work collaboratively to promote efficiency should fact discovery in this and any related cases ultimately proceed.[1]

The parties have set forth their respective positions on how this case should proceed in the separate statements below.

Plaintiffs' Statement:

Plaintiffs propose the following schedule:

March 11, 2022: Defendants answer or move to dismiss the Second Amended Complaint;

April 4, 2022: Plaintiffs respond to any motions to dismiss and move for summary judgment;

May 11, 2022: Defendants file oppositions to Plaintiffs' summary judgment motion and reply briefs in support of any motions to dismiss;

June 1, 2022: Plaintiffs file reply brief in support of summary judgment motion.

On remand from the Eighth Circuit, this case presents two fundamental questions: (1) whether President Trump would have fired FHFA Director Mel Watt but for the statutory removal restriction that the Supreme Court held unconstitutional in *Collins v. Yellen*, 141 S. Ct. 1761 (2021); and (2) what if any additional actions the Trump

[1] For the Court's background, there are two other cases in which the same issues as presented by Plaintiffs' Second Amended Complaint have been raised, and the parties are represented by the same counsel. Both are currently pending in appellate courts. *See Collins v. Yellen*, No. 17-30364 (5th Cir.) (orally argued to *en banc* court on January 19, 2022); *Rop v. FHFA*, No. 20-2071 (6th Cir.) (regular briefing ongoing now, currently scheduled to be completed on or about March 11, 2022).

Administration would have taken that would have benefitted shareholders of Fannie and Freddie had President Trump fired Director Watt. *See Collins*, 141 S. Ct. at 1788–89. Former President Trump recently wrote a letter that addresses both of those questions, which is attached as Exhibit A to Plaintiffs' second amended complaint. In light of that letter and Defendants' public statements and actions while President Trump was in office, Plaintiffs believe that uncontestable facts establish that they are entitled to the relief they seek. While Plaintiffs recognize that it is more common for courts to await completion of fact discovery before considering summary judgment motions, judicial economy counsels in favor of an early summary judgment motion in this case for two reasons.

First, if Plaintiffs can establish that they are entitled to summary judgment now based upon the uncontested public record, that would make it unnecessary for the parties to engage in motions practice over executive privilege issues. Any fact discovery in this case is likely to focus on the decision-making process of the most senior officials in the Executive Branch, making it all but inevitable that the parties will disagree about whether and to what extent Defendants may invoke the presidential communications and deliberative process privileges to withhold otherwise discoverable materials. Disputes over those same privileges have already consumed considerable time and judicial resources in litigation over the Obama Administration's decision to impose the Net Worth Sweep. *See In re United States*, 678 Fed. App'x 981 (Fed. Cir. 2017) (granting in part and denying in part United Sates's mandamus petition challenging Court of Federal Claims privilege rulings). Similar disputes should be avoided in this case if possible.

Second, even if Plaintiffs cannot prevail via an early summary judgment motion, the Court's ruling on such a motion could help the parties take a more targeted approach to discovery that would minimize the scope of any privilege disputes. While the Court's ruling on Defendants' motions to dismiss will undoubtedly provide some guidance, it is unclear whether the Court will have occasion in ruling on that motion to decide which side should bear the burdens of proof and persuasion. *See* Plaintiffs' Supplemental Opening Brief at 13–17 (8th Cir. Aug. 10, 2021) (arguing that burdens should shift to defendants once Plaintiffs make a *prima facie* case that unconstitutional removal restriction prevented Trump Administration from pursuing policies that would have benefitted shareholders). Deciding that disputed legal issue now through a summary judgment motion could help to limit the extent of future privilege disputes.

As part of their summary judgment motion, Plaintiffs intend to rely on the testimony of an expert witness, and the schedule Plaintiffs propose is intended to leave time for Defendants to depose Plaintiffs' expert before filing their summary judgment responses. To the extent Defendants need more time after reviewing Plaintiffs' summary judgment motion and the attached expert testimony, that could be appropriately handled through a motion for extension of time; this possibility is not a reason to delay entry of a complete briefing schedule in the first instance. Defendants suggest that they might file a Rule 56(d) motion in response to Plaintiffs' summary judgment motion. But such a motion would have little prospect of success, for any non-public evidence that bears upon the factual issues in this case is likely to be in Defendants' exclusive possession.

Defendants argue that all other proceedings in this five-year-old case should be frozen pending the disposition of their motions to dismiss because the legal defenses they intend to raise are "substantial." Most of the same legal arguments that Defendants preview in their statement in this filing were also presented to the Eighth Circuit in supplemental briefing prior to remand. In any event, none of the arguments Defendants reference is likely to deal a knock-out blow to the Second Amended Complaint: (1) In *Collins*, the Supreme Court remanded the constitutional claim rather than dismissing it under 12 U.S.C. § 4617(f); (2) Defendants' arguments about *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), and the Administrative Procedure Act (APA) could not justify dismissing Count I of the complaint, which is not an APA claim, *see Free Enter. Fund v. PCAOB*, 561 U.S. 477, 491 n.2 (2010); (3) Defendants' separation of powers defense has little prospect of success in the face of the Supreme Court's holding that FHFA's structure violates the separation of powers and can "inflict compensable harm" justifying retrospective relief, *Collins*, 141 S. Ct. at 1789; (4) the Second Amended Complaint's factual narrative about what President Trump would have done but for the unconstitutional removal restriction was recently and forcefully endorsed by President Trump himself; and (5) the separate writings of Justices Thomas and Kagan in *Collins* did not garner a majority of the Court.

Defendants' Statement:

Defendants anticipate moving to dismiss the Second Amended Complaint and propose the following schedule:

March 11, 2022: Defendants file their motions to dismiss the Second Amended Complaint;

April 4, 2022: Plaintiffs respond to the motions to dismiss;

May 11, 2022: Defendants file their reply briefs in support of the motions to dismiss.

Defendants believe no discovery is needed at this time because the case can be resolved by the motions to dismiss. Defendants disagree with Plaintiffs' description of the scope of this case and of the inquiry envisioned by the Supreme Court's remand instructions in *Collins*. In particular, Defendants disagree with Plaintiffs' position that either *Collins* or the Eighth Circuit's corollary remand instructions in this case call for an open-ended determination of "what, if any, additional actions the Trump Administration would have taken that would have benefitted shareholders of Fannie and Freddie had President Trump fired Director Watt," much less an injunction ordering Defendants to implement those actions now. Rather, the Supreme Court granted a limited remand to allow shareholders to pursue "retrospective" claims, if any, that the unconstitutional removal restriction caused confirmed FHFA Directors to take actions implementing the Third Amendment that injured shareholders. *Collins*, 141 S. Ct. at 1789; *see also id.* at 1795 (Thomas, J., concurring) ("I seriously doubt that the shareholders can demonstrate that any relevant action by an FHFA Director violated the Constitution. And, absent an unlawful act, the shareholders are not entitled to a remedy."); *id.* at 1802 (Kagan, J., concurring) (commenting that "the lower court proceedings" on remand "may be brief indeed" because the potentially remaining claims would likely be foreclosed on threshold legal grounds).

Defendants intend to raise these threshold issues in their motions to dismiss. Defendants anticipate also raising other substantial threshold arguments, potentially including, but not limited to, (i) that the relief Plaintiffs seek is precluded by 12 U.S.C. § 4617(f), which forbids judicial "action to restrain or affect the exercise of [the] powers or functions of [FHFA] as Conservator"; (ii) that Plaintiffs fail to satisfy the requirements under *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), for a challenge to agency *in*action; (iii) failure to meet various threshold requirements for bringing an action pursuant to the Administrative Procedure Act; (iv) that the relief Plaintiffs seek would violate the separation of powers; and (v) that Plaintiffs' theory is implausible under *Twombly* and *Iqbal*.

Defendants respectfully submit that these are substantial threshold legal issues that should be resolved before any discovery takes place. *See*, *e.g.*, *Catholic Mut. Relief Society of Am. v. Arrowood Indemnity Co.*, 2018 WL 9787272, at *5 (D. Minn. Apr. 23, 2018) (staying discovery pending dispositive motion); *Dufrene v. ConAgra Foods, Inc.*, 2016 WL 10651947, at *4 (D. Minn. Apr. 7, 2016). It appears to be common ground among the parties that discovery at this point in the litigation is unnecessary and would not be an efficient use of the Court's or the parties' resources. Further, because the two other cases raising similar issues are currently pending in appellate courts, *see supra* note 1, deferring a determination on discovery in this case would best facilitate potential coordination with any discovery that may ultimately be available in those two cases if they are remanded to the district courts.

With regard to Plaintiffs' anticipated motion for summary judgment, Defendants respectfully submit that it would be most efficient and best serve judicial economy for summary judgment proceedings to be deferred until after the Court resolves Defendants' motions to dismiss. As set forth above, Defendants' motions to dismiss will present substantial threshold challenges to whether the novel type of claim Plaintiffs are bringing is even properly before the Court. If Defendants' motions to dismiss are denied, Defendants may wish to file fact-based motions for summary judgment of their own. In the meantime, there is no need to multiply the layers of motion practice and work for the Court before it is even confirmed that Plaintiffs have properly invoked this Court's jurisdiction and that their pleading states a claim upon which relief could be granted.

If the Court nevertheless does allow Plaintiffs to file a motion for summary judgment before Defendants' motions to dismiss are decided, Defendants respectfully submit that, at a minimum, the Court should refrain from setting a due date for Defendants' responses to the motion for summary judgment at this time. Plaintiffs represent that they intend to submit expert testimony in support of their motion for summary judgment. Under Plaintiffs' proposal, Defendants would see the expert testimony for the first time as an attachment to Plaintiffs' summary judgment motion. As such, there is no way presently to predict how much time Defendants might need, for example, to identify and develop rebuttal expert testimony of their own or to take the deposition of Plaintiffs' expert. Further, depending on the content of Plaintiffs' summary judgment motion, it is possible that Defendants would file Rule 56(d) declarations

identifying targeted fact discovery needed for Defendants' responses. Thus, if the Court allows Plaintiffs to file a motion for summary judgment before Defendants' motions to dismiss are decided, Defendants propose that the parties meet and confer and report to the Court within 14 days of that filing on their proposed schedule or schedules for summary judgment briefing as well as any expert discovery and/or targeted fact discovery needed before Defendants can respond.

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Respectfully submitted,

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