No. 20-2071

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL ROP, STEWART KNOEPP, and ALVIN WILSON,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Michigan, No. 1:17-cv-00497-PLM-RSK

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STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 2201. Am. Compl., RE 17, Page ID # 199. On September 8, 2020, the district court entered judgment granting the defendants' motions to dismiss. Order, RE 67, Page ID # 1819; Opinion, RE 66, Page ID # 1758. Plaintiff timely filed a notice of appeal on October 27, 2020. Notice of Appeal, RE 69, Page ID # 1821. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

To avert the catastrophic impact on the housing market that would result from the collapse of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (the enterprises), Congress enacted the Housing and Economic Recovery Act of 2008 (HERA), which created the Federal Housing Finance Agency (FHFA) and empowered it to act as conservator or receiver of the enterprises. 12 U.S.C. §§ 4511, 4617(a). Congress recognized that federal assistance of vast proportions could be required and authorized the Treasury Department to "purchase any obligations and other securities issued by" the enterprises. *Id.* §§ 1455(*l*)(1)(A), 1719(g)(1)(A).

After FHFA placed the enterprises into conservatorship, Treasury immediately purchased senior preferred stock in each entity and committed to provide up to $100 billion in taxpayer funds to each enterprise to avoid insolvency. Between 2008 and 2012, the preferred stock purchase agreements (Purchase Agreements) were amended

three times. The first two amendments substantially increased Treasury's capital commitment to the enterprises. The Third Amendment challenged here replaced a fixed dividend obligation with a variable dividend equal to the amount, if any, by which the enterprises' net worth exceeds a capital buffer.

At the time the Third Amendment was adopted, FHFA was headed by Acting Director Edward DeMarco. Plaintiffs acknowledge that DeMarco was properly designated Acting Director by the President but argue that the Constitution impliedly limits an acting official's period of service; that at some point DeMarco became a Director who had not been put in place in accordance with the Appointments Clause; and that the Court should therefore declare the Third Amendment invalid. Plaintiffs also claim for the first time on appeal that former President Trump would have drastically reduced Treasury's financial interests in the enterprises if not for the statutory restriction on the President's authority to remove FHFA's Senate-confirmed Director.

The issues presented are the following:

1. Whether the district court correctly rejected plaintiffs' argument that the Third Amendment should be set aside because the length of Acting Director DeMarco's tenure violated the Appointments Clause.

2. Whether this Court should reject plaintiffs' argument, raised for the first time on appeal, that they are entitled to an injunction requiring Treasury to write-

down its interests in the enterprises because former President Trump purportedly lacked sufficient control over those interests.

STATEMENT OF THE CASE

A. Fannie Mae and Freddie Mac

Congress created Fannie Mae and Freddie Mac to, among other things, "promote access to mortgage credit throughout the Nation . . . by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing." 12 U.S.C. § 1716(4). These government-sponsored enterprises provide liquidity to the mortgage market by purchasing residential loans from banks and other lenders, thereby providing lenders with capital to make additional loans. *Collins v. Yellen*, 141 S. Ct. 1761, 1770-71 (2021). The enterprises finance these purchases by borrowing money in the credit markets and by packaging many of the loans they buy into mortgage-backed securities, which they sell to investors. *Id.* Fannie Mae and Freddie Mac are private, publicly traded companies. *Id.*

B. The 2008 Housing Crisis and HERA

With the 2008 collapse of the housing market, Fannie Mae and Freddie Mac experienced overwhelming losses due to a dramatic increase in default rates on residential mortgages. *See Collins*, 141 S. Ct. at 1771. At the time, the enterprises owned or guaranteed over $5 trillion of residential mortgage assets, representing

nearly half the United States mortgage market. *Id.* Their failure would have had a catastrophic impact on the national housing market and economy.

The enterprises lost more in 2008 ($108 billion) than they had earned in the past 37 years combined ($95 billion). *Collins*, 141 S. Ct. at 1771 (citing FHFA, Office of Inspector General (OIG), *Analysis of the 2012 Amendments to the Senior Preferred Stock Purchase Agreements* 5 (Mar. 20, 2013)). As a result, the enterprises faced capital shortfalls, and private investors were unwilling to provide Fannie Mae and Freddie Mac with the capital they needed to weather their losses and avoid receivership and liquidation. *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 601 (D.C. Cir. 2017).

In July 2008, Congress enacted the Housing and Economic Recovery Act of 2008 (HERA), Pub. L. No. 110-289, 122 Stat. 2654. The legislation created FHFA as an independent agency to supervise and regulate the enterprises. FHFA is headed by a single Director nominated by the President and confirmed by the Senate. 12 U.S.C. § 4512(a), (b)(1). The statute provided that the Director was to serve a five-year term and could be removed during that term only for cause. *Id.* § 4512(b)(2). HERA further states that, "in the event of the death, resignation, sickness, or absence of the Director," the President may designate one of three Deputy Directors to serve as Acting Director until the Director returns or a new Director is confirmed. *Id.* § 4512(f). "Since its inception, the FHFA has had three Senate-confirmed Directors, and in times of their absence, various Acting Directors have been selected to lead the Agency on an interim basis." *Collins*, 141 S. Ct. at 1771.

HERA also granted FHFA the authority to act as conservator or receiver of the enterprises. 12 U.S.C. §§ 4511, 4617(a). HERA provides that FHFA, as conservator or receiver, "immediately succeed[s] to—(i) all rights, titles, powers, and privileges of the [enterprises] and of any stockholder, officer, or director of such [enterprises], with respect to the [enterprises]." 12 U.S.C. § 4617(b)(2)(A)(i). The legislation authorizes FHFA, as conservator, to "take such action as may be—(i) necessary to put the [enterprises] in a sound and solvent condition; and (ii) appropriate to carry on the business of the [enterprises] and preserve and conserve the assets and property of the [enterprises]." *Id.* § 4617(b)(2)(D). HERA also permits a conservator to take actions "for the purpose of reorganizing, rehabilitating, or winding up the affairs" of the enterprises. *Id.* § 4617(a)(2). HERA further states that FHFA, when acting as conservator, may exercise its statutory authority in a manner "which the Agency determines is in the best interests of the [enterprises] or the Agency." *Id.* § 4617(b)(2)(J)(ii). Finally, HERA contains an anti-injunction provision, which provides that "[e]xcept as provided in this section or at the request of the Director, no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver." *Id.* § 4617(f).

Recognizing that an enormous commitment of taxpayer funds could be required, Congress also amended the enterprises' statutory charters to authorize Treasury to "purchase any obligations and other securities issued by" the enterprises upon "Treasury's specific determination that the terms of the purchase would 'protect

the taxpayer,'" *Perry Capital*, 864 F.3d at 600, and to "exercise any rights received in connection with such purchases." 12 U.S.C. §§ 1455(*l*)(1)(A), (2)(A), 1719(g)(1)(A), (B).

C. Conservatorship and the Purchase Agreements

FHFA, then-led by Director James Lockhart, placed the enterprises in conservatorship on September 6, 2008. *Collins*, 141 S. Ct. at 1772. One day later, Treasury purchased senior preferred stock in each entity. *Id.* at 1772-73. Under the Purchase Agreements, Treasury committed to provide up to $100 billion in taxpayer funds to each enterprise to maintain their solvency by ensuring that their assets were at least equal to their liabilities. *Id.*

The Purchase Agreements entitled Treasury to four principal contractual rights. *Collins*, 141 S. Ct. at 1773. First, Treasury received preferred stock with a senior liquidation preference of $1 billion for each enterprise, plus a dollar-for-dollar increase each time the enterprises drew upon Treasury's funding commitment. *Id.*[1] Second, Treasury was entitled to quarterly dividends equal to 10% of its liquidation preference. *Id.* Third, Treasury received warrants to purchase the enterprises' common stock. *Id.* Fourth, Treasury would be entitled to a periodic commitment fee. *Id.*

[1] "A liquidation preference is a priority right to receive distributions from the [enterprises'] assets in the event they are dissolved." *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 216 n.6 (D.D.C. 2014).

Treasury's initial funding commitment soon proved to be inadequate. *Collins*, 141 S. Ct. at 1773. To address this problem, in May 2009, FHFA and Treasury agreed to double Treasury's funding commitment to $200 billion per enterprise. *Id.*

Three months later, in August 2009, FHFA Director James Lockhart resigned, and President Obama designated Edward DeMarco, one of the three Deputy Directors authorized to serve as Acting Director under 12 U.S.C. § 4512(f), to serve as Acting Director. Opinion, RE 66, Page ID # 1764.

In December 2009, in the face of ongoing losses, Treasury and FHFA amended the Purchase Agreements for a second time to allow the enterprises to draw unlimited amounts from Treasury to cure net-worth deficits until the end of 2012, at which point Treasury's funding commitment would be fixed. Opinion, RE 66, Page ID # 1764; *Collins*, 141 S. Ct. at 1773.

As of June 30, 2012, the enterprises had drawn $187.5 billion from Treasury's funding commitment, making Treasury's liquidation preference $189.5 billion, including the initial $1 billion senior liquidation preference for each enterprise. *Collins*, 141 S. Ct. at 1773. Under the terms of the original Purchase Agreements, the enterprises' dividend obligations to Treasury were thus nearly $19 billion per year. Between 2009 and 2011, the enterprises could not pay these substantial dividend obligations out of their earnings and drew on Treasury's funding commitment to pay them. *Id.*

D. The Third Amendment

On August 17, 2012, Treasury and FHFA (headed by Acting Director DeMarco) agreed to modify the Purchase Agreements for a third time. *Collins*, 141 S. Ct. at 1773. This "Third Amendment" broke the draws-to-pay-dividends cycle by replacing the previous fixed dividend obligation with a variable dividend equal to the amount, if any, by which the enterprises' net worth for the quarter exceeded a capital buffer. *Id.* at 1774. The Third Amendment thus ensured that the enterprises would not deplete Treasury's vital capital commitment prematurely and that the enterprises would play their central role in the housing market for the foreseeable future. *See id.* at 1777 (stating that the Third Amendment assured "a stable secondary mortgage market"). The Third Amendment did not amend or alter Treasury's liquidation preference rights.

Shareholders of Fannie Mae and Freddie Mac brought suits challenging the Third Amendment in district courts around the country. In one such suit, this Court rejected a shareholder's challenge to the Third Amendment in which the shareholder argued that FHFA and Treasury exceeded their authority under HERA and acted arbitrarily and capriciously in agreeing to the amendment. *See Robinson v. FHFA*, 876 F.3d 220, 226-27 (6th Cir. 2017). This Court concluded that FHFA and Treasury acted within their statutory authority and that plaintiffs' claims were therefore barred by HERA's anti-injunction provision. *See id.* at 229-35.

E. Additional Amendments

In May 2013, President Obama nominated Melvin Watt to serve as FHFA Director; he was confirmed by the Senate and sworn into office on January 6, 2014. Opinion, RE 66, Page ID # 1765. On December 21, 2017, Director Watt and the Treasury Secretary negotiated an amendment to the Purchase Agreements under which Treasury agreed to permit the enterprises to retain up to $3 billion each in internal capital, rather than paying those funds to Treasury as cash dividends.[2] In exchange for the foregone cash dividends, Treasury received a $3 billion increase in its liquidation preference for each enterprise.

Director Watt served until his term expired in January 2019. Opinion, RE 66, Page ID # 1765. At the end of Director Watt's term, President Trump designated Joseph Otting to serve as Acting Director. *Id.* That same month, President Trump nominated Mark Calabria to serve as Director. *Id.* The Senate confirmed Calabria as Director in April 2019. *Id.*

On September 27, 2019, Treasury and FHFA (then led by Director Calabria) entered into a letter agreement under which the parties agreed to allow the enterprises to increase their internal capital buffers from $3 billion each to $25 billion (for Fannie

[2] https://www.fhfa.gov/Media/PublicAffairs/Documents/GSEletteragreementfre12-21-2017.pdf

Mae) and $20 billion (for Freddie Mac).[3] In exchange for allowing the enterprises to retain additional capital, Treasury received a $22 billion increase in its liquidation preference in Fannie Mae and a $17 billion increase in its liquidation preference for Freddie Mac.

In January 2021, Treasury and FHFA agreed to another amendment to the Purchase Agreements. Pursuant to that amendment, Treasury and FHFA agreed to suspend all quarterly cash dividend payments until the enterprises build sufficient capital to meet specified thresholds. *Collins*, 141 S. Ct. at 1774. Once those thresholds are met, cash dividend payments to Treasury will resume. *Id.* at 1774-75. In the meantime, the dividends that the enterprises would have paid to Treasury in cash under the Third Amendment will be added to Treasury's liquidation preference. *Id.*

F. Prior Proceedings

1. Plaintiffs in this suit, who are three enterprise shareholders, raise constitutional challenges to the Third Amendment. In a complaint filed in June 2017, nearly five years after Treasury and FHFA agreed to the Third Amendment, plaintiffs asserted, as relevant here, that the Third Amendment should be set aside because (1) the President lacked the authority to remove FHFA's Acting Director at will at the

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[3] U.S. Dep't of the Treasury, *Treasury Department and FHFA Modify Terms of Preferred Stock Purchase Agreements for Fannie Mae and Freddie Mac* (Sept. 30, 2019), https://go.usa.gov/xF6NS.

time the Third Amendment was signed, Am. Compl., RE 17, Page ID # 257-260, and (2) Acting Director DeMarco was serving in violation of the Appointments Clause when he agreed to the Third Amendment because he had been in the position for too long, Am. Compl., RE 17, Page ID # 262-266. Plaintiffs sought an order "vacating and setting aside the third amendment;" "[e]njoining [Treasury and FHFA] . . . from implementing, applying, or taking any action whatsoever pursuant to the third amendment;" and requiring Treasury "to return to Fannie and Freddie all dividend payments made pursuant to the Net Worth Sweep." Am. Compl., RE 17, Page ID # 271. Plaintiffs also sought an order "[d]eclaring that FHFA's structure violates the separation of powers." *Id.*

2. On September 8, 2020, the district court granted Treasury's and FHFA's motions to dismiss. Opinion, RE 66, Page ID # 1818. With regard to plaintiffs' removal authority claim, the court determined that the HERA provision limiting the President's authority to remove FHFA's Senate-confirmed Director, 12 U.S.C. § 4512(b)(2), was "almost certainly unconstitutional." Opinion, RE 66, Page ID # 1798. But the court concluded that the unconstitutional removal restriction had no effect on FHFA's agreement to the Third Amendment because FHFA was headed by an Acting Director at the time and the Acting Director was not subject to the removal restriction. Opinion, RE 66, Page ID # 1806; *see also id.* (concluding that the removal restriction was "not in any way connected to the injuries in this particular case"). The court therefore declined to set the Third Amendment aside.

The district court also rejected plaintiffs' Appointments Clause claim. Opinion, RE 66, Page ID # 1807-1812. Although plaintiffs conceded that Acting Director DeMarco was validly designated as Acting Director, they argued that his service at some point began to violate the Appointment Clause because he served in an acting capacity for "too long." Opinion, RE 66, Page ID # 1807. The district court concluded that the question whether Acting Director DeMarco had served "too long" was not one susceptible to "judicially discoverable and manageable standards." Opinion, RE 66, Page ID # 1809. The court stated that to determine whether the length of an acting agency head's tenure was "reasonable under the circumstances," a court would have "to look over the shoulder of at least one of the other branches of government to evaluate internal processes, personnel decisions, and political dynamics that [a court] is ill-equipped to assess." Opinion, RE 66, Page ID # 1810. The court observed that although it could choose a specific time limit (such as plaintiffs' proposed two-year limit), such a choice would be "wholly arbitrary" and "would be tantamount to making a 'policy determination' that two years is sufficient time" for a new appointment to be made. Opinion, RE 66, Page ID # 1811-1812.[4]

[4] The district court also dismissed other claims brought by plaintiffs, including claims alleging that Congress impermissibly delegated legislative authority to FHFA through HERA, unconstitutionally insulated FHFA from the appropriations process, and unlawfully shielded FHFA's actions as conservator from judicial review. *See* Opinion, RE 66, Page ID # 1806, 1814-1818. Plaintiffs do not appeal the district court's dismissal of those claims.

G. The Supreme Court's Decision In *Collins v. Yellen*

Approximately nine months after the district court issued its decision in this case, the Supreme Court announced its decision in *Collins v. Yellen*, 141 S. Ct. 1761 (2021). In *Collins*, enterprise shareholders challenged the Third Amendment on the grounds that (1) FHFA had exceeded its statutory authority in agreeing to the amendment, and (2) Acting Director DeMarco was unconstitutionally insulated from Presidential control when he agreed to the amendment. The Supreme Court rejected both claims and declined to set the Third Amendment aside.

The Supreme Court first held that FHFA lawfully exercised its statutory conservatorship authority when it agreed to the Third Amendment and that, as a result, the shareholders' statutory challenge to the Third Amendment was barred by HERA's "anti-injunction" provision. *Collins*, 141 S. Ct. at 1775-78. In so holding, the Court confirmed this Court's conclusion in *Robinson*, 876 F.3d at 229-35.

The Court then addressed the constitutionality of the statutory restriction on the President's authority to remove FHFA's Senate-confirmed Director. *Collins*, 141 S. Ct. at 1783-89. That provision states that "[t]he Director shall be appointed for a term of 5 years, unless removed before the end of such term for cause by the President." 12 U.S.C. § 4512(b)(2). The Supreme Court held that, under its prior decision in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), Congress could not, consistent with the separation of powers, limit the President's authority to remove

FHFA's Director, and the restriction was therefore invalid. *Collins*, 141 S. Ct. at 1783-89.

Like the district court here, the Supreme Court further held, however, that the unconstitutional removal restriction had no bearing on FHFA's agreement in August 2012 to the Third Amendment because FHFA was headed by an Acting Director at the time, and the Acting Director was removable at will by the President. *Collins*, 141 S. Ct. at 1781-83. The Court therefore rejected plaintiffs' request to set the Third Amendment aside. *Id.* at 1788.

The Supreme Court also held that, with respect to the later implementation of the Third Amendment by confirmed Directors, there was "no reason to regard any of the actions taken by the FHFA in relation to the third amendment as void." *Collins*, 141 S. Ct. at 1787. However, because it remained "possible" that actions taken by Senate-confirmed Directors while implementing the Third Amendment could have resulted in harm to shareholders, the Supreme Court remanded the case to the Fifth Circuit for it to decide whether the shareholders were entitled to retrospective relief. *Id.* at 1789.

SUMMARY OF ARGUMENT

In *Collins v. Yellen*, 141 S. Ct. 1761 (2021), the Supreme Court concluded that the restriction on the President's authority to remove FHFA's Senate-confirmed Director violated the separation of powers, but rejected the claim that it should set aside the Third Amendment to the Purchase Agreements. The Court held that the

provision had no effect on the adoption of the Third Amendment because FHFA was headed at the time by Acting Director DeMarco, who could be removed at will. The Supreme Court also emphasized that "there is no reason to regard any of the actions taken by the FHFA in relation to the Third Amendment as void." *Id.* at 1787. The Court's holding is dispositive of the same claim asserted by the shareholders in this case.

Plaintiffs nevertheless press two arguments to maintain their suit, one raised for the first time on appeal. First, they argue the Acting Director, though validly designated, had served in an acting capacity beyond an implied Constitutional limit and that his continued service violated the Appointments Clause. Second, plaintiffs assert, for the first time, that they are entitled to an injunction zeroing out Treasury's liquidation preference in the enterprises on the theory that former President Trump was prevented from doing so by the statutory removal restriction that limited his authority to remove FHFA's Senate-confirmed Director. Neither argument has merit.

I. Plaintiffs' novel Appointment Clause claim fails on the merits and would not, in any event, justify invalidating the Third Amendment. Plaintiffs do not dispute that DeMarco was validly designated as Acting Director. They urge, however, that his designation ceased to be valid by the time he signed the Third Amendment. The district court correctly rejected this attempt to engraft a judicially enforceable constitutional time limit on the service of acting officials. Congress has included time limitations in statutes providing for the designation of individuals to serve in an acting

capacity when it has concluded that such limitations are appropriate. The Constitution does not expressly prescribe any such limitation, and plaintiffs' attempt to locate a time limit in the Recess Appointments Clause is without basis. In any event, to the extent there is an implied, justiciable limitation on the service of acting officials, the length of Acting Director DeMarco's service would not test that limit. During DeMarco's tenure, President Obama took timely steps to replace DeMarco with a permanent Director. After the Senate declined to approve the first nominee, it was necessary for the President to select and nominate a second candidate who both met the President's approval and was likely to obtain Senate confirmation. The time it took to do so was entirely reasonable.

Even assuming plaintiffs' Appointment Clause claim had merit, it would not entitle them to an injunction setting the Third Amendment aside and requiring Treasury to repay dividends it received. Plaintiffs waited nearly five years to challenge an agreement they claim violates their constitutional rights and rights as shareholders. They cannot properly demand that a Court exercise its equitable powers without regard to the multifarious actions taken with regard to the Third Amendment in those years and without regard to the prejudice to the government and numerous third parties that would result from the requested order. Plaintiffs' invocation of the Court's equitable authority is particularly anomalous because the subsequent FHFA Directors, whose appointments plaintiffs do not challenge, have defended and

implemented the Third Amendment and have entered into additional agreements in light of the amendment that they believe advance the enterprises' interests.

II. Plaintiffs' new removal authority claim and requested relief, first presented in this appeal, are similarly baseless. Plaintiffs contend that they are entitled to an injunction reducing Treasury's liquidation preference to zero or converting Treasury's senior preferred stock to common stock because former President Trump would have purportedly done so if not for the HERA provision that limited his authority to remove FHFA's Senate-confirmed Director. Plaintiffs did not assert this claim or the allegations on which it is based in their Amended Complaint; nor did they present it to the district court in any of their other filings. This Court should therefore reject the claim as waived.

In any event, plaintiffs' new removal authority claim and proposed remedy are without merit. Plaintiffs speculate that, absent the removal restriction, President Trump would have required Treasury to forfeit its liquidation preference rights in the enterprises or to convert its senior preferred stock into less valuable common stock. President Trump at all times had plenary authority over the Secretary of the Treasury and could have directed the Secretary to reduce Treasury's interests in the enterprises. Thus, this is not a situation in which a court has to speculate about whether the President had sufficient control over government actors to bring about the changes plaintiffs hypothesize. He plainly did. In asking this Court to enter an injunction dramatically reducing Treasury's rights in the enterprises, plaintiffs ask this Court—in

the name of vindicating Presidential authority—to order action that President Trump himself could have directed, but did not.

Plaintiffs' conjectures also cannot be squared with the actions of Director Calabria, the Director who the former President nominated and the Senate confirmed. Director Calabria continued to defend and implement the Third Amendment during his tenure. He also twice negotiated alterations to the Purchase Agreements, neither of which bore any resemblance to the actions that President Trump purportedly wished to direct. To the contrary, the alterations Director Calabria negotiated involved an increase in Treasury's liquidation preference—precisely the opposite of the actions that plaintiffs assert President Trump would have directed his appointee to take.

STANDARD OF REVIEW

This Court reviews the district court's grant of a motion to dismiss de novo. *Gahafer v. Ford Motor Co.*, 328 F.3d 859, 861 (6th Cir. 2003).

ARGUMENT

I. The District Court Correctly Rejected Plaintiffs' Appointments Clause Claim.

A. Acting Director DeMarco Was Not Serving In Violation Of The Appointments Clause

1. The Appointments Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States." U.S. Const. art. II, § 2, cl. 2. Congress may, however, "vest the

Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.* Both principal and inferior officers exercise "significant authority pursuant to the laws of the United States." *Edmond v. United States,* 520 U.S. 651, 662 (1997). The Supreme Court has not, however, "set forth an exclusive criterion for distinguishing between" the two. *Id.* at 661. But all parties in this case recognize that the President may "direct certain officials to temporarily carry out the duties of a vacant PAS [Presidential appointment and Senate confirmation] office in an acting capacity, without Senate confirmation." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 934 (2017). Indeed, the President's power to designate acting officials "to temporarily perform the functions of a vacant PAS office without first obtaining Senate approval" is one that Congress recognized and authorized in "President Washington's first term." *Id.* at 935.

Consistent with that well-established legal authority, Congress provided in HERA that, "[i]n the event of the death, resignation, sickness, or absence of [FHFA's Senate confirmed] Director, the President shall designate" one of three Deputy Directors "to serve as acting Director until the return of the Director, or the appointment of a successor." 12 U.S.C. § 4512(f). President Obama exercised that authority in August 2009 when, upon the resignation of FHFA's first Director (James Lockhart), he designated Deputy Director Edward DeMarco to fulfill the duties of Director on an acting basis. Opinion, RE 66, Page ID # 1764.

President Obama sent a nomination for Director to the Senate in November 2010, but that nomination was returned to the President on December 22, 2010. *Bhatti v. FHFA*, 332 F. Supp. 3d 1206, 1219 (D. Minn. 2018). Acting Director DeMarco continued to serve, and, in August 2012 signed the Third Amendment on behalf of FHFA as conservator of the enterprises. *Collins v. Yellen*, 141 S. Ct. 1761, 1773 (2021). President Obama nominated Melvin Watt to serve as FHFA's Director nine months later, and, following Senate confirmation, Director Watt was sworn in as the director of FHFA in January 2014. Opinion, RE 66, Page ID # 1765.

2. Plaintiffs do not dispute that Acting Director DeMarco was validly designated. They theorize, however, that at some indeterminate point during his tenure as Acting Director, his continued service began to violate the Appointments Clause. Plaintiffs infer a constitutional limitation on the duration of an acting official's service and argue that after the permissible duration expires, any action taken by the official must violate the Appointments Clause.

This argument fails. Congress is free to establish time limitations on the service of acting officials, as it has done in the Federal Vacancies Reform Act of 1998 (FVRA). *See* 5 U.S.C. §§ 3345, 3346. As plaintiffs do not dispute, Congress has placed no such limitation on the service of an FHFA Acting Director.[5]

[5] Plaintiffs suggest that the absence of such a limitation is unusual and that Congress "almost always" places such limits on an acting officer's tenure. Pls. Br. 19. The assertion has no bearing on the merit of their constitutional argument, and is, in

Neither the Appointments Clause nor any other provision of the Constitution expressly limits the length of time during which an individual may be designated to act as Director. The Supreme Court has recognized that an acting designation is a "temporary" state, *United States v. Eaton,* 169 U.S. 331, 343 (1898), but DeMarco served on a temporary basis—i.e., only until "the appointment of [his] successor," 12 U.S.C. § 4512(f). *Cf. Morrison v. Olson*, 487 U.S. 654, 672 (1988) (concluding that an independent counsel's service was "temporary" even though there was "concededly no time limit on the appointment of a particular counsel" because the counsel's service would end upon the completion of the counsel's task). Plaintiffs have identified no case in which a court has even considered whether the length of time before confirmation of a permanent officer had become "too long," let alone any case in which a court actually held that the length of an acting official's tenure become unconstitutional.

Plaintiffs' attempt to locate such a limitation in the Recess Appointments Clause (Pls. Br. 18), does not withstand even cursory examination. The Constitution expressly limits the tenure of recess appointments, providing that they last until the

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any event, mistaken. Indeed, the Senate Report on the bill that became the FVRA noted that the Senate was aware of "statutes specifically governing a vacancy in 41 specific offices." S. Rep. No. 105-250, at 15-16 (1998). The report further provides that 40 of those statutory provisions would remain in effect following the FVRA's enactment and that "[m]ost of these retained statutes do not place time restrictions on the length of an acting officer." *Id.* at 17.

next session of Congress, which, by definition, is less than two years from the time of any recess appointment. *See NLRB v. Noel Canning*, 573 U.S. 513, 550-57 (2014) (allowing intra-session appointments and thus appointments early in the two-year period, which creates the possibility of recess appointments lasting nearly two years). Plaintiffs cannot properly insist that a constitutional limitation specifically addressed to recess appointments can be read to apply to acting officials.

Plaintiffs' reliance on an OLC memorandum is similarly misplaced. Pls. Br. 23 (citing *Status of the Acting Director, Office of Management and Budget*, 1 Op. O.L.C. 287, 287 (1977)). The memorandum discusses whether an individual who had already served for three months as Acting Director of the Office of Management and Budget (OMB) could continue to do so. OLC first concluded that no statute provided a concrete time limitation on service as Acting Director. OLC opined, however, that implicit in Congress's direction that the Deputy Director of OMB act as the Director during a vacancy (now codified at 31 U.S.C. § 502) is a requirement that acting service "not continue beyond a reasonable time." 1 Op. O.L.C. at 289-90. Considering a variety of factors, OLC determined that the individual's tenure as Acting Director was lawful under the statute, without grounding that analysis in the Appointments Clause.

Moreover, as the district court noted, the OLC opinion would not provide a "judicially discoverable and manageable standard[]" for conducting plaintiffs' proposed constitutional inquiry: Opinion, RE 66, Page ID # 1809-12. "The factors relevant to a reasonableness inquiry are fraught with too much complexity and

subjectivity" and "would require [a court] to look over the shoulder of at least one of the other branches of government to evaluate internal processes, personnel decisions, and political dynamics." Opinion, RE 66, Page ID # 1810. As the district court observed, a court would be "ill-equipped" to make such assessments, which would require the court to delve into such matters as "the President's [and] the Senate's ability to devote attention to a nomination." *Id.*

The type of evaluation contemplated by plaintiffs is thus plainly committed to the political branches. Congress can and does determine the period of service of an Acting Director taking into account the nature of the office, congressional limits on the universe of individuals who can be designated to fill an office in an acting capacity, and the concerns that might be raised by an extended designation as Acting Director.

In any event, to the extent that the Constitution imposes a judicially enforceable limit on the duration of service of an acting official, the length of Acting Director DeMarco's service would not test that limit. DeMarco had served as Acting Director for approximately one year when President Obama nominated Joseph Smith to be FHFA's Director. Because the nominee was not approved by the Senate, additional time was necessary to nominate a second candidate who both met the President's qualifications and could obtain Senate confirmation. Even so, after the Senate returned Smith's nomination to the President, DeMarco continued to serve as Acting Director for less than two years when he signed the Third Amendment in

August 2012. The President then nominated Melvin Watt to be Director in May 2013, and the Senate confirmed him in December 2013. Opinion, RE 66, Page ID # 1765. There is nothing extraordinary in this sequence, which also illustrates that one reason that the tenure of acting officials is left to the political branches is the need to construct any limitations with full consideration of the Senate's role in confirmation.

B. Even Assuming Acting Director DeMarco Was Serving In Violation Of The Appointments Clause, Plaintiffs Are Not Entitled To An Injunction Setting The Third Amendment Aside

Even assuming that the Constitution at some point transformed Acting Director DeMarco into a permanent Director serving without Senate confirmation, there would be no basis for vacating the Third Amendment. Before granting equitable relief to remedy a constitutional violation, a court must consider whether the requested relief comports with "what is necessary, what is fair, and what is workable." *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) (per curiam); *see also, e.g.*, *John Doe Co. v. CFPB*, 849 F.3d 1129, 1133 (D.C. Cir. 2017) (recognizing "traditional constraints on separation-of-powers remedies" and noting "vacatur of past actions is not routine").

The relief sought here plainly would not meet that standard. As one district court explained in rejecting an identical Appointments Clause claim, "none of those who had business before or were being affected by the agency—not private individuals, not businesses, not other governmental agencies, not members of Congress, not even the President himself—would have any way of knowing whether

the acting officer who was heading the agency had lost his or her authority to act on the agency's behalf. Instead, they would have to order their affairs with the knowledge that, at some point years later, a judge acting with the benefit of hindsight might pronounce the length of the tenure unreasonable." *Bhatti*, 332 F. Supp. 3d at 1219.

In these circumstances the principles underlying the de facto officer doctrine apply with particular force. When applicable, that doctrine "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient." *Ryder v. United States*, 515 U.S. 177, 180 (1995). Here, the validity of the initial designation is not even questioned. What would be discovered under plaintiffs' theory is that the designation became invalid at some undefined point under a constitutional rule never recognized by any court. There could not be a clearer case for avoiding the risk of "chaos" and "multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question." *Id.*; *see also Bhatti v. FHFA*, 15 F.4th 848, 852-53 (8th Cir. 2021) (concluding that the de facto officer doctrine barred the court from setting aside the Third Amendment based on an Appointments Clause claim identical to plaintiffs'). .

The full extent of the chaos that would result from issuing the requested injunction is magnified by plaintiffs' decision to delay filing suit until June 2017, nearly five years after FHFA and Treasury adopted the Third Amendment in August 2012.

As noted above, the Third Amendment "ensure[d] market stability" in the national housing market. *Collins*, 141 S. Ct. at 1777. It did so by ending the draws-to-pay-dividends cycle, thereby curtailing the threat of the enterprises incurring escalating dividend obligations to Treasury and reducing the risk that Treasury's remaining capital commitment (which was and is vital to the enterprises' viability) would be depleted prematurely. The Third Amendment thus reduced the enterprises' fixed dividend obligations and reduced their exposure to market downturns and the adverse consequences of failing to earn sufficient income to pay the fixed dividends they owed Treasury under the Purchase Agreements. *See Jacobs v. FHFA*, 908 F.3d 884, 893-94 (3d Cir. 2018) (emphasizing that the Third Amendment represented a "risk-averse" measure that assured the enterprises' ongoing operation). In turn, market participants such as lenders, investors, and others relied on the Third Amendment and the safeguards it placed on the enterprises' financial future in structuring their relationships with the enterprises over the past several years. In short, Treasury, the enterprises, and a host of individuals and corporations—including the enterprises' customers and lenders—have conducted their affairs over the past ten years in reliance on the Third Amendment and the assurances it provided.

Plaintiffs note that they filed suit (Pls. Br. 35) within the six-year statute of limitations set out in 28 U.S.C. § 2401. But a litigant does not demonstrate entitlement to particular equitable relief merely by satisfying a general limitations period. *See Chirco v. Crosswinds Communities, Inc.*, 474 F.3d 227, 235 (6th Cir. 2007).

That is particularly the case here where plaintiffs do not seek to enforce a statutorily defined right and instead ask the Court to fashion a remedy with extraordinary consequences for third parties and the mortgage market. As the district court in *Bhatti* explained in rejecting a request to set the Third Amendment aside, "plaintiffs are attempting to unwind the actions of an executive agency going back more than five years—actions of national (indeed, international) significance that have been the basis of trillions of dollars' worth of economic activity." *Bhatti*, 332 F. Supp. 3d at 1225; *see also Chirco*, 474 F.3d at 236 (concluding that the doctrine of laches barred plaintiffs' request for retrospective injunctive relief and emphasizing that plaintiffs' 18-month delay in filing suit was "inordinately lengthy" and had permitted significant reliance interests to develop).

One of the many examples illustrating the consequences of the requested relief is the impact it would have on the parties' January 2021 renegotiation of the terms of the Purchase Agreements. *See supra* p. 9. Pursuant to that renegotiation, Treasury agreed to restructure its dividend payments so that the enterprises can rebuild capital, a necessary step towards the enterprises' exit from conservatorship. Treasury's agreement to this further amendment to the Purchase Agreements followed from and relied on the parties' decade of history under the Third Amendment. An order retrospectively setting the Third Amendment aside and forcing Treasury to repay dividends would undermine the premises of the 2021 amendment, calling into question its workability and legal status.

The present case differs in every respect from the circumstances in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), in which the Supreme Court held that the petitioner, whose case had been heard by an improperly appointed Administrative Law Judge (ALJ), should receive a new hearing before a properly appointed ALJ. *See id.* at 2055 ("'[O]ne who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief" consisting of "a new 'hearing before a properly appointed' official" (quoting *Ryder*, 515 U.S. at 182-83)). It is not disputed that Acting Director DeMarco was properly designated, unlike the ALJ in *Lucia* who was not properly appointed. And, in contrast to the present case, the challenge in *Lucia,* was, as the Court emphasized, "timely." The remedy in *Lucia* accorded with the recognized remedy in judicial or quasi-judicial proceedings in which the adjudicator had no power to act or was subject to recusal. In ordering that remedy, a court has no need to consider its impact on third parties and resulting disruptions. The opposite is true here.

Moreover, in the case of a single adjudication by a single adjudicator, a court has no reason to consider the nature of the acts in question and other relevant agency actions relevant to an appropriate remedy. In contrast, FHFA has had three Directors since Acting Director DeMarco: two Senate-confirmed Directors and one Acting Director. Each of the Directors has defended the Third Amendment against challenge by shareholders and implemented the Third Amendment in accordance with its terms. Plaintiffs thus ask the Court to set aside an agreement implemented by

three subsequent Directors in aid of the separation of powers. Plaintiffs cite no precedent for an order of this kind, which would defeat the purpose of the Appointments Clause by setting aside the lawful actions of properly appointed agency heads. *See also Bhatti*, 15 F.4th at 853 (declining to set the Third Amendment because "[a]ny defect [in Acting Director DeMarco's service] was resolved when the subsequent FHFA directors—none of whose appointments were challenged—ratified the third amendment").

II. Plaintiffs' Newly Minted Assertions Regarding The Unconstitutional Removal Restriction Are Waived And Without Merit.

A. *Collins* Resolves The Removal Authority Claim Asserted In District Court

Like the plaintiffs in *Collins,* plaintiffs here urged in district court that the HERA provision limiting the President's authority to remove the FHFA Director only "for cause" unconstitutionally infringed on the President's Article I authority. Am. Compl., RE 17, Page ID # 260.[6] Plaintiffs further argued that, in light of the unlawful removal provision, the district court should "vacate the third amendment to the [Purchase Agreements] because it was adopted by FHFA when it was operating as an independent agency headed by a single person" and "strike down the provisions of HERA that purport to make FHFA independent from the President." *Id.*

[6] HERA provided that FHFA's Senate-confirmed Director "shall be appointed for a term of 5 years, unless removed before the end of such term for cause by the President." 12 U.S.C. § 4512(b).

In *Collins*, 141 S. Ct. at 1783-89, the Supreme Court held that the removal provision violated the separation of powers and was therefore invalid. But, like the district court in this case, the Supreme Court further held that the unconstitutional removal provision had no bearing on the adoption of the Third Amendment to the Purchase Agreements. The Court explained that at the time the parties agreed to the Third Amendment, FHFA was headed by an Acting Director, who was removable at the President's will. *Id.* at 1781-83. The Court therefore rejected plaintiffs' request to set the Third Amendment aside. *Id.* at 1787. The Court further observed that there was no reason to assume that the removal restriction had any effect on the later implementation of the Third Amendment by confirmed Directors. It noted, however, that it was theoretically possible that the restriction prevented the President from altering "the implementation of the third amendment" in a manner "that would have benefited the shareholders," *id.* at1789, and it therefore remanded the case to the Fifth Circuit to determine whether plaintiffs could establish any such harm.

The Supreme Court's decision in *Collins* resolves the removal authority claim asserted in plaintiffs' complaint and disposes of their claims for both prospective and retrospective relief. The Court declared the removal restriction invalid and thereby "declare[d] that henceforth FHFA is no longer" independent of the President's control. Am. Compl., RE 17, Page ID # 260. Plaintiffs' request for an injunction striking down the removal provision is thus moot. The Supreme Court also refused to "vacate the third amendment," *id.*, explaining that the Acting Director who signed

the Third Amendment was not unlawfully insulated from presidential control, *Collins*, 141 S. Ct. at 1781-83. The Supreme Court thus also decided (and rejected) the other relief plaintiffs requested. Because the Supreme Court resolved the removal authority claim plaintiffs raised below, there is no work left for this Court to do, and the district court's order dismissing plaintiffs' claim should be affirmed.

B. Plaintiffs' New Removal Authority Claim Is Waived

In this appeal, plaintiffs proffer an entirely new claim for relief for the first time. They assert that, if not for the removal restriction, President Trump would have directed the Treasury Department either "to reduce the liquidation preference on Treasury's senior preferred stock to zero and end further increases to the liquidation preference" or "to convert Treasury's senior preferred stock to common stock," which likewise would result in Treasury's liquidation preference being written down to zero. Pls. Br. 44. They therefore ask this Court to direct the district court to enter an injunction "zeroing out Treasury's liquidation preference or converting Treasury's senior preferred stock to common stock." Pl. Br. 46.

This claim, and the relief sought, are unrelated to the adoption or implementation of the Third Amendment's net-worth dividend—the subject of plaintiffs' complaint. Until now, plaintiffs have not challenged Treasury's liquidation preference rights or rights associated with Treasury's liquidation preference under the Purchase Agreements, which are not a product of the Third Amendment and were not altered by that amendment.

It is black-letter law that a claim raised for the first time on appeal is waived. *See, e.g.*, *Sheet Metal Workers' Health & Welfare Fund of N. C. v. Law Office of Michael A. DeMayo, LLP*, 21 F.4th 350, 357 (6th Cir. 2021) (Absent exceptional circumstances, this Court does not "entertain new claims raised for the first time on appeal."). And for the same reason that the new claim is unrelated to the challenge to the Third Amendment raised in plaintiffs' complaint, it is also distinct from the subject of the Supreme Court's remand in *Collins,* which asked the Fifth Circuit to evaluate whether the removal restriction affected "the implementation of the third amendment" by a Senate-confirmed Director. 141 S. Ct. at 1789.

C. Plaintiffs' New Removal Authority Claim Is Without Merit

1. Plaintiffs' new removal authority claim would be without basis even if it were properly presented. The premise of the new claim is that President Trump wanted to reduce dramatically *Treasury*'s liquidation preference in the enterprises but was prevented from doing so by the removal restriction. But President Trump controlled Treasury's interest in the enterprises at all times and could have directed the Secretary of the Treasury to reduce that interest, if he so desired. And there is no indication that any FHFA Director would have objected to such a course.

Plaintiffs speculate that, absent the removal restriction, President Trump would have removed FHFA's confirmed Director Melvin Watt in January 2017 and replaced him with a different Director. Pls. Br. 38-40. They further contend that this hypothetical Director would have asked Treasury to either "(1) reduce the liquidation

preference on Treasury's senior preferred stock to zero and end further increases to the liquidation preference so long as the Companies did not make further draws on Treasury's funding commitment; or (2) convert Treasury's senior preferred stock to common stock." Pls. Br. 44. On this basis, plaintiffs ask this Court to enter an injunction reducing Treasury's liquidation preference to zero or converting Treasury's senior preferred stock to common stock. Pls. Br. 43-44.

Even accepting for purposes of argument the unsupported premise that President Trump wanted to dramatically reduce Treasury's interest in the enterprises without any corresponding benefit to Treasury or taxpayers, HERA's removal restriction did not impair his ability to pursue that goal. President Trump could have directed the Secretary of the Treasury to give up Treasury's dividend rights, to reduce its liquidation preference, or to trade in its preferred shares for less valuable common shares. And even assuming that FHFA, for some unidentified reason, would have opposed an attempt by Treasury to forgo a contractual benefit, nothing would have prevented Treasury from doing so unilaterally. Indeed, Treasury for years voluntarily waived the periodic commitment fee to which it was entitled under the initial stock purchase agreements. *See Collins*, 141 S. Ct. at 1773 n.4. In short, President Trump had plenary authority over Treasury's financial interests in the enterprises at all times and could have ordered the Secretary of Treasury to reduce those interests if he so desired.

Moreover, even assuming FHFA's approval were required, there is no basis for assuming that Director Watt (or any FHFA Director) would have opposed an amendment that, at no cost to the enterprises, eliminated Treasury's liquidation preference or converted Treasury from a preferred to common shareholder, thus paving the way for the enterprises' recapitalization. Among other things, Treasury's liquidation rights "limit the companies' ability to raise capital and debt" and "limit the companies' independence." *Roberts v. FHFA*, 889 F.3d 397, 405 (7th Cir. 2018). Had Treasury proposed significantly reducing its rights voluntarily, there is no reason to believe (and plaintiffs offer none) that Director Watt would have rebuffed that overture. To the contrary, as plaintiffs themselves highlight, Director Watt stated that the enterprises' inability to build internal capital reserves under the Third Amendment created a "serious risk" for the enterprises. RE 17, PageID #244 (Am. Compl.). Shareholders in other litigation have similarly emphasized that Director Watt described the Third Amendment as "especially irresponsible" because it limited the amount of internal, private capital the enterprises could retain, *see* Plaintiffs. Supplemental En Banc Br. 31, *Collins v. Yellen*, No. 18-20364 (5th Cir. Dec. 12, 2018) (quoting Melvin L. Watt, Director, FHFA, *Statement before the U.S. Senate Committee on Banking, Housing, and Urban Affairs* (May 11, 2017)).

Plaintiffs do not advance their argument by delineating "five steps" that they claim (Br. 41-42) would have been necessary to recapitalize the enterprises. With regard to the first two steps, as noted, Director Watt favored "permit[ting] [the

enterprises] to retain net worth rather than being forced to hand it over to Treasury" and "to build capital." Pl. Br. 42. He, like any FHFA Director, would have had every reason to welcome an amendment to the Purchase Agreements that reduced the enterprises' dividend payments to Treasury and allowed them to increase their capital. And, in fact, Director Watt negotiated such an amendment with President Trump's Treasury Secretary in December 2017. *See supra* p. 9 (describing amendment to the Purchase Agreements under which Treasury agreed to forego cash dividends so that the enterprises could retain additional capital). With regard to plaintiffs' third "step," Director Watt also promulgated a proposed rule governing "the amount of capital that would be required once [the enterprises] were under private control," Pls. Br. 42. *See* 83 Fed. Reg. 33,312 (July 17, 2018). That proposal, in fact, supplied the "foundation" for the final rule FHFA promulgated under Director Calabria. 85 Fed. Reg. 82,150, 82,150 (Dec. 17, 2020). And there is no reason to assume Director Watt would not have undertaken the minimal step of "hir[ing] investment bankers" to explore the possibility of a stock offering, plaintiffs' proposed fourth step. Pls. Br. 43. Indeed, plaintiffs nowhere suggest that Watt would have opposed any of these measures, and any such suggestion would be implausible, as is their assertion that Director Watt's tenure and the removal restriction prevented President Trump from taking any of their proposed steps.

2. Plaintiffs' argument is also at odds with events following Director Watt's resignation. President Trump chose two Directors during his Administration: an

Acting Director in January 2019 and a Senate-confirmed Director in April 2019. Order, RE 66, Page ID # 1765. These Directors, along with Treasury, "consistently reevaluated" the Purchase Agreements, *Collins*, 141 S. Ct. at 1781, and at no point did either Director negotiate a change in Treasury's rights along the lines plaintiffs propose (a change that, in plaintiffs' view, Treasury would have readily accepted).

Instead, under the confirmed Director chosen by President Trump (Mark Calabria), FHFA and Treasury twice altered the terms of purchase agreements. First, on September 27, 2019, the parties entered into a letter agreement under which the enterprises' internal capital buffers were increased from $3 billion each to $25 billion (for Fannie Mae) and $20 billion (for Freddie Mac).[7] In exchange for allowing the enterprises to retain additional capital, Treasury received a $22 billion increase in its liquidation preference in Fannie Mae and a $17 billion increase in its liquidation preference for Freddie Mac. Thus, far from negotiating a reduction in Treasury's liquidation rights—as plaintiffs argue the President's hypothetical Director would have done—the President's chosen Director agreed to an *increase* in those rights.

In January 2021, the parties agreed to amend the purchase agreements by suspending all quarterly cash dividend payments to Treasury until the enterprises build sufficient capital to meet specified thresholds. *Collins*, 141 S. Ct. at 1774. Once those

[7] U.S. Dep't of the Treasury, *Press Release: Treasury Department and FHFA Modify Terms of Preferred Stock Purchase Agreements for Fannie Mae and Freddie Mac* (Sept. 30, 2019), https://go.usa.gov/xF6NS.

thresholds are met, cash dividend payments to Treasury will resume. *Id.* at 1774-75. In the meantime, the dividends that the enterprises would have paid to Treasury in cash under the Third Amendment will be added to Treasury's liquidation preference. *Id.* Thus, rather than taking action to "reduce the liquidation preference on Treasury's senior preferred stock to zero and end further increases to the liquidation preference" or to "convert Treasury's senior preferred stock to common stock," Pls. Br. 44, President Trump's selected Director did precisely the opposite. He renegotiated the Purchase Agreements in a way that increases the enterprises' internal, non-Treasury-funded capital in exchange for an *increase* in Treasury's liquidation rights. (And, by shareholders' own account, the January 2021 agreement did "nothing" to aid them. *See* Plaintiffs Letter, *Collins v. Yellen*, No. 19-422 (U.S. Mar. 31, 2021)). In other words, when given the opportunity, President Trump selected a Director whose approach to the Purchase Agreements was entirely at odds with the approach plaintiffs now seek to attribute to the former President.

3. Disregarding this history, plaintiffs place considerable emphasis on a November 2021 letter in which now-former President Trump states that he would have fired Director Watt absent the removal restriction. Pls. Br. 37-38, 44-46. President Trump's letter, in fact, only underscores the fatal flaws in plaintiffs' theory of injury. As plaintiffs note, the Supreme Court suggested that the shareholders in *Collins* might be able to establish harm by showing "that the President had made a public statement expressing displeasure with actions taken by a Director and had

asserted that he would remove the Director if the statute did not stand in the way," *Collins*, 141 S. Ct. at 1789. The Supreme Court referred to the possibility of a statement the President "had made" during his time in office, not one made in a letter a year after leaving office.

In any event, plaintiffs would be entitled to the remedy they seek (an injunction zeroing out Treasury's liquidation preference at no cost to the enterprises) only if the removal restriction prevented President Trump from taking that action. As discussed above, President Trump could have directed the Secretary of the Treasury to sell Treasury's stock in the companies or otherwise reduce Treasury's interest at any time. President Trump's letter demonstrates that he had no interest in gratuitously reducing Treasury's stake in the enterprises. Instead, he states that his "Administration would have . . . sold the government's common stock in these companies at a huge profit." Pls. Br. 38. That assertion cannot be squared with plaintiffs' contention that the former President wanted simply to write-off Treasury's valuable liquidation preference or forego its more valuable preferred shares.

Moreover, there is little basis for assuming that President Trump felt bound by HERA's removal restriction. *See* Pl. Br. 36-40. The Trump Administration did not defend the constitutionality of the removal restriction and argued before the district court, the courts of appeals, and the Supreme Court that the provision was invalid and unenforceable. *See, e.g.*, Notice, RE 48, Page ID # 1495-96. The Administration was

of the view, later affirmed by the Supreme Court, that the President at all times had plenary authority to remove FHFA's Director if he so desired.

4. Plaintiffs underscore the error of their argument in attempting to derive their proposed remedy from a 2019 Housing Reform Plan issued by the Treasury Department. *See* Pls. Br. 43-44 (citing U.S. Dep't of the Treasury, *Housing Reform Plan* (Sept. 2019) (Housing Reform Plan)). That Plan does not suggest that Treasury would have forgone its liquidation preference or other rights at no cost to enterprises. The Plan identifies "[e]liminating all or a portion" of Treasury's liquidation preference or "exchanging all or a portion of that [liquidation preference] for common stock or other interests in the GSE" as one possible "option[]" among "[p]otential approaches to recapitalizing a GSE." Housing Reform Plan 27. The Plan also identifies other options, including "[a]djusting the variable dividend on Treasury's senior preferred shares" or "[p]lacing the GSE in receivership." *Id.* The Plan does not endorse any of the options or suggest that any of the options is likely, preferred, or even feasible. Instead, the Plan recognizes that each option "poses a host of complex financial and legal considerations" that would require "careful consideration." *Id.*

The Plan also makes clear that "protecting taxpayers" from future bailouts and ensuring that "the Federal Government is properly compensated for any explicit or implicit support it provides to the GSEs" should be central components of any reform of the enterprises. Housing Reform Plan 1, 28. And the Plan expressly states that, in the event Treasury were to allow the enterprises to recapitalize through

retaining more of their earnings, it should do so "with appropriate compensation to Treasury for any deferred or forgone dividends." *Id.* Nothing in the Plan suggests Treasury would simply have foregone its interests in the enterprises, notwithstanding its continued commitment of hundreds of billions of dollars of taxpayer funds, and restored the enterprises to the flawed model that necessitated the conservatorships and taxpayer-funded bailouts.

5. Plaintiffs cannot salvage their position by insisting, Pls. Br. 46-50, that the government bears the "burden" of proving that a constitutional violation caused no harm where a plaintiff makes "a *prima facie* showing that [an] unconstitutional removal restriction inflicted compensable harm," Pls. Br. 48-49, or by urging that the Court should resolve in their favor any "[u]ncertainty" over whether and how the Trump Administration would have amended the Purchase Agreements but for the unconstitutional removal provision, Pls. Br. 46.

The Supreme Court emphasized in *Collins* that "there is no reason to regard any of the actions taken by the FHFA in relation to the third amendment[, including actions taken by confirmed Directors,] as void." 141 S. Ct. at 1787; *see also id.* at 1793 (Thomas, J., concurring) (explaining that the "mere existence of an unconstitutional removal provision, too, generally does not automatically taint Government action by an official unlawfully insulated"). Thus, contrary to plaintiffs' suggested approach, the Supreme Court made clear that a validly appointed Director's actions are presumed lawful and thus any uncertainty over the validity of those actions is properly resolved

in the government's favor. Plaintiffs' novel burden-shifting approach cannot be squared with those instructions.

In any event, for the reasons explained above, plaintiffs have not established a "*prima facie* case" that the removal restriction prevented President Trump from renegotiating the Purchase Agreements to the plaintiffs' benefit. Nor is there any uncertainty over whether and how the Trump Administration would have amended the Purchase Agreements but for the removal provision. As discussed, to establish harm stemming from the removal restriction, plaintiffs would have to show that the removal restriction prevented President Trump from reducing Treasury's interest in the enterprises. As explained, plaintiffs cannot do so given that President Trump had plenary authority over the Secretary of the Treasury and could have directed the Secretary to forgo or reduce Treasury's interests at any time.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 10,103 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Gerard Sinzdak
Gerard Sinzdak

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

s/ Gerard Sinzdak
Gerard Sinzdak

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rule 28(b)(1)(A)(i), the government designates the following district court documents as relevant:

Record Entry	Description	Page ID # Range
RE 17	Am. Complaint	196-272
RE 66	Memorandum Opinion	1758-1818
RE 67	Order	1819
RE 69	Notice of Appeal	1821

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