No. 20-2071

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL ROP; STEWART KNOEPP; and ALVIN WILSON,

Plaintiffs-Appellants,

v.

THE FEDERAL HOUSING FINANCE AGENCY, in its capacity as Conservator of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation; SANDRA L. THOMPSON, in her official capacity as Acting Director of the Federal Housing Finance Agency; and THE DEPARTMENT OF THE TREASURY,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Michigan, No. 1:17-cv-497

BRIEF OF APPELLEES THE FEDERAL HOUSING FINANCE AGENCY AND ACTING DIRECTOR SANDRA L. THOMPSON

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The FHFA Defendants respectfully request oral argument. This appeal raises substantial and important issues, and involves requests for extraordinary relief.

PRELIMINARY STATEMENT

This case is a challenge by private shareholders of Fannie Mae and Freddie Mac, two government-sponsored enterprises that are currently in conservatorships, to a 2012 transaction between those enterprises' conservator, the Federal Housing Finance Agency ("FHFA"), and the U.S. Department of the Treasury. It is merely the latest in a long series of related litigation in numerous courts nationwide. Most notably, after this appeal was filed, the Supreme Court rejected the same claim that was the lead count in the complaint here: an argument that an unconstitutional restriction on the President's power to remove FHFA directors rendered the 2012 transaction invalid. *Collins v. Yellen*, 141 S. Ct. 1761 (2021). The district court here presciently rejected that theory on largely the same grounds that the Supreme Court later adopted as its own, so this Court should affirm the district court on those issues.

The main focus of plaintiffs' appeal is a different constitutional theory than *Collins*: that the 2012 transaction, known as the Third Amendment, should be invalidated because the FHFA Acting Director who approved it served longer than plaintiffs say the Appointments Clause allows. No precedent supports this novel theory, and, as the district court correctly found in dismissing it, adjudicating it would require probing non-justiciable matters such as the adequacy of a President's personnel selection and nomination efforts. The Eighth Circuit

recently affirmed dismissal of the same claim, *Bhatti v. FHFA*, 15 F.4th 848, 853 (8th Cir. 2021), and this Court should do likewise.

Plaintiffs also attempt to reinvent their failed removal-restriction claim in a way that is collateral to the 2012 Third Amendment and was never presented to the district court. They now hypothesize for the first time that FHFA's director in 2017-2018 "stymied" an alleged presidential agenda of "restoring the shareholders' value" by essentially wiping out Treasury's entire preferred stock value as it had existed before the Third Amendment. Appellant Brief (Br.) 15, 50.

Plaintiffs offer no basis for the notion that such an agenda existed, the extra-record sources they rely on indicate otherwise, and once the Trump Administration had its chosen leadership in place at FHFA in 2019-2020, FHFA and Treasury did the opposite of what an administration with such an objective would do. Yet plaintiffs claim "entitlement" to a mandatory permanent injunction forcing the current Administration to implement the alleged policy of the previous Administration, enriching plaintiffs' stock interests by billions of dollars at the expense of taxpayers.

The Court can reject this new theory on myriad grounds, beginning with failure to preserve it. Plaintiffs claim a part of *Collins* allowing a limited remand in that case for certain other discrete issues opened the door to asserting the new theory in this case, but that is wrong. Even if it were properly before the Court,

plaintiffs' new claim would be both barred on multiple threshold legal grounds, and implausible as a factual matter. This Court should affirm the judgment dismissing plaintiffs' claims.

STATEMENT OF JURISDICTION

The district court had jurisdiction over the claims pursuant to 28 U.S.C. § 1331. This Court has jurisdiction over the district court's final order pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the duration of service of FHFA's Acting Director in 2012 violated an implied limit in the Appointments Clause of the U.S. Constitution and, if so, whether such a violation would compel invalidation of the transaction with Treasury that the Acting Director approved that year.

II. Whether the judgment should be reversed in order to permit plaintiffs to bring an unpreserved claim that an unconstitutional for-cause limitation on the President's power to remove an FHFA Director caused FHFA and Treasury to refrain from fundamentally overhauling Treasury's investment to shift billions of dollars in value from Treasury to private shareholders.

STATEMENT OF THE CASE

A. Statement of the Facts

The following facts are essentially undisputed and set forth in numerous judicial opinions, including *Collins*, 141 S. Ct. 1761, the district court's opinion,

RE66, PageID#1758-66, and a decision of this Court rejecting a prior Third Amendment challenge, *Robinson v. FHFA*, 876 F.3d 220 (6th Cir. 2017).

In the midst of the 2008 economic crisis, Congress enacted the Housing and Economic Recovery Act ("HERA"). *Robinson*, 876 F.3d at 224. HERA created FHFA as regulator of Fannie Mae and Freddie Mac (collectively, the "Enterprises"), which are financial institutions chartered by Congress to provide liquidity to the mortgage market by purchasing residential loans. *Collins*, 141 S. Ct. at 1770-71; *Robinson*, 876 F.3d at 224; First Amended Complaint, RE17, PageID#200-201 (¶ 15).

Congress structured FHFA to be headed by a Director appointed by the President and confirmed by the Senate. Although HERA provided that the Director was removable by the President only for cause, 12 U.S.C. § 4512(b), the Supreme Court held in *Collins* that the "for cause" limitation was unconstitutional and unenforceable. 141 S. Ct. at 1783-87.

FHFA also has three Deputy Directors. 12 U.S.C. § 4512(c)-(e). To ensure continuity of operations during a vacancy in the office of Director, Congress empowered the President to designate one of those Deputy Directors to serve as acting Director in that circumstance. *Id.* § 4512(f). The unconstitutional removal restriction did not apply to acting directors. *Collins*, 141 S. Ct. at 1781-83.

HERA empowered the Director to appoint FHFA as conservator or receiver

of the Enterprises. *Id.* at 1772; *Robinson*, 876 F.3d at 224-25. Consistent with other financial institution conservatorship and receivership statutes, Congress provided that "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver." 12 U.S.C. § 4617(f).

Separate from creating FHFA, and anticipating an imminent need for a vast infusion of taxpayer funding into the Enterprises, Congress authorized the Treasury Department to purchase securities from the Enterprises to "provide stability to the financial markets," "prevent disruptions in the availability of mortgage finance," and "protect the taxpayer." 12 U.S.C. §§ 1455(l), 1719(g).

In September 2008, shortly after HERA was enacted and as financial markets plunged into tumult, FHFA placed the Enterprises into conservatorships. *Robinson*, 876 F.3d at 225. FHFA, in its capacity as Conservator, simultaneously entered into preferred stock agreements with Treasury pursuant to Treasury's securities purchase authority. By those agreements, Treasury committed to provide each Enterprise, on a quarterly basis, any capital necessary to avoid insolvency, up to a cumulative limit of $100 billion. *Collins*, 141 S. Ct. at 1772-73; *Robinson*, 876 F.3d at 225. In exchange, Treasury received newly issued shares of Enterprise senior preferred stock with "four key entitlements." *Collins*, 141 S. Ct. at 1773; *see* Preferred Stock Purchase Agreements, RE23-1,

PageID#318-346; Preferred Stock Certificates, RE23-2, PageID#347-365.

The first "key entitlement" was "a senior liquidation preference equal to $1 billion in each company, with a dollar-for-dollar increase every time the company drew on the capital commitment." *Collins*, 141 S. Ct. at 1773. A provision that has endured through several amendments to the present day requires that in the event any new Enterprise stock is ever issued to the public, at least some of the proceeds be used to pay down the liquidation preferences. RE23-2, PageID#350-51, 359-61.

A second entitlement consisted of quarterly cash dividends at an annual rate of 10% of Treasury's outstanding liquidation preference. *Collins*, 141 S. Ct. at 1773. The third and fourth entitlements were a warrant to purchase 79.9% of the Enterprises' common stock, and a periodic commitment fee. *Id.*

In August 2009, the original FHFA Director, James B. Lockhart III, resigned. RE17, PageID#218 (¶ 55). On August 25, 2009, President Obama designated career federal employee Edward DeMarco, who was serving as one of FHFA's Deputy Directors, to serve as Acting Director pursuant to 12 U.S.C. § 4512(f). *Id.* (¶ 56).

On November 12, 2010, the President nominated Joseph Smith as FHFA Director. *Id.* at PageID#219 (¶ 57); 156 Cong. Rec. S7911 (Nov. 15, 2010). Although the Senate Banking Committee approved the nomination, opposition

blocked a vote in the full Senate, eventually forcing the President to withdraw the nomination. RE17, PageID#219 (¶ 57); 156 Cong. Rec. S11071 (Dec. 22, 2010). Therefore, Mr. DeMarco continued as Acting Director in 2011 and 2012 despite an alleged "desire" on the part of the Obama Administration for "new leadership at FHFA." RE17, PageID#222 (¶ 62); *see id.* at PageID#220, 222 (¶¶ 60, 62) (alleging the Administration "pressure[d]" Acting Director DeMarco to resign because he "resisted" the Administration's "most significant housing finance policies").

Meanwhile, the Enterprises made numerous and sizable draws on Treasury's funding commitment, causing the liquidation preferences to swell. The parties twice amended the preferred stock agreements to expand the available funding beyond the initial $100 billion per Enterprise limit. *Collins*, 141 S. Ct. at 1773; *Robinson*, 876 F.3d at 225. By August 2012, the Enterprises together had drawn $187 billion, and the liquidation preferences combined stood at $189 billion (including an additional $1 billion seed amount per Enterprise). *Collins*, 141 S. Ct. at 1773; *Robinson*, 876 F.3d at 225-26. The resulting combined annual dividend obligation of $18.9 billion exceeded the Enterprises' average earnings per year historically, and the Enterprises were increasingly forced to draw money from Treasury just to make their quarterly dividend obligations to Treasury. *Collins*, 141 S. Ct. at 1773; *Robinson*, 876 F.3d at 226.

Against this backdrop, in August 2012 the parties amended the preferred stock purchase agreements for a third time—hence, the "Third Amendment"—to adjust the various forms of consideration paid to Treasury in exchange for its extraordinary funding commitment. *Collins*, 141 S. Ct. at 1773-74; *Robinson*, 876 F.3d at 226; *see* Third Amendment, RE23-3, PageID#367-382. Acting Director DeMarco signed the Third Amendment on behalf of FHFA as Conservator.

The Third Amendment changed the dividend formula from 10% of the liquidation preference to a variable dividend equal to each Enterprise's net worth at the end of each quarter. *Collins*, 141 S. Ct. at 1774; *Robinson*, 876 F.3d at 226. Thus, unless an Enterprise's total net worth in a given quarter exceeded the amount of the buffer, it would owe no dividend; if an Enterprise's net worth exceeded the buffer, it would pay the amount of that excess as a dividend, whether greater or less than the prior fixed-percentage dividend obligation. The Third Amendment also suspended the periodic commitment fee otherwise due to Treasury. *Collins*, 141 S. Ct. at 1774; *Robinson*, 876 F.3d at 226 n.4. It did not change the liquidation preferences.

In May 2013, President Obama nominated Rep. Melvin L. Watt as FHFA Director. District Court Opinion, RE66, PageID#1765. The Senate Banking Committee approved the nomination, 159 Cong. Rec. S5799 (July 18, 2013), but it was filibustered in the full Senate, 159 Cong. Rec. S7706 (Oct. 31, 2013). Rep.

Watt was confirmed only after the Senate abolished the filibuster for certain presidential nominees. 159 Cong. Rec. S8417-18 (Nov. 21, 2013); 159 Cong. Rec. S8593 (Dec. 10, 2013). Over eight months after being nominated, Rep. Watt was sworn in as FHFA Director on January 6, 2014, for a five-year term, ending Mr. DeMarco's tenure as Acting Director. RE17, PageID#219 (¶ 57); RE66, PageID#1765.

When Mr. Watt's term ended in January 2019, President Trump designated Joseph Otting to serve as acting Director. RE66, PageID#1765. That same month, President Trump nominated Dr. Mark Calabria to succeed Director Watt. *Id.* The Senate confirmed Dr. Calabria and he began serving as Director in April 2019. *Id.* Dr. Calabria served as Director of FHFA until June 2021. Br. 14.

B. This Litigation

Enterprise shareholders Michael Rop, Stewart Knoepp, and Alvin Wilson filed this suit in June 2017, nearly five years after the Third Amendment, and after numerous litigation challenges to it had already failed. Plaintiffs later amended their complaint. The First Amended Complaint alleged that the Third Amendment "expropriate[d] [their] [i]nvestments," thereby "eliminating" their economic rights. RE17, PageID#240, 245, 247 (¶¶ 98, 109, 112). Plaintiffs sought to invalidate the Third Amendment, which as noted above related specifically to Treasury's dividend formula, based on several constitutional theories. Plaintiffs never alleged

that any other aspect of the preferred stock, *e.g.*, the liquidation preferences as they existed independent of the Third Amendment, expropriated their economic rights.

Plaintiffs alleged two constitutional theories that remain live in this appeal. In Count I, they alleged that the Third Amendment must be invalidated because it violated the separation of powers for FHFA's Director to be removable only for cause. *Id.* at PageID#257-60 (¶¶ 134-145). In Count III, plaintiffs sought invalidation of the Third Amendment on the ground that Mr. DeMarco had served as acting director for longer than permitted by the Appointments Clause when he approved the Third Amendment. *Id.* at PageID#262-66 (¶¶ 152-161).[1]

In their prayer for relief, plaintiffs sought an order "[v]acating and setting aside the third amendment," "[e]njoining Defendants ... from implementing, applying, or taking any action whatsoever pursuant to the third amendment," "[e]njoining Treasury ... to return to Fannie and Freddie all dividend payments made pursuant to the Net Worth Sweep," and "[d]eclaring that FHFA's structure violates the separation of powers." *Id.* at PageID#271. All aspects of the prayer for relief related singularly to the Third Amendments and dividends paid

[1] Plaintiffs also alleged other counts below, including nondelegation and other separation-of-powers theories, that the district court dismissed and plaintiffs no longer pursue on appeal.

thereunder, and none to the liquidation preferences or any other aspect of the preferred stock.

Defendants moved to dismiss and plaintiffs moved for summary judgment, attaching numerous documents. After extensive briefing, the district court dismissed plaintiffs' claims in a meticulous opinion. The court held, on the one hand, that the removal protection for the FHFA Director was "almost certainly unconstitutional," but, on the other, that the protection was "not in any way connected to the injuries in this particular case." RE66, PageID#1798, 1806. The district court grounded its decision on the fact that the Third Amendment was approved by an Acting Director not covered by the removal protection. *Id.* at PageID#1798-1805. Thus, "to the extent there is a constitutional defect in the structure of the FHFA and the tenure protection for its Director, plaintiffs cannot show a causal connection between that defect and their injuries." *Id.* at PageID#1807. Accordingly, the district court dismissed plaintiffs' claim relating to the for-cause removal provision.

The district court also dismissed plaintiffs' Appointments Clause claim. *Id.* at PageID#1807-12. The court held that the principal standard proposed by plaintiffs for how long an acting official could serve—"reasonable under the circumstances"—was non-justiciable. *Id.* at PageID#1809-11. To determine what was "reasonable," the court would have to evaluate the diligence of the President's

and Senate's nomination and confirmation efforts, *i.e.*, "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 the Court is ill-equipped to assess." *Id.* at PageID#1810. These factors would be "fraught with too much complexity and subjectivity to be objectively meaningful." *Id.* The court further rejected an alternative rule suggested by plaintiffs—a *per se* two-year limit derived by analogy to the Recess Appointments Clause and Twentieth Amendment—as unsupported and "wholly arbitrary." *Id.* at PageID#1811-12.

C. The Supreme Court's Decision in *Collins*

A short time before the district court's decision in this case, the Supreme Court had granted certiorari in *Collins*—a case presenting the same removal restriction claim, as the basis for challenging the same FHFA action (the Third Amendment), as in this case. *Collins v. Mnuchin*, 141 S. Ct. 193 (2020). This appeal was stayed pending the Supreme Court's decision.

The Supreme Court held that FHFA's removal provision was unconstitutional, just as the district court here had predicted. 141 S. Ct. at 1783-87.[2] Equally in line with the district court's reasoning in this case, the Court

[2] The Court also held that HERA's provision barring judicial action restraining or affecting the Conservator's functions or powers, 12 U.S.C. § 4617(f), required dismissal of other claims by the *Collins* plaintiffs. *Collins*, 141 S. Ct. at 1775-78.

Footnote continued on next page

declined to grant the requested remedy of invalidating the Third Amendment because the removal provision was inapplicable to FHFA Acting Directors. *Id.* at 1781-83. Because the Third Amendment was approved by an Acting Director, that fact alone "defeat[ed]" the request by plaintiffs in that case to set aside the Third Amendment in its entirety. *Id.* at 1787.

That holding did not fully dispose of the *Collins* plaintiffs' claims, however. The *Collins* plaintiffs had sought "an order enjoining the FHFA and Treasury from taking any further action to implement the third amendment," *id*. at 1775, and they argued to the Supreme Court that regardless of the Acting Director's status, confirmed Directors who clearly enjoyed removal protection "ordered and approved the payment of Net Worth Sweep dividends" and "directed" its legal defense. Reply Br. 13, *Collins v. Yellen*, No. 19-422 (U.S. S. Ct.).

The Court by and large rejected that argument as well. The Court called plaintiffs' position that such implementing actions were "void *ab initio*" "neither logical nor supported by precedent." 141 S. Ct. at 1787. An unconstitutional removal provision does not undermine an official's authority, so "there is no reason to regard any of the actions taken by the FHFA in relation to the third amendment as void." *Id.* "[T]here is no basis for concluding that any head of the

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That part of *Collins* addressed the same issue this Court confronted in *Robinson* and validates this Court's decision there.

FHFA lacked the authority to carry out the functions of the office," and "the unlawfulness of the removal provision does not strip the Director of the power to undertake the other responsibilities of his office, including implementing the third amendment." *Id.* at 1788 & n.23.

The Supreme Court stopped just short, however, of shutting the door entirely on plaintiffs' retrospective claims relating to Third Amendment implementation. The Court held that, while the removal provision never deprived any FHFA official of authority to act, and was never enforceable, "[t]hat does not necessarily mean, however, that the shareholders have no entitlement to retrospective relief." *Id.* at 1788. The "possibility" of the removal provision inflicting harm by affecting Third Amendment implementation "cannot be ruled out," the Court explained. *Id.* at 1789. Such harm could occur if "the president had attempted to remove a Director but was prevented from doing so by a lower court decision holding that he did not have 'cause' for removal," or if "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 his way." *Id.* While finding the situation in this case "less clear-cut," and acknowledging countervailing arguments that the President's undisputed plenary control over Treasury gave him control of all relevant matters, the Court gave the *Collins* plaintiffs the benefit of the doubt by allowing such remaining issues to be

"resolved in the first instance by the lower courts." *Id.*

Several Justices expressed skepticism about plaintiffs' prospects in the limited remand. Writing for herself and two other Justices, Justice Kagan observed that (1) "all of the FHFA's policies were jointly 'created [by] the FHFA and Treasury'" and (2) the Treasury Secretary was always "subject to at will removal by the President" were "sufficient to answer the question the Court kicks back." *Id.* at 1802 (Kagan, J., concurring) (quoting *Collins v. Mnuchin*, 938 F.3d 553, 594 (5th Cir. 2019) (en banc)). There is no need to "speculate about whether appropriate presidential oversight would have stopped" any FHFA implementing actions because "[w]e know that the President, acting through the Secretary of the Treasury, could have stopped [them] but did not." *Id.* (quoting *Collins*).[3]

Justice Thomas likewise "seriously doubt[ed] that the shareholders can demonstrate that any relevant action by an FHFA Director violated the Constitution." *Id.* at 1795 (Thomas, J., concurring). He emphasized that the fact that "a removal restriction is unlawful in the abstract" does not make agency actions unlawful. *Id.* at 1789. "[B]efore a court can provide relief, it must

[3] Justice Gorsuch, who believed the Court should have directly granted more substantial relief to the shareholders, for his part criticized the remand as a "speculative enterprise" expected to "go nowhere." 141 S. Ct. at 1799 (Gorsuch, J., concurring in part).

conclude that either the adoption or implementation of the Third Amendment was unlawful," not just that the removal restriction was unlawful. *Id.* at 1790.

Justice Thomas surveyed possible theories that might be used to bridge the gap between an unconstitutional removal restriction and unlawful agency action, and found them all lacking. In particular, because the unconstitutional removal restriction was never operative or enforceable anyway, a claim that it affected agency action could only be brought as an Administrative Procedure Act claim that "a misunderstanding about the scope of the President's removal authority" influenced the agency's decision-making. *Id.* at 1794 & n.7. In the context of the shareholders' claims against the Conservator, such a claim would run up against HERA's bar on judicial action restraining or affecting Conservator functions. *Id.* at 1794 n.7. In this novel area, moreover, Justice Thomas cautioned against "creat[ing] a new restriction on a coequal branch" to be enforced "through a new private right of action" because "[d]oing so places great stress upon the Constitution's separation of legislative and judicial power." *Id.* at 1794 (quotation marks omitted). In all events, "[a]bsent an unlawful act, the shareholders are not entitled to a remedy." *Id.* at 1795.

SUMMARY OF THE ARGUMENT

I. The district court did not err by dismissing plaintiffs' Appointments Clause claim. Supreme Court precedent approves the common practice of acting

officials, and Congress chose not to limit the duration of an FHFA Acting Director's service. Plaintiffs offer two alternate standards for evaluating how long is too long for an acting official to serve, but as the district court held, neither is tenable. The "reasonable under the circumstances" standard raises non-justiciable issues, and the *per se* two-year limit improperly transplants concepts from the non-analogous Recess Appointments Clause. This Court could also affirm on the alternative grounds that plaintiffs' claim is precluded by the *de facto* officer doctrine, or that plaintiffs have not established that FHFA Acting Director's service as of August 2012 was unreasonable given all of the surrounding circumstances.

II. *Collins* dictates affirmance with respect to the sole Article II removal-restriction claim pleaded in the complaint, which sought invalidation of the Third Amendment. Plaintiffs do not press any claims that any acts implementing the Third Amendment were unlawful, so the *Collins* remand is irrelevant here. The new claim asserted for the first time on appeal, that the removal restriction prevented Treasury and the Conservator from overhauling their relationship in a way that would shift vast economic value to junior shareholders, is not preserved.

Even if properly before the Court, the new claim would be precluded by several threshold legal bars, including 12 U.S.C. § 4617(f), which bars judicial interference with Conservator operations and financial decisions; *Norton v.*

Southern Utah Wilderness Alliance, 542 U.S. 55 (2004), which narrowly limits lawsuits seeking to force agencies to take affirmative actions; and separation-of-powers problems inherent in seeking to compel the Executive Branch to implement alleged policy preferences of a prior Administration. The new theory is also implausible as a factual matter, collapsing upon even minimal scrutiny.

STANDARD OF REVIEW

This Court reviews the district court's grant of a motion to dismiss *de novo*. *Bishop v. Lucent Techs., Inc.*, 520 F.3d 516, 519 (6th Cir. 2008).

ARGUMENT

I. Plaintiffs' Appointments Clause Claim is Without Merit

The district court correctly rejected plaintiffs' novel Appointments Clause claim challenging Mr. DeMarco's service as FHFA Acting Director. While Congress can and often does limit the duration of acting officials' service, it chose not to do so in HERA. The Appointments Clause itself imposes no specific limit on acting officials, who are deemed by Supreme Court precedent to be "inferior officers" not requiring Senate confirmation. While plaintiffs ask the Court to make new law in this area, neither of the alternative standards they propose for judging when an acting official has served too long is tenable. As the district court correctly held, (a) "reasonable under the circumstances" is "fraught with too much complexity and subjectivity" to be justiciable, and (b) a *per se* two-year limit

transplanted from the Recess Appointments Clause would be "wholly arbitrary." RE66, PageID#1810-11.

This Court could alternatively affirm the judgment on either of two alternative grounds not reached by the district court. As the Eighth Circuit held in affirming dismissal of the same claim, the *de facto* officer doctrine precludes the claim. *Bhatti v. FHFA*, 15 F.4th 848, 852-53 (8th Cir. 2021). If the Court opts to reach the merits, it could affirm because plaintiffs have not established that Mr. DeMarco's duration of service as of August 2012 was unreasonable under the circumstances.

A. Acting Officials are Constitutionally Permitted and Common Practice

The President designated Mr. DeMarco, a Deputy Director of FHFA, to serve as Acting Director under 12 U.S.C. § 4512(f) upon the resignation of the prior Director. That designation was fully consistent with HERA and the Appointments Clause.[4] While that Clause requires Senate confirmation of principal officers, it is well-settled that the President may "direct certain officials to temporarily carry out the duties of a vacant [principal] office in an acting capacity,

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[4] In district court briefing albeit not in their complaint, plaintiffs advanced an argument that the designation was invalid. The district court properly rejected this claim, RE66, PageID#1812-14, plaintiffs have not appealed it, and it is not before the Court.

without Senate confirmation." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 934 (2017). Such designations are critical to prevent important responsibilities from "go[ing] unperformed if a vacancy arises and the President and Senate cannot promptly agree on a replacement." *Id*.

The Supreme Court upheld the constitutionality of this common practice in *United States v. Eaton*, 169 U.S. 331 (1898). "Because the subordinate officer is charged with the performance of the duty of the superior for a limited time, and under special and temporary conditions, he is not thereby transformed into the superior and permanent official." *Id.* at 343.

Congress can and sometimes does limit the duration of acting officials' service by statute. For example, the Vacancies Act provides general authority for designation of acting officials across the Government, subject to a 210-day time limit, albeit one that can be tolled and extended in certain circumstances. 5 U.S.C. § 3346; *see* Anne Joseph O'Connell*, Actings*, 120 Colum. L. Rev. 613, 630-31 (2020) (explaining how Vacancies Act extensions and tolling can sometimes result in acting service being permitted to continue for over two-and-a-half years).

However, the Vacancies Act does not displace, but rather "operate[s] alongside," acting official provisions within enabling statutes for individual agencies. *Guedes v. ATF*, 356 F. Supp. 3d 109, 143 (D.D.C. 2019); *see* 5 U.S.C. § 3347(a)(1)(A). If such an agency-specific succession provision exists, the

President can use either the Vacancies Act or the agency-specific authority to designate an acting official. If the President uses the agency-specific authority, the time limits in the Vacancies Act do not apply. *See*, *e.g.*, *Casa de Maryland, Inc. v. Wolf*, 486 F. Supp. 3d 928, 955 (D. Md. 2020). In many such agency-specific provisions, Congress has declined to "place time restrictions on the length of an acting officer." S. Rep. No. 105-250, at 16-17 (1998).

HERA is one of those agency-specific statutes without a time limit. No court has held that the Constitution overrides such congressional judgments not to impose a specific time limit on the duration of an acting official's service. There are many examples of officials performing the functions of agency leadership or other senior roles in an acting capacity for multiple-year periods.[5]

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[5] *See*, *e.g.*, O'Connell, 120 Colum. L. Rev. at 631 (ATF had acting directors for over seven years); *id.* at 653-54 (acting administrator of FAA for 19 months); *id.* at 701 (acting head of DEA for two-and-a-half years); U.S. Gov't Accountability Off., GAO-18-270, *Inspectors General* 13 (2018) (vacancies of 4 to almost 6 years in inspector general offices at multiple cabinet departments); *SW Gen.*, 137 S. Ct. at 937 (NLRB acting general counsel for over three years); Social Security Administration, History, https://bit.ly/3gXKvXe (Social Security Administration had Acting Administrator for nearly four years); *Doolin Sec. Sav. Bank v. OTS*, 139 F.3d 203, 205 (D.C. Cir. 1998) (Office of Thrift Supervision Acting Director served nearly four years); Consumer Product Safety Commission, Commissioners, https://bit.ly/3H1VNo6 (the Commission had Acting Chair for two-and-a-half years).

B. Plaintiffs' "Reasonable Under the Circumstances" Standard is Non-Justiciable

Plaintiffs' principal argument below was that Mr. DeMarco served as acting director longer than "reasonable under the circumstances." The district court correctly found that standard unworkable and non-justiciable. To be clear, plaintiffs cite no case in which a court has applied such a test. Rather, as the district court observed and plaintiffs concede, it is derived from an Office of Legal Counsel ("OLC") opinion providing legal advice to the Executive Branch. Br. 23 (citing *Status of the Acting Director, OMB*, 1 Op. O.L.C. 287, 290 (1977)). That opinion advised that even absent an express statutory time limit, "the President should submit a nomination" within a "reasonable time after the occurrence of a vacancy." *Id.* But plaintiffs offer no basis for converting this internal advice into a new actionable "reasonableness" limitation to be policed through private litigation and judicial fact-finding.

Courts "should be reluctant to create a new restriction on a coequal branch and enforce it through a new private right of action" because "[d]oing so places great stress upon the Constitution's separation of legislative and judicial power." *Collins*, 141 S. Ct. at 1794 (Thomas, J., concurring) (quotation marks omitted). Making a new cause of action out of OLC's "reasonable time" advice would be particularly problematic because the factors OLC identified as guiding the evaluation of how much time is "reasonable" lack "judicially discoverable and

manageable standards." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 197 (2012). Those factors include:

> the specific functions being performed by the Acting Director; the manner in which the vacancy was created (e.g., whether near the beginning or the end of a session of the Senate); whether the President has sent a nomination to the Senate; and particular factors affecting the President's choice (e.g., a desire to appraise the work of an Acting Director) or the President's ability to devote attention to the matter.

RE66, PageID#1810 (quoting 1 Op. O.L.C. at 290); *see also Dep't of Energy—Appointment of Interim Officers—Dep't of Energy Organization Act*, 2 Op. O.L.C. 405, 410 (1978) (additionally considering "difficulty of finding suitable candidates" for "complex and responsible positions").

Those matters are outside the judicial purview. As the district court observed, plaintiffs' standard "would require the 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 that the Court is ill-equipped to assess." RE66, PageID#1810; *accord Bhatti v. FHFA*, 332 F. Supp. 3d 1206, 1219-20 (D. Minn. 2018) ("[I]t is difficult to imagine what such litigation would look like or how the normal tools of discovery would operate. ('Mr. President, I see that you spent two hours meeting with the ambassador from Aruba on March 23. Wasn't it more important for you to devote attention to the affairs of the FHFA?')"), *aff'd on other grounds*, 15 F.4th 848. A President's deliberations

regarding his personnel choices, balancing of competing demands on his attention, and navigation of obstacles to Senate confirmation of his nominees are among the most delicate and privileged matters in government. *See*, *e.g.*, *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 381-82 (2004) (emphasizing intractable separation-of-powers problems raised by inquiry into President's deliberations and agenda).

Plaintiffs' indeterminate "reasonable under the circumstances" standard would also "throw the functioning of the government into intolerable uncertainty." *Bhatti*, 332 F. Supp. 3d at 1218-19. Because the analysis would be done later by a judge "with the benefit of hindsight," and the relevant "circumstances" are constantly fluctuating, in real time "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." *Id.* at 1219.

Plaintiffs' emphasis on the important "judicial role in safeguarding the separation of powers" (Br. 26) misses the point. To be sure, courts do not generally shrink from issues touching on the division of power between the Branches. The problem is that, unlike the separation-of-powers cases plaintiffs rely on, the claim plaintiffs advance here would require probing the *bona fides* of

coordinate branches in performing their constitutionally assigned responsibilities in a particular instance. *See Bhatti*, 332 F. Supp. 3d at 1220 (contrasting "the reasonableness of DeMarco's tenure" with justiciable issues like "the meaning of [a Senate] 'recess,'" which "is a static question of law that is capable of prospective determination").

The Court should give no weight to plaintiffs' hyperbole that the opinion below "effectively nullifies both the Appointments Clause and the Recess Appointments Clause" and now Presidents will "simply fill out the administration with 'acting' principal officers for an unlimited duration." Br. 27. Courts cannot assume Presidents will shirk their Article II nomination responsibilities absent judicial superintendence. In fact, plaintiffs' own account of the acting designation in this case contradicts their false specter of presidential abuse. By plaintiffs' telling, President Obama did not want DeMarco in the position in the first place, but reluctantly accepted him because he was one of the Deputy Directors the statute authorized to act as Director. RE17, PageID#218 (¶ 56); *see also id.* at PageID#221-22 (¶ 62) (alleging the Obama Administration had "vehement policy disagreements" with DeMarco and a strong "desire for new leadership at FHFA").

Moreover, the time limits in the Vacancies Act are designed to address potential concerns about overuse of acting designations. *See* 5 U.S.C. § 3346. While those limits do not apply to all acting officials (such as FHFA acting

directors), *see supra* at 20-21, nothing would stop Congress from amending the Act to extend its reach if it perceived abuse. Further, "attempt[s] to circumvent the right of the Senate to participate in the appointment process" tend to draw "political reprisals and repercussions," and acting officials are often regarded as "caretaker[s] without a mandate to take far-reaching measures." *Acting Officers*, 6 Op. O.L.C. 119, 121 (1982); *NLRB v. Noel Canning*, 573 U.S. 513, 541 (2014) ("Acting officials may have less authority than Presidential appointments."). These built-in "practical and political" checks (6 Op. O.L.C. at 119) obviate any need for courts to disregard well-established justiciability limits and make new law to police perceived abuses.

C. The Recess Appointments Clause is Inapplicable

Plaintiffs' argument that "[t]he Appointments Clause and Recess Appointments Clause establish a bright-line rule" that acting officials can serve "for no more than two years" (Br. 16) is equally without merit. While perhaps "more manageable," a *per se* two-year limit would be "wholly arbitrary." RE66, PageID#1811.

As an initial matter, the Recess Appointments Clause contains no reference to two years. Rather, plaintiffs derive two years by combining the Recess Appointments Clause with a separate constitutional provision, the Twentieth Amendment. RE17, PageID#265 (¶ 159). The former provides that an

appointment during a Senate recess "expire[s] at the End of [the Senate's] next Session," U.S. Const. art. II, § 2, cl. 3, while the latter requires the Senate to "assemble at least once in every year," U.S. Const. amend XX. This means a recess appointment at the very beginning of a Senate term could run for a full two years (though the limit on any given recess appointment will be a product of the appointment date relative to the Senate calendar). Because the two constitutional provisions were adopted 150 years apart, however, it is spurious to read them as reflecting a deliberate policy judgment about a specific "time that the Framers believed it would be reasonable for someone to act as a principal officer without Senate confirmation." RE17, PageID#265 (¶ 159). Rather, two years is a byproduct of mechanical interaction of two unrelated provisions.

Moreover, "recess appointees are not analogous to acting officers." *Bhatti*, 332 F. Supp. 3d at 1221. As the district court explained, to prevent abuse of the recess appointments mechanism, it made sense for the Framers to "tie the terms of recess appointments to a fixed length of time after the Senate returns from its recess and is available to fulfill its role in the appointment process." RE66, PageID#1811. Designation of acting officers, in contrast, "allow[s] executive agencies to continue functioning when the position filled by the appointed officer is vacant or the appointed officer is unavailable. These vacancies can arise at any time and their duration may be unpredictable." *Id.*; *accord Designation of Acting*

Solicitor of Labor, 26 Op. O.L.C. 211, 214-15 (2002) ("An acting official does not hold the office, but only performs the functions and duties of the office" while continuing to occupy a permanent, lower-ranking position, whereas a recess appointee "is appointed by one of the methods specified in the Constitution itself; he holds the office; and he receives its pay.")

Recess appointments and acting designations also differ in another salient way: "[w]hen making a recess appointment, the President has unlimited authority; he can appoint anyone of his choosing with no oversight whatsoever." *Bhatti*, 332 F. Supp. 3d at 1221. The recess appointment power cannot be cabined by legislation, so the "End of [the Senate's] next Session" constitutes "[t]he *sole* limit on this extraordinary authority over two of the three branches of government." *Id.* Congress, however, "has the power to control the President's choice of acting officers," including by limiting the field of eligible candidates and imposing durational limits where it sees fit. *Id.* (citing 5 U.S.C. § 3345, 12 U.S.C. § 4512(f)).

Declaring a heretofore unknown *per se* two-year limit on acting officials would also threaten collateral damage well beyond this case. As noted above, Mr. DeMarco is far from the only official who has served in an acting role for multiple years, and a two-year limit would throw the validity of those other officials' service into question. *See supra* at 21 n.5. A *per se* two-year limit would also

imply the unconstitutionality of many agency statutes besides HERA in which Congress opted to impose either no time limit at all on acting officials, or a variable limit that could result in service exceeding two years in particular cases. *See supra* at 20-21. The Court should decline plaintiffs' invitation to take a novel step with such far-reaching potential consequences.

D. The *De Facto* Officer Doctrine and Ratification by Subsequent Directors Preclude Plaintiffs' Appointments Clause Claim

While the district court's reasons for dismissing the Appointments Clause claim were sound, this Court could pretermit those issues by affirming based on the *de facto* officer doctrine or ratification, as the Eighth Circuit did in *Bhatti*. *See Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.*, 280 F.3d 619, 629 (6th Cir. 2002).

"The *de facto* officer doctrine confers validity upon acts performed by a person acting under 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) (citing *Norton v. Shelby Cty.*, 118 U.S. 425, 440 (1886)); *Bhatti*, 15 F.4th at 852-53. This helps avoid 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." *Ryder*, 515 U.S. at 180; *Bhatti*, 15 F.4th at 853. It also "protect[s] the public by insuring the orderly functioning of the government." *Ryder*, 515 U.S. at 180; *Bhatti*, 15 F.4th at 853.

"The doctrine has generally been applied to individuals who are in possession of an office, are performing the duties of the office, and who maintain an appearance of right to the office." *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 17 (2d Cir. 1981) (citing *Waite v. Santa Cruz*, 184 U.S. 302, 323 (1902)). It has been specifically recognized as validating actions by acting officials challenged for having served an excessively long time. *Department of Energy*, 2 Op. O.L.C. at 411.

Courts do not hesitate to apply the *de facto* officer doctrine to protect past acts of executive officials from invalidation in Appointments Clause suits. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 142 (1976) ("accord[ing] de facto validity" to FEC's "past acts" despite Appointments Clause problem with FEC's composition); *Bhatti*, 15 F.4th at 852-53; *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 861-62 (1st Cir. 2019), *rev'd on other grounds*, 140 S. Ct. 1649 (2020); *Franklin Sav. Ass'n v. Director, OTS*, 934 F.2d 1127, 1150 (10th Cir. 1991); *see also Andrade v. Lauer*, 729 F.2d 1475, 1496-1500 (D.C. Cir. 1984) (treating *de facto* officer doctrine as generally applicable to Appointments Clause claim, subject to exception for claims filed at or around the time of the challenged action).

As the Eighth Circuit has already held, the *de facto* officer doctrine covers Acting Director DeMarco and his adoption of the Third Amendment in 2012. He was designated to act as director under proper statutory authority, was openly

performing those functions, and was perceived as such by the public and market participants, with numerous entities relying on his acts and decisions as being those of FHFA.

Indeed, the nature of plaintiffs' challenge here exemplifies the stability and reliance policies animating the *de facto* officer doctrine. Unlike plaintiffs' cases declining to apply the doctrine, which all involve discrete adjudications affecting only the parties, the attack here targets decade-old amendments to funding agreements with national significance and the aim of "market stability." *Collins*, 141 S. Ct. at 1777. This case also stands out because plaintiffs raise an issue of first impression, asking the Court to make new law and invalidate agency action by applying an indeterminate standard in hindsight; it is not as if a President and agency disregarded some established judicial rule limiting the amount of time an acting officer could serve. Plaintiffs also overlook that regardless of their attack on Mr. DeMarco's tenure as Acting Director, he continued validly serving in his permanent position of Deputy Director and plaintiffs offer no reason why he could not have approved the Third Amendment in that capacity.

Plaintiffs' arguments against the *de facto* officer doctrine are not well-founded. They say it does not apply to constitutional claims, only to "'merely technical defect[s] of statutory authority.'" Br. 30-31 (quoting *Nguyen v. United States*, 539 U.S. 69, 77 (2003)). But that ignores numerous cases applying the

doctrine to constitutional, indeed Appointments Clause, claims. *See supra* at 30. Plaintiffs' "technical defects" quotation from *Nguyen* is cropped to obscure that the Court was referring exclusively to application of the doctrine to invalidly appointed *judges*,[6] while emphasizing it was not speaking to "the force of the *de facto* officer doctrine in other contexts." *Nguyen*, 539 U.S. at 77. Similarly, while plaintiffs portray *Ryder* as abrogating *Buckley*'s approach to the *de facto* officer doctrine (Br. 35-36), *Ryder* just declined to "extend" the approach taken in "civil cases" like *Buckley* to the *criminal* setting. *Ryder*, 515 U.S. at 184. This is of course a civil case, and "the facts of *Buckley*—which concerned an agency with a wide range of regulatory responsibilities—are much more similar to the facts of this case than they are to the facts of *Ryder* and *Nguyen*." *Bhatti*, 332 F. Supp. 3d at 1225.

Plaintiffs also inveigh against a "modified" version of the *de facto* officer doctrine used by the D.C. Circuit, which permits challenges to agency action based on an official's lack of authority so long as brought "at or around the time that the challenged government action is taken." *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 81 (D.C. Cir. 2015), *aff'd on other grounds*, 137 S. Ct. 929. This criticism overlooks

[6] 539 U.S. at 77 ("Typically, we have found *a judge's actions* to be valid *de facto* when there is a 'merely technical' defect of statutory authority." (emphasis added)).

that the D.C. Circuit's modification is for the *benefit* of plaintiffs, crafted to ameliorate potential hardship from a rigid bar. Plaintiffs cannot proceed even under the relaxed form of the doctrine because they waited until 2017—nearly five years after the Third Amendment, and only after numerous other challenges failed—to bring their Appointments Clause claim.[7]

In addition to the *de facto* officer doctrine, this Court could also affirm on the other alternate ground that the Eighth Circuit relied on: "[a]ny defect" relating to Mr. DeMarco's continued service "was resolved when the subsequent FHFA directors—none of whose appointments were challenged—ratified the third amendment." *Bhatti*, 15 F.4th at 853. Plaintiffs do not dispute that subsequent FHFA directors nominated by the President and confirmed by the Senate supported the Third Amendment. In fact, they insisted to the court below that the "FHFA's

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[7] To the extent that the Court were to borrow the D.C. Circuit's more plaintiff-friendly approach, the fact that plaintiffs filed within a general six-year statute of limitations for lawsuits against the federal government (albeit just barely) would not satisfy the "at or around the time that the challenged government action is taken" requirement. The *de facto* officer doctrine and statute of limitations serve different purposes: "[t]he private interests served by statutes of limitation cannot be compared to the fundamental need for a stable, functioning government." *Bhatti*, 332 F. Supp. 3d at 1225. *Nguyen* and *Carr v. Saul*, 141 S. Ct. 1352 (2021), are not inconsistent with requiring timely filing. In *Nguyen*, the challenges to the Ninth Circuit panel's composition were raised in petitions for certiorari within 90 days of that panel's action, not five years later. In *Carr*, "timeliness" referred merely to issue exhaustion. 141 S. Ct. at 1357 (addressing whether social security claimants challenging benefits determinations "forfeited their Appointments Clause challenges by failing to raise them before the agency").

current Senate-confirmed Director has continued to require the Companies to declare dividends under the Net Worth Sweep, blocked shareholder derivative suits seeking to challenge Mr. DeMarco's actions, and vigorously defended the Net Worth Sweep in every court in which it is challenged." Opposition to Motion to Dismiss, RE32, PageID#885. In other words, "the Net Worth Sweep was made possible and has been sustained by [Senate-confirmed] FHFA Directors." *Id.*

E. Acting Director DeMarco's Service in August 2012 was Not Constitutionally Problematic

While all of the above reasons make it unnecessary to reach the merits, this Court could also affirm on the alternate ground that plaintiffs failed to establish that the President's nomination efforts and duration of Mr. DeMarco's service were not "reasonable under the circumstances." As shown above, *supra* at 21 n.5, the amount of time Mr. DeMarco had served as Acting Director as of the date of the Third Amendment is neither unprecedented nor unusual. The relevant factors, including "whether the President has sent a nomination to the Senate," 1 Op. O.L.C. at 290, "particular factors affecting the President's choice ... or the President's ability to devote attention to the matter," *id.*, and "the difficulty of finding suitable candidates" for "complex and responsible positions" in the face of legislative uncertainties, 2 Op. O.L.C. at 410, all point toward a finding of reasonableness in this case.

When the Director vacancy arose in late 2009, the country was reeling from the worst economic crisis since the Great Depression. The Enterprises' futures were, at best, uncertain. Despite the challenges of finding suitable candidates in such a fraught setting, President Obama selected and nominated a potential FHFA Director the following year, but the nomination was rejected by the Senate in a highly polarized political environment. When the President later submitted the nomination of Mr. Watt, then a sitting Member of Congress, it took seven months and the historic abolition of the filibuster for that nomination to be approved by the narrowest of party-line margins.

Plaintiffs submit that the reasonableness inquiry should also consider "the risks inherent in permitting the President to unilaterally select an acting officer without the check of Senate confirmation." Br. 23 (quoting law review article). However, that factor cuts against plaintiffs. In moving for summary judgment, plaintiffs adduced no basis to find President Obama "unilaterally select[ed]" Mr. DeMarco to evade Senate confirmation. Rather, as discussed above, plaintiffs alleged the opposite: that President Obama nominated DeMarco only reluctantly and his Administration and DeMarco regularly split over policy issues. *See supra* at 25. Since President Obama could have removed Acting Director DeMarco at will anytime (the for-cause removal provision not applying to him), the only

possible explanation for his remaining in office is the insurmountable difficulties the President faced in nominating a viable and confirmable successor.

II. Plaintiffs' Removal-Restriction Claim Challenging the Third Amendment was Correctly Dismissed and Their New Claim Challenging the Liquidation Preferences is Both Waived and Without Merit

The district court held that the sole relief plaintiffs sought for their removal-restriction claim, invalidation of the Third Amendment, was unavailable because that Amendment was adopted by an Acting Director not covered by the removal restriction. That was precisely the conclusion *Collins* subsequently reached, and so was plainly correct.

Plaintiffs do not contend otherwise. Rather, the second half of their brief introduces a completely new claim, theory, and request for relief for the first time on appeal. They no longer challenge anything about the 2012 Third Amendment, its implementation, or payment of net worth dividends to Treasury. Instead, they now allege they were harmed by the unconstitutional removal-restriction in an entirely different way: that it prevented President Trump from starting to execute in 2017-2018 an imagined plan to write off or convert Treasury's preferred stock in order to "restor[e]" billions in value to junior shareholders like them. Br. 15. They ask the Court to order a mandatory prospective "injunction that places them in the position they would be in but for the unconstitutional statute," to wit, commanding FHFA and Treasury to implement that massive wealth transfer now. Br. 37.

The new theory is without merit for several reasons. *First*, it was never presented to the district court and has not been preserved. While plaintiffs try to piggyback on the Supreme Court's allowing of a limited remand in *Collins*, the new claim is totally different from the inquiry that Court envisioned for the *Collins* remand, and nothing in that decision supports allowing them to bring a whole new case for the first time on appeal. *Second*, the new claim is precluded by multiple threshold legal bars: HERA's prohibition on judicial interference with conservator functions, APA and equitable limitations on suing agencies for *not* taking action, and the separation of powers. *Third*, even if plaintiffs could clear all of those hurdles, the narrative that is the basis for their new theory lacks any foundation. The sources they cite do not support it, and it directly contradicts what happened in the real world once the Trump Administration installed new leadership in FHFA—in the real world, FHFA and Treasury doubled down on ensuring maximal protection for the value of the taxpayers' investment.

A. Plaintiffs' New Claim is Not Preserved

Plaintiffs' complaint was singularly focused on a discrete transaction: the Third Amendment. The First Amended Complaint leaves no ambiguity about the relief sought for the unconstitutional removal restriction:

> To remedy the violation of the President's constitutional removal authority alleged in this Count, the Court should (1) vacate the third amendment to the PSPAs because it was adopted by FHFA when it was operating as an independent agency headed by a single person; and (2)

> declare that henceforth FHFA is no longer an independent agency and strike down the provisions of HERA that purport to make FHFA independent from the President, including 12 U.S.C. §§ 4511(a), 4512(b)(2), and 4617(a)(7).

RE17, PageID#260 (¶ 145).

The district court effectively gave plaintiffs the declaratory relief sought in clause (2) by opining that the removal restriction was "almost certainly unconstitutional" (RE66, PageID#1798), and the Supreme Court definitively ruled to that effect. The district court and Supreme Court also held the relief sought in clause (1) was not available, and plaintiffs acquiesce in that holding, as they must. Simply put, there is nothing more to do.

Plaintiffs pivot to an entirely different theory in their appellate brief—one (a) unrelated to the Third Amendment, (b) focused on a different time period (2017-18 rather than 2012), (c) focused on different FHFA leadership (Director Watt rather than Acting Director DeMarco), (d) challenging agency *inaction* rather than action, and (e) requesting totally new relief (a total write-off of Treasury's liquidation preferences largely accumulated *before* the Third Amendment, rather than vacatur of the Third Amendment). Plaintiffs' explication of the new theory is rife with citations to videos, podcasts, speeches, and political stories, but contains not a single argument directed to the decision below, citation to the complaint, or anything from the record below. That means the new claim has not been preserved. *See Foster v. Barilow*, 6 F.3d 405, 406 (6th Cir. 1993) ("issues not

raised in the district court are waived on appeal"). Holding appellants to the arguments they raised below in situations like this "ensures fairness to litigants by preventing surprise issues from appearing on appeal," *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 552 (6th Cir. 2008), and promotes "judicial economy and the finality of judgments," *Taft Broad. Co. v. United States*, 929 F.2d 240, 245 (6th Cir. 1991).

Plaintiffs are likely to contend that the *Collins* remand calls for departing from the normal rules of appellate preservation here. Not so. Finding that "[o]nly harm caused by a confirmed Director's implementation of the Third Amendment could ... provide a basis for relief," 141 S. Ct. at 1781, the Supreme Court allowed a limited remand in *Collins* for any claims for "retrospective" relief on the ground that the removal restriction caused confirmed Directors to implement the Third Amendment in a manner detrimental to them. *Id.* at 1788-89. But plaintiffs here do not seek retrospective relief for Third Amendment implementation. The relief they seek is forward-looking in nature, independent of the Third Amendment, and dwarfs any issues over acts implementing the Third Amendment. The Third Amendment changed the formula for *dividends*, one component of Treasury's consideration under the stock agreements. Plaintiffs now seek prospective cancellation of the quarter-trillion dollar *liquidation preferences*, a separate form of consideration, nearly all of the value of which accrued either before the Third

Amendment, or after President Trump installed his chosen leadership at FHFA beginning in January 2019.[8]

Plaintiffs read *Collins* as calling for a much more generalized inquiry into "whether the President *wanted* to remove the Director but deemed himself unable to do so." Br. 37. If so, according to plaintiffs, the Court must craft and enter an injunction "that places [plaintiffs] in the position they would be in but for the unconstitutional statute." *Id*. But that misreads *Collins*. Nothing in *Collins* suggests that merely showing that an official was covered by the removal protection statute and would have been removed absent the statute would entitle plaintiffs to any relief at all—much less programmatic relief requiring the agency to carry out different policies that plaintiffs speculate other agency leadership might have pursued. The remand instructions in *Collins*, rather, simply allow further consideration of whether the removal restriction actually affected any actions implementing the Third Amendment that allegedly harmed plaintiffs. Plaintiffs here make no such claim.[9]

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[8] Treasury's combined liquidation preferences in the Enterprises were $189 billion before the Third Amendment, $199 billion in January 2019 when President Trump installed leadership at FHFA, and today exceed $250 billion as a result of amendments made by President Trump's appointees. *See infra* at 52-54.

[9] Plaintiffs state in passing that "[a]t the very least" the Court must reverse the judgment because confirmed Directors covered by the removal restriction implemented the Third Amendment, and according to plaintiffs one of them would

Footnote continued on next page

B. The New Claim is Precluded by Several Legal Bars

If the Court is inclined to consider plaintiffs' new claim despite their waiver, it is precluded by multiple threshold legal bars.

1. Section 4617(f)

First, the sweeping relief plaintiffs request would be barred by 12 U.S.C. § 4617(f), which forbids injunctions that would "restrain or affect the exercise of [the] powers or functions of the Agency as a conservator." This provision covers any situation "where the FHFA action at issue fell within the scope of the Agency's authority as a conservator." *Collins*, 141 S. Ct. at 1776. "[R]elief is allowed" *only* "if the FHFA exceeded that authority." *Id.*; *see also Robinson*, 876 F.3d at 227-228 (describing § 4617(f) as a "sweeping ouster of courts' power to grant equitable remedies" with the only exception being "[i]f the FHFA were to act beyond statutory or constitutional bounds" (quotation marks omitted)).

Thus, the applicability of § 4617(f) turns on two questions. *First*, would the requested relief restrain or affect the powers or functions of the Conservator?

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have been replaced. Br. 46. This reference, comprising two sentences, is the sole mention of Third Amendment implementation in Section II of plaintiffs' brief. The Court need not consider "perfunctory and undeveloped arguments" for reversal. *Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1063 (6th Cir. 2014). In any event, plaintiffs' own statements foreclose any notion that the removal protection affected implementation of the Third Amendment. They admit that Director Watt (whom they assert would have been replaced) and Director Calabria (whom they assert advanced the President's agenda and would not have been replaced) *both* implemented the Third Amendment.

Second, was FHFA without statutory or constitutional authority to take the action challenged, or, as relevant here, to *refrain* from taking the action plaintiffs seek to compel?

The answer to the first question is plainly yes. It is difficult to imagine a judicial action that would "restrain or affect" the Conservator's functions more intrusively than a mandatory permanent injunction compelling the Conservator to wipe out the Treasury investment that has served as the foundation of the conservatorships since their inception and allowed the Enterprises to continue operations as the bulwarks of the United States housing finance system. This would throw the entire underpinnings for the conservatorships, and by extension the safe and sound functioning of the housing markets, into chaos. Both *Collins* and this Court have already found relief that would "effectively unravel the Third Amendment" barred. *Robinson*, 876 F.3d at 228. It necessarily follows that the relief now sought, which would unravel not only the Third Amendment but the entire preferred stock relationship, is barred as well.

As for the second question, *Collins* makes unmistakably clear that at no time did the presence of the unconstitutional removal restriction ever render any FHFA action or inaction beyond statutory or constitutional bounds. In contrast to issues caused by "a Government actor's exercise of power that the actor did not lawfully possess" in certain other separation-of-powers cases, "there is no basis for

concluding that any head of the FHFA lacked the authority to carry out the functions of the office." *Collins*, 141 S. Ct. at 1788; *see also id.* at 1788 n.23 ("[s]ettled precedent" confirms "the unlawfulness of the removal provision does not strip" FHFA's Director of statutory or constitutional authority to perform the "responsibilities of his office"); *id.* at 1793 (Thomas, J., concurring) (removal-restriction issue posed "no barrier" to FHFA Directors "exercising power").

Plaintiffs have taken the position in other cases that § 4617(f) does not apply because it lacks the clear statement required for a statute to "deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988). That position is misplaced. Plaintiffs' constitutional claim has received extensive judicial attention already, including from the Supreme Court. That Court granted plaintiffs a significant part of the relief they sought—declaring the removal restriction unconstitutional, which did not restrain or affect Conservator powers and functions. Section 4617(f) thus does not "deny any judicial forum" for the removal restriction claim; it simply precludes the highly intrusive remedy plaintiffs now seek, an archetypal example of interfering with Conservator prerogatives. Further, because the unconstitutionality of the removal restriction never made any FHFA actions themselves unconstitutional, a challenge to FHFA actions or inaction as having been improperly influenced by the removal restriction amounts

in substance to an Administrative Procedure Act claim indisputably subject to § 4617(f). *See Collins*, 141 S. Ct. at 1794 & n.7 (Thomas, J., concurring).

2. Limitations on Challenges to Agency Lack of Action

Plaintiffs' new claim also flouts well-established limitations on *failure*-to-act claims and judicial direction of agency policy and operations. Unlike plaintiffs' complaint, which solely targeted an affirmative agency action, the Third Amendment, the new claim challenges *inaction*—failure to overhaul Treasury's preferred stock by wiping out its investment value to supposedly facilitate an initial public offering. Supreme Court jurisprudence and longstanding equitable principles, however, allow such failure-to-act claims only in very narrow circumstances not present here.

In *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), the Court held that a claim to compel agency action unlawfully withheld "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Id.* at 64. While *Norton* involved an APA claim, these requirements derive from longstanding pre-APA equity practice. *Id.* at 63 (emphasizing mandamus was limited to enforcing "a specific, unequivocal command," a "precise, definite act about which an official had no discretion whatever") (quotation marks and alterations omitted).

Equitable remedies in cases involving structural constitutional challenges to agencies fully comport with these principles. In various recent cases, courts have been called upon to invalidate discrete actions directed to particular parties, such as adjudicatory outcomes, *see*, *e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Noel Canning*, 573 U.S. 513; *cf. United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021) (remanding patent adjudications for supervisory review, rather than vacating them), or investigative demands, *e.g.*, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020). But no case suggests that an agency could be compelled to take new actions or shift policy in a way that the court finds might have occurred absent the constitutional issue. When recess appointments of several NLRB members were found invalid in *Noel Canning*, courts vacated adjudications in which those members participated. They did not try to discern what different labor policies a properly constituted NLRB would have pursued, and then order the NLRB to make it so. When the Supreme Court struck down the line item veto, *Clinton v. City of New York*, 524 U.S. 417 (1998), it vacated the President's vetoes of particular expenditures, but did not attempt to speculate about, much less order into existence, the budget that the political branches might have negotiated if there had not been a line item veto.

Plaintiffs' new claim here does not pass muster under *Norton* and traditional equitable principles. The action that plaintiffs say the agencies should have

taken—a radical overhaul of the preferred stock to eliminate Treasury's value in favor of private shareholders—is the opposite of "discrete." And it definitely is not an action FHFA or Treasury were required by law to take. On the contrary, a statute effective through the first year of the Trump Administration made it *unlawful* to "sell, transfer, relinquish, liquidate, divest, or otherwise dispose" of any part of Treasury's preferred stock interests through the first year of the Trump Administration, and proclaimed that even after that point, it would be against the "sense of Congress" to do so absent authorizing legislation. Pub. L. No. 114-113, § 702, 129 Stat. 2242, 3025 (2015).

The Supreme Court's remand instructions in *Collins* do not depart from *Norton* and its limited conception of the judicial role in policing agencies' failures to act. There was no failure-to-act claim in *Collins*; the only claims were for "adoption and implementation of the Third Amendment," both discrete, positive actions. 141 S. Ct. at 1779. Therefore, the Court's comments cannot be understood as sanctioning some new, open-ended cause of action to compel implementation of policies not pursued. *See* 141 S. Ct. at 1794 (Thomas, J., concurring) (emphasizing that "our watchword should be caution" when asked to create or expand private rights of action with separation-of-powers implications). "[A]bsent an unlawful *act*, the shareholders are not entitled to a remedy." *Id.* at 1795 (emphasis added).

3. Separation-of-Powers Principles

Plaintiffs' new claim is barred not only by § 4617(f) and by limitations on failure-to-act claims, but also by core separation-of-powers principles. Brandishing an after-the-fact letter from a *former* President making assertions about what he would have liked to accomplish during his term, plaintiffs seek to have this Court force the *current* Administration to implement prospectively what they say was that former President's vision on policy matters of great public moment—regardless of whether it aligns with current Treasury and FHFA policy.[10] In fact, plaintiffs candidly admit that they are seeking to force the current Administration to "vindicat[e] the prior administration's policy goals." Br. 50. That arrogation would work a far greater affront to the separation of powers than any harm they have identified from the existence of the unenforceable removal provision in the first place. Article II of the Constitution vests "[t]he executive Power" in the current President, and it is he, not any former President or the courts, who is accountable to the electorate and obliged to "take Care that the Laws be faithfully executed." U.S. Const. art. II, §§ 1, 3.

C. The New Claim is Implausible

Plaintiffs' new removal-restriction theory is also beyond outer limits of plausibility and could be rejected on that basis even if it were otherwise properly

[10] FHFA Appellees do not concede the admissibility of this document.

before the Court. The theory is that absent the removal restriction, President Trump would have immediately removed then-FHFA Director Watt, and his chosen appointee would have gotten Treasury to write off its liquidation preferences, then valued at a collective $199 billion, in order to facilitate public offerings of new shares of stock in the Enterprises. Junior preferred shareholders would then take Treasury's place as top priority equity holders in Enterprises with billions in assets. This highly attenuated narrative suffers from several fatal flaws.

First, it defies basic economics. Holders of multi-billion dollar investments do not typically renounce such investments so that others can profit instead. Even less when the investor is the Government, the investment represents accrued compensation for infusions of taxpayer funds by the Government into financial institutions, and the investor's decision-makers are politically accountable to the taxpayers. The Court is not required to credit wildly implausible allegations. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

Second, assuming, against all logic, that the Trump Administration and Treasury did wish to give up the liquidation preferences, plaintiffs cannot coherently explain how Director Watt's for-cause removal protection stood in the way. Treasury—not FHFA or Director Watt—was in charge of its investment, and the Treasury Secretary was always removable at will. Plaintiffs cannot blame the removal restriction for matters over which "the President had oversight" all along

through his plenary control over Treasury. *See Collins*, 141 S. Ct. at 1802 (Kagan, J., concurring).

Plaintiffs cite a letter from former President Trump expressing general negative views about Director Watt, but offer no reason to believe that if Treasury had really wanted to reduce *its* consideration for its past funding, Director Watt would have had any incentive or ability to block such efforts. In contrast to their newfound appellate theory, plaintiffs' amended complaint showcased public statements by Director Watt raising concerns about the amount of consideration flowing to Treasury. RE17, PageID#244 (¶ 105). Plaintiffs now quote a former mid-level Treasury official's "tales and legends of what Mel Watt was like," but use an ellipsis to hide the official's acknowledgment that "[q]uite honestly, ... [Watt] would have actually done almost anything we wanted to do."[11]

Third, while plaintiffs emphasize the Trump Administration's interest in getting the Enterprises out of conservatorship and preparing for potential public stock offerings, those general objectives cannot be equated with writing Treasury's preferred stock down to zero or converting it to less valuable common stock. Both exiting conservatorship and new stock offerings not only *could* coexist, but were *expected* to coexist, with Treasury's preferred stock and liquidation preferences.

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[11] *Compare* Br. 39, *with* Interview with Craig Phillips, SitusAMC-On the Hill, https://bit.ly/3sl08yU, at 10:33-10:51.

The Trump Administration Treasury Department's report, relied on heavily by plaintiffs, stressed the importance of "leaving the PSPA commitment in place after the conservatorships."[12] Likewise, the stock agreements themselves always required that the proceeds of any new stock offering be used, at least in part, to *redeem* Treasury's preferred stock. RE23-2, PageID#350-51, 359-61. That concept, which President Trump's Treasury and FHFA appointees readopted in January 2021 amendments, is irreconcilable with plaintiffs' thesis that the liquidation preferences had to be written down as an advance precondition for a new stock offering.

Plaintiffs' position that "no one would buy the stock" unless the liquidation preferences had been preemptively reduced "to zero" or converted out of existence (Br. 43, 44) is thus out of step with how the range of options was seen in the real world. Out of the many extra-record sources in Section II of plaintiffs' appellate brief, the only document that touches on those options refers to "[e]liminating all *or a portion* of the liquidation preference ... or exchanging all *or a portion* of that interest for common stock *or other* interests" as part of a bullet in a menu of many "[p]otential approaches to recapitalizing a GSE." Dep't of the Treasury, *Housing Reform Plan* at 27 (emphasis added). Other options included a negotiated solution

[12] Dep't of the Treasury, *Housing Reform Plan* at 3 (Sept. 2019), https://bit.ly/2Uyvzre.

assented to by all stakeholders, or "[p]lacing the GSE in receivership ... to facilitate a restructuring of the capital structure," which would likely have resulted in plaintiffs' junior equity interests being zeroed out. *Id.* This list of options concluded with acknowledgment of the "host of complex financial and legal considerations that will merit careful consideration" and the paramount importance that any resolution ensure "appropriate compensation to Treasury." *Id.* at 27-28. If the Administration was already set in January 2017 on zeroing out or converting its preferred stock, as plaintiffs' theory necessarily presupposes, it would make no sense for Treasury to be contemplating a much broader array of diverse options two years and eight months later.

Plaintiffs' depiction of "four steps" in 2019-2020 supposedly pointing toward writing off Treasury's liquidation preferences (Br. 41-43) ignores that all four actions equally made sense without ascribing that end goal. The first and second steps, modifying the net worth dividend to allow the Enterprises to retain more earnings to build capital, follow in the footsteps of similar amendments that Director Watt himself had instituted back in December 2017, the period when plaintiffs contend he "stymied [the] administration's policy goals" (Br. 50). *See Collins*, 141 S. Ct. at 1774 n.8; FHFA, Statement from FHFA Director Melvin L. Watt on Capital Reserve for Fannie Mae and Freddie Mac (Dec. 21, 2017), https://bit.ly/3gCG9F1.

Likewise for the third step, "a regulatory framework for determining the amount of capital that would be required once [the Enterprises] were under private control" (Br. 42), Director Watt had already set that process in motion himself, issuing the first iteration of the capital framework in July 2018. *See* Enterprise Capital Requirements, 83 Fed. Reg. 33,312 (July 17, 2018). The fourth step, retention of investment bankers, is one that would be necessary for *any* sort of stock offering or corporate restructuring, not just one in which Treasury's interest would be cancelled in advance. As already discussed, the premise that any stock offering or restructuring was dependent on advance implementation of the relief plaintiffs seek here is a fallacy.

Fourth, and most importantly, plaintiffs' narrative collides with the stark reality of what happened in the real world when President Trump did replace Director Watt in January 2019. While FHFA continued laying the groundwork for eventual exits from conservatorship and explored potential recapitalization of the Enterprises, nothing FHFA and Treasury did in the ensuing two years is consistent with an agenda of writing off the liquidation preferences. Rather, in two subsequent amendments to the stock agreements, one in September 2019 and the other in January 2021, the parties not only retained the liquidation preferences as a critical component of Treasury's consideration, but also established that for the foreseeable future, dividends to Treasury would be paid "through *increases* in the

liquidation preference." *Collins*, 141 S. Ct. at 1774 (emphasis added); *see also id.* at 1774 nn. 8, 10.[13]

Both amendments also retained the requirement that any stock offering proceeds be used, at least in part, to pay down Treasury's liquidation preferences. *See supra* at 6. And the January 2021 amendments reiterated the parties' conviction that any exit from conservatorship must "ensure a path for Treasury to resolve its investment in the Enterprise in a manner that fairly compensates taxpayers for the support they have provided and continue to provide." Plaintiffs did not view these developments as a positive: their counsel wrote to the Supreme Court that they "only further entrenched Treasury's status as the sole shareholder that can ever receive a return on its investment." Letter in Response of Patrick J. Collins, et. al., *Collins v. Yellen*, No. 19-422 (U.S. S. Ct. Mar. 31, 2021).

As a result of these changes deliberately set in motion by President Trump's chosen FHFA Director and chosen Treasury Secretary, the liquidation preferences have increased from a collective $199 billion when Director Watt stepped down to over $260 billion today. All of this is the opposite of what one would expect to happen under plenary Trump Administration control in 2019-2020 if, as plaintiffs'

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[13] Copies of these amendments are available in the public record at https://bit.ly/3CS5mVL (Fannie Mae 2019); https://bit.ly/3iNyIg2 (Freddie Mac 2019); https://bit.ly/3CRWcs9 (Fannie Mae 2021); and https://bit.ly/37OyT4s (Freddie Mac 2021).

theory presupposes, the Administration's agenda was to unilaterally relinquish the liquidation preferences.

The November 2021 letter from former President Trump that plaintiffs prominently feature does not help their case. Plaintiffs hold the letter out as highly probative evidence supposedly matching one of the hypothetical ways in which *Collins* said a removal restriction could potentially cause cognizable harm. But the hypothetical in *Collins* was 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"—in other words, substantive expressions of disagreement with policies or actions while the President was in office and allegedly prevented from carrying out his will. *Collins*, 141 S. Ct. at 1789 (emphasis added). Even assuming *arguendo* that a *former* President's statements about a previously unarticulated state of mind five years ago fits what the Court had in mind, those statements do not express displeasure with any actions by Director Watt that allegedly caused plaintiffs' injury. On the contrary, the principal goal expressed, getting the Enterprises out of conservatorship, was both openly shared and endorsed by Director Watt,[14] and

[14] The former Treasury official quoted on page 39 of plaintiffs' appellate brief said, in the portion of the quotation masked with an ellipsis, that Watt's "position on [GSE reform] is not terribly different than Director Calabria's; he thought that the conservatorship should be ended." *See supra* at 49 n.11.

fully compatible with Treasury continuing to have preferred stock, *see supra* at 49-52.

Notably, the former President's *post hoc* letter nowhere indicates any interest whatsoever in cancelling Treasury's liquidation preferences—the actual relief plaintiffs seek. The letter says Treasury would have "sold the government's common stock in these companies at a huge profit." Br. Ex. A. But the government did not own common stock in the Enterprises, and the common stock traded for *de minimis* value.

Betraying just how attenuated and speculative their narrative is, plaintiffs ask the Court to shift the burden to defendants to "mak[e] a clear showing that the removal restriction did *not*, in fact, harm Plaintiffs." Br. 46. That bid has no merit. Plaintiffs' own authorities spell out the black-letter rule that "the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims." Mueller & Kilpatrick, 1 Federal Evidence § 3:3 (4th ed. 2021); *see* 2 McCormick on Evidence § 337 (8th ed. 2020) (burden "assigned to the plaintiff who generally seeks to change the present state of affairs"). The presumption of regularity applies to "the official acts of public officers," *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926), not to reminiscences by *former* officials, even former Presidents. Plaintiffs' analogy to burden-shifting for discrimination claims fails because nothing comparable to a

"prima facie case" has been established here, and even in that context, "the ultimate burden of persuading the trier of fact ... remains at all times with the plaintiff." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

Plaintiffs' analogy to the standard for "harmless error" in APA rulemaking cases also falls flat. The issue here is not harmless error; it is that plaintiffs have not come forward with a remotely plausible theory connecting the unenforceable removal provision with any injury to them. In any event, plaintiffs' APA analogy cuts squarely against them. If a failure to provide notice and comment rights is not "harmless," the remedy is to remand to the agency for application of the proper procedures, not for the court to rewrite the rule itself or otherwise direct a particular substantive outcome. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Here, plaintiffs seek to lock in a particular, desired substantive outcome and to remove the relevant decisions from the agency's jurisdiction—the opposite of a remand to the agency.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Dated: February 18, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 12,995 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure and 6th Cir. R. 32(b)(1).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionately spaced typeface in 14-point Times New Roman font.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to 6th Cir. Rule 30(g)(1), the FHFA Defendants hereby designate the following portions of the district court record for this Court's consideration:

Record Entry No.	Description	PageID Range
17	First Amended Complaint	196-272
22	Treasury's Motion to Dismiss	285
23	Treasury's Memorandum in Support of its Motion to Dismiss	287-317
23-1	Exhibit A to Treasury's Memorandum in Support of Motion to Dismiss -- Fannie Mae and Freddie Mac Preferred Stock Purchase Agreements (PSPAs)	319-346
23-2	Exhibit B to Treasury's Memorandum in Support of Motion to Dismiss -- Fannie Mae Senior Preferred Stock Certificate & Freddie Mac Senior Preferred Stock Certificate	347-365
23-3	Exhibit C to Treasury's Memorandum in Support of Motion to Dismiss -- Third Amendment to the PSPAs	367-382
24	FHFA's Motion to Dismiss	383-385
25	FHFA's Brief in Support of its Motion to Dismiss	386-424
31	Plaintiff's Brief in Opposition to Treasury's Motion to Dismiss	577-608
32	Plaintiff's Response in Opposition to FHFA's Motion to Dismiss	875-898
34	Treasury Reply in Response to Motion to Dismiss	926-937
36	FHFA Reply in Response to Motion to Dismiss & Opposition to Motion for Summary Judgment	946-977
66	District Court Opinion	1758-1818
68	Judgment	1820
69	Notice of Appeal	1821

RELEVANT STATUTES, REGULATIONS, AND RULES

12 U.S.C. § 4512(f) - Acting Director

In the event of the death, resignation, sickness, or absence of the Director, the President shall designate either the Deputy Director of the Division of Enterprise Regulation, the Deputy Director of the Division of Federal Home Loan Bank Regulation, or the Deputy Director for Housing Mission and Goals, to serve as acting Director until the return of the Director, or the appointment of a successor pursuant to subsection (b).

12 U.S.C. § 4617(f) - Limitation on Court Action

Except 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 the Agency as a conservator or a receiver.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of February, 2022, I filed the foregoing Brief of Defendants-Appellees the Federal Housing Finance Agency and Acting Director Sandra L. Thompson with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered users:

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