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

Defendants–Appellees.

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

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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Both the authorization and perpetuation of the Third Amendment violated the Constitution's separation of powers. When Mr. DeMarco authorized the Third Amendment, he had served as an "acting" principal officer for three years without Senate confirmation. Defendants cite nothing—no constitutional provision, no historical practice, no case—permitting such limitless acting service to circumvent the Appointments Clause. Despite the Third Amendment's unlawful genesis, the former President of the United States has confirmed that the harm would have been undone were it not for a separate statutory provision that the Supreme Court has already deemed unconstitutional. Under the Supreme Court's Appointments Clause precedent and its decision in *Collins*, Plaintiffs are entitled to a remedy.

ARGUMENT

I. Mr. DeMarco Was Serving in Violation of the Appointments Clause when He Purported to Authorize the Third Amendment.

A. Text, History, and Precedent Confirm Mr. DeMarco's Acting Service Violated the Appointments Clause.

Every source of constitutional meaning—text, history, and precedent—shows that Mr. DeMarco was serving in violation of the Appointments Clause when he authorized the Third Amendment. His three years of acting service vastly exceeded the two years authorized by the text of the Constitution, the ten months approved by the Supreme Court in *United States v. Eaton*, 169 U.S. 331 (1898), and the six months generally permitted by Congress for nearly 200 years. Opening Br. 17-22.

Defendants' argument to the contrary is extraordinary. In their view, the Constitution permits limitless "acting" service as a principal officer without Senate confirmation. Taking their theory to its logical conclusion, confirmation hearings for the Executive Branch could become an artifact of a bygone era. That result has no basis in text, history, or precedent.

Defendants' textual arguments only undermine their position. They contend that the Recess Appointments Clause does not "apply to acting officials." Treas. Br. 22. But that is the entire point: The Recess Appointments Clause—the exclusive textual exception to the requirement of Senate confirmation for principal officers—did *not* authorize Mr. DeMarco's acting service. FHFA contends "it is spurious" to interpret the Recess Appointments Clause alongside the Twentieth Amendment's requirement that the Senate "assemble" at least "once in every year" because the Framers did not draft the Twentieth Amendment. FHFA Br. 26-27. That contention makes little sense, however, because Art. I, § 4, cl. 2, also mandates that "Congress shall assemble at least once in every Year," and "the Senate's practice, particularly during the Republic's early years" was "meeting for a single brief session each year," *NLRB v. Noel Canning*, 573 U.S. 513, 523 (2014).

FHFA also quotes the district court for the unremarkable proposition that vacancies can be "unpredictable" and acting service allows agencies "to continue functioning." FHFA Br. 27. But the question is not whether acting service is

constitutional *at all*; it is *how long* the Constitution permits a person without Senate confirmation to exercise the power of a principal officer. Defendants' argument is that the Constitution provides no limit whatsoever—despite its express requirement for Senate confirmation subject to its limited exception for recess appointments.

Next, FHFA falls back on an argument the Supreme Court has repeatedly rejected in separation-of-powers cases. Specifically, FHFA contends that there is no constitutional problem with limitless acting service because *Congress* could limit the President's ability to designate an acting official. FHFA Br. 28. But the power of "advice and consent" is a *Senate* prerogative, and the Senate alone may not pass legislation to protect its constitutional power. Moreover, limitless acting service violates the separation of powers "whether or not the encroached-upon branch approves the encroachment." *New York v. United States*, 505 U.S. 144, 182 (1992). Defendants' textual arguments fail to explain why the Constitution would create a detailed procedure for the exercise of power by principal officers—in the Appointments Clause and Recess Appointments Clause—while also permitting "acting" officials to endlessly exercise the same power.

On history, Defendants fare no better. For nearly two centuries, Congress generally limited acting service to six months, and Defendants fail to cite a single statute in the Nation's history expressly authorizing an official without Senate confirmation to act as a principal officer for over two years. All Treasury can muster

is the halfhearted citation of a Senate committee report for the proposition that forty[1] agency-specific statutes do not expressly place a time limit on acting service. Treas. Br. 20-21 n.5. But these statutes merely demonstrate that Congress sometimes chooses to accept the Constitution's default time limit rather than specify a *shorter* one by statute. Thus, they are wholly consistent with recognizing a constitutional limit on the duration of acting service.

For actual historical practice, FHFA offers only a handful of examples that, it says, show Mr. DeMarco's three years of acting service as a principal officer without Senate confirmation was consistent with tradition. FHFA Br. 21 n.5. But "'[h]istorical practice' is too grand a title" for FHFA's examples. *NLRB v. Sw. Gen., Inc.* 137 S. Ct. 929, 943 (2017). As an initial matter, most of FHFA's examples are irrelevant to the issue here—which is the constitutionality of acting service (1) by an official without Senate confirmation (2) as a principal officer (3) for over two years. First, several of FHFA's examples involved acting officials who, unlike Mr. DeMarco, had previously been confirmed by the Senate to a different position—a constitutionally relevant distinction that FHFA ignores. *See* 111 CONG. REC. S11062 (daily ed. Dec. 22, 2010) (Carolyn Colvin as Deputy SSA Commissioner); 113 CONG. REC. S5512 (daily ed. June 27, 2013) (Ann Marie Buerkle as a Commissioner

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[1] The number is actually less; the committee report's numbering skips from "25" to "28." S. REP. NO. 105-250, at 16 (1998).

of the Consumer Product Safety Commission). Second, other examples concerned acting service of *inferior* officers, who are not constitutionally required to be confirmed by the Senate. *See* 5 U.S.C. app. pp. 13-14, §§ 2-3 (2020) (inspectors general serve under "the general supervision of the head" of the agency). Third, still other examples did not serve more than two years. *See* FHFA Br. 21 n.5 (Acting FAA administrator serving only 19 months). Indeed, one of them was deemed to have served unlawfully on statutory grounds six months into his acting service. *See Sw. Gen.*, 137 S. Ct. at 937, 943-44 (NLRB general counsel). FHFA's remaining "isolated examples" are either modern, contested, or both. *See Seila Law v. CFPB*, 140 S. Ct. 2183, 2202 (2020). Thus, Mr. DeMarco's acting service has "no foothold in history or tradition." *Id.*

Finally, FHFA suggests that the FVRA could be "collateral damage" under Plaintiffs' reading of the Appointments Clause. But the hypothetical scenario in which an acting official could serve more than two years under the FVRA is nearly unimaginable, requiring a Rube-Goldberg-like appointment process that perfectly times the President's nominations with the Senate's rejections of them. *See* Anne O'Connell, *Actings*, 120 COLUM. L. REV. 613, 630-31 (2020). This improbable hypothetical application of a statute enacted in the 1980s cannot change the Constitution's meaning.

Text and history aside, Defendants say almost nothing about *Eaton*—the only

Supreme Court precedent on point. Indeed, FHFA never even attempts to justify Mr. DeMarco's service under *Eaton*. Treasury contends that "temporary" service under *Eaton* should be read to mean "until the appointment of [a] successor." Treas. Br. 21 (internal quotation marks omitted). But that is no limitation at all—*every* acting official who does not resign or get fired serves until a successor is appointed. *Eaton* was much more concrete: It held that acting service was constitutional if it was "*for a limited time*." 169 U.S. at 343 (emphasis added). That holding calls for an analysis of duration—days, months, years. And Mr. DeMarco's three years of acting service goes far beyond the ten months at issue in *Eaton*.[2]

B. Mr. DeMarco's Acting Service Violated the Appointments Clause Under a Functional Separation-of-Powers Analysis.

Mr. DeMarco's acting service also violated the Constitution under a functional analysis, which "considers purposes and consequences" to determine what is reasonable. *Arthrex*, 141 S. Ct. at (Breyer, J., dissenting). Here, the Appointments Clause "serves both to curb Executive abuses of the appointment power" and "to promote a judicious choice of persons for filling the offices of the union." *Edmond v. United States*, 520 U.S. 651, 659 (1997) (internal quotation marks

[2] FHFA faults Plaintiffs for "overlook[ing]" an argument FHFA has never made before—that Mr. DeMarco could have approved the Third Amendment in his capacity as Deputy Director. FHFA Br. 31. This argument fails. If Mr. DeMarco were exercising executive power with no oversight by "any other principal officer," then he was still acting as a principal officer, no matter the label. *See United States v. Arthrex*, 141 S. Ct. 1970, 1981 (2021).

omitted).

A functional analysis that gives any weight to these purposes requires rejecting Defendants' view that limitless acting service is lawful. If Defendants are correct, a President's submission of a nomination to Congress could become an act of mere executive grace, thus wholly vitiating the Appointments Clause's purpose.

Defendants focus on one aspect of the 1977 O.L.C. memo that takes a functional approach to this issue. Specifically, they pluck a single consideration among many in that memo—the office's consideration of "particular factors affecting the President's choice" or "ability to devote attention to the matter"—and claim that observing *any* constitutional limit on the length of an acting agency head's service would "require the Court to look over the shoulder" of the Executive Branch's "internal processes" and "personnel decisions." FHFA Br. 23; Treas. Br. 22-23. But given the sheer length of Mr. DeMarco's service, the Court need not wade into such matters to recognize that he held his position in violation of the Appointments Clause, even under a functional analysis. And to the extent the Court is concerned about the hazards of "probing the *bona fides* of coordinate branches," FHFA Br. 24-25, that is a reason to adopt the bright-line, two-year rule Plaintiffs propose above—not to cede the field to the political branches.[3]

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[3] FHFA cites a separate O.L.C. opinion for the proposition that acting officials "may have less authority than Presidential appointments." FHFA Br. 26. But in the same paragraph quoted by FHFA, O.L.C. states that "an acting officer has the same

Finally, Treasury contends "[t]here is nothing extraordinary" about a President taking *a full year* to nominate an FHFA Director and, when that nomination is returned, taking another *two years* before nominating someone else. Treas. Br. 23-24. This delay was required, Treasury asserts, because the administration needed to find someone "who both met the President's qualifications and could obtain Senate confirmation." *Id.* But if the President can take three years—three quarters of a presidential term—conducting due diligence before selecting a permanent agency head who is able to obtain Senate confirmation, there will be nothing left of the Appointments Clause's mandate that principal officers serve with the advice and consent of the Senate. Given the purpose of the Appointments Clause, this Court should hold that Mr. DeMarco was serving unlawfully when he authorized the Third Amendment.

C. The Court Should Vacate All Actions Taken Pursuant to the Third Amendment.

Defendants attempt to throw up a host of roadblocks to prevent the Court from reaching the merits of Plaintiffs' Appointments Clause claim. All of Defendants' arguments fail.

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legal authority as a presidential appointee." *Acting Officers*, 6 Op. O.L.C. 119, 121 (1982). Regardless, Defendants never suggest that Mr. DeMarco had less than the full powers of the FHFA Director.

1. Political Question Doctrine

Defendants barely defend the district court's holding that the two-year limit created by the text of the Constitution is a non-justiciable political question. *Rop v. FHFA*, 485 F. Supp. 3d 900, 943 (W.D. Mich. 2020). That holding rested on a conclusion that identifying any rule of constitutional law to limit the tenure of an acting agency head would be "wholly arbitrary." *Id.* at 942-43. This "wholly arbitrary" principle, however, has no basis in the Supreme Court's political question jurisprudence, which explains that there are only two types of political questions: (1) those that implicate "a textually demonstrable constitutional commitment" to a political branch; and (2) those that lack "judicially discoverable and manageable standards for resol[ution]." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194-95 (2012). The district court acknowledged that a two-year limit is manageable, *Rop*, 485 F. Supp. 3d at 942, leaving only the possibility that the duration of acting service is "textually" committed to the political branches by the Constitution. But the district court pointed to no constitutional text granting Congress or the President unfettered power to determine the appropriate length of service for acting agency heads, and there is none.

In defense of the district court's ruling, FHFA parrots the phrase "wholly arbitrary" without ever explaining what that label has to do with the political question doctrine. *See* FHFA Br. 26. Treasury at least attempts to fit the district

court's ruling into the existing doctrine by contending that the issue is "plainly committed to the political branches." Treas. Br. 23. But Treasury points to no "*textually demonstrable* constitutional commitment of the issue" to either political branch. *Zivotofsky*, 566 U.S. at 194-95 (emphasis added). Thus, the Constitution creates a time limit that everyone agrees is "manageable," and no one points to any constitutional text committing this question to one of the political branches. Those facts foreclose the district court's application of the political question doctrine.

Separately, the district court's application of the political question doctrine to a functional analysis is inconsistent with the Supreme Court's decision in *Noel Canning*, which adopted a flexible rule for determining when a recess falls within the Recess Appointments Clause. *See* 573 U.S. at 538 (a recess of "less than 10 days is presumptively too short" and "unusual circumstance[s]" might require exceptions to the rule). The types of judgments required by *Noel Canning* are no different from the judgment of whether an acting official's tenure violates the Appointments Clause.

2. De Facto Officer Doctrine

The *de facto* officer doctrine does not excuse this Appointments Clause violation. *Ryder* held that the *de facto* officer doctrine does not apply to a "timely" Appointments Clause challenge. *Ryder v. United States*, 515 U.S. 177, 182-83 (1995). In *Carr v. Saul*, 141 S. Ct. 1352 (2021), the Supreme Court explained what

makes a challenge to an agency official's appointment "timely" under *Ryder*. There, the government argued that an Appointments Clause challenge to an agency official was untimely under *Ryder* because the challengers waited until reaching federal court to raise the claim. *Id.* at 1362. The Court rejected that understanding of *Ryder*, subject to one exception: If the agency offers an administrative-review scheme that imposes an issue-exhaustion requirement (*i.e.*, "traditional forfeiture rules apply") then an Appointments Clause challenge would not be "timely" under *Ryder* if it is raised for the first time in court. *Id.* Barring a "require[ment] to exhaust certain issues in administrative proceedings to preserve them for judicial review," however, parties who raise Appointments Clause challenges "for the first time in federal court are not untimely in doing so." *Id.* Thus, when there is no administrative-review scheme requiring issue exhaustion, an Appointments Clause challenge is "timely" under *Ryder*—and thus precludes application of the *de facto* officer doctrine—so long as it is filed within the statute of limitations.

Here, an administrative-review scheme did not even exist, let alone require Plaintiffs to exhaust their Appointments Clause challenge before some sort of FHFA tribunal. Thus, Plaintiffs "are not untimely" in raising their Appointments Clause challenge within the statute of limitations "for the first time in federal court." *Carr*, 141 S. Ct. at 1362. And under *Ryder*, the *de facto* officer doctrine does not apply.

As *Ryder* makes clear, Appointments Clause challenges are distinct from the

technical statutory defects that are generally subject to the *de facto* officer doctrine. *See Nguyen v. United States*, 539 U.S. 69, 77 (2003). FHFA suggests Plaintiffs "cropped" a quote from *Nguyen* "to obscure" that *Nguyen*'s discussion of "technical defects" was made in the context of judicial appointments and that the Court said it was not speaking to "the force of the *de facto* officer doctrine in other circumstances." FHFA Br. 32. It is not clear how this helps Defendants: The relevant sentence in *Nguyen* casts doubt on whether the doctrine applies *at all* in "other circumstances" besides judicial appointments. 539 U.S. at 77. More importantly, the teaching of *Nguyen* is that the *de facto* officer doctrine does not cure defects in title that implicate important statutory policies, much less violations of the United States Constitution. Whatever the circumstances, the Supreme Court has never once applied the *de facto* officer doctrine to deny a remedy for a timely Appointments Clause challenge.

Defendants rely on *Buckley v. Valeo*, 424 U.S. 1 (1976), but *Ryder* forecloses their argument. As *Ryder* made clear, *Buckley* did not deny relief to the challengers—who received the "relief they sought." *Ryder*, 515 U.S. at 183. Moreover, *Ryder* cabined *Buckley* to its *facts*. FHFA makes the novel assertion that *Ryder* confined *Buckley* only to the *civil* context. FHFA Br. 32. But *Ryder* said more than that, explaining that *Buckley* and similar cases do not apply "beyond *their facts*"—which included much more than merely being civil cases. 515 U.S. at 183-

84 (emphasis added).

FHFA's circuit precedent fares no better. It cites the four sentences of analysis in *Bhatti*, which (as explained, Opening Br. 33) is so conclusory that it has no persuasive value. Second, FHFA relies on a First Circuit decision that the Supreme Court reversed on an Appointments Clause issue before it could reach the court's *de facto* officer holding—which the Supreme Court had also granted certiorari to review. *See FOMB for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020). Moreover, the First Circuit principally relied on *Buckley* without addressing how *Ryder* limited that decision. *See Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 861-62 (1st Cir. 2019).

FHFA also cites *Andrade v. Lauer*, 729 F.2d 1475 (D.C. Cir. 1984), and *Franklin Sav. Ass'n v. Director, OTS*, 934 F.2d 1127 (10th Cir. 1991). But the Ninth Circuit had it right in refusing to follow these two decisions. *Silver v. U.S. Postal Serv.*, 951 F.2d 1033, 1036 n.2 (9th Cir. 1991) (per curiam). As the Ninth Circuit noted, the "continued vitality of the *de facto* officer doctrine is in serious doubt," and even the D.C. Circuit's adoption of it was "decidedly unenthusiastic." *Id.* Because the doctrine "'would likely leave plaintiffs'" in Appointments Clause cases "'without any remedy at all,'" the Ninth Circuit correctly "decline[d] to apply the *de facto* officer doctrine" to the Appointments Clause challenge before it. *Id.* (quoting *Andrade*, 729 F.2d at 1497)). This Court should do the same—especially given the

Supreme Court's recent confirmation that "Appointments Clause remedies are designed" to "create incentives to raise Appointments Clause challenges." *Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018).

Treasury's attempt to distinguish *Lucia* fails. It contends that "DeMarco was properly designated, unlike the ALJ in *Lucia* who was not properly appointed." Treas. Br. 28. But the issue here is that Mr. DeMarco was not properly *appointed* to serve as a principal officer; a "designation" for acting service is not an "appointment" under the Constitution—as FHFA admits, Br. 28.

FHFA cites an O.L.C. memo for the proposition that the *de facto* officer doctrine "has been specifically recognized as validating actions by acting officials challenged for having served an excessively long time." FHFA Br. 30. This memo is irrelevant because it discusses the doctrine solely in the context of a *statutory* challenge to an acting officer's service and cites no precedent that extends the doctrine to the Appointments Clause context. *See Dep't of Energy—Appointment of Interim Officers—Dep't of Energy Organization Act*, 2 Op. O.L.C. 405, 406 (1978). Notably, the memo was prompted by a D.C. Circuit case, *see id.* at 411, where the "Government concede[d] that the President cannot designate an acting officer indefinitely without any presentation to the Senate for confirmation," *Williams v. Phillips*, 482 F.2d 669, 671 (D.C. Cir. 1973).

Both Defendants repeatedly suggest "chaos" would reign if this Court rules in

favor of Plaintiffs. Treas. Br. 25-26, 27; FHFA Br. 29. This is a curious argument since Plaintiffs' requested relief for their Appointments Clause claim—vacatur of the Third Amendment and the subsequent actions that flow from it—would require many of the same actions the Trump Administration planned to take, only to be thwarted by the unconstitutional removal restriction. *See* Opening Br. 9-11. Nothing suggests the reforms pursued by the Trump Administration and Director Calabria would have unleashed some sort of catastrophe if completed. Similarly, given the prior administration's publicly stated policy goals (and the *Collins* litigation), "market participants," Treas. Br. 26, "have been on notice for years" that these transactions might be undone. *See Janus v. AFSCME*, 138 S. Ct. 2448, 2484 (2018). That forecloses any claims of "reliance" that could justify ignoring a constitutional violation. *Id.* Moreover, Plaintiffs are effectively requesting the same remedy Congress provided for violations of the FVRA. *See* 5 U.S.C. § 3348(d). This remedy is thus by no means an outlier.

3. Laches and Fairness

Separately, Treasury contends that laches should bar Plaintiffs' claim even though Plaintiffs sued within the statute of limitations. Treas. Br. 26-27 (citing *Chirco v. Crosswinds Communities, Inc.*, 474 F.3d 227, 235 (6th Cir. 2007)). But laches "is a gap-filling doctrine, and where there is a statute of limitations, there is no gap to fill." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods. LLC*,

137 S. Ct. 954, 961 (2017). Additionally, Treasury identifies no harm resulting from any alleged "delay" that is even close to the harm in *Chirco*, where delay permitted the construction of a housing project where "168 units were built, 109 of which were occupied" and the remedy would have "mandat[ed] destruction of the housing project." *See Petrella v. MGM, Inc.*, 572 U.S. 663, 685-86 (2014) (discussing *Chirco*). If anything, Treasury has *benefitted* from the fact that Plaintiffs did not sue sooner by collecting "dividends" under the constitutionally defective Third Amendment that it could not have otherwise received.

Next, Treasury appeals to "fair[ness]" in arguing that this Court should deny Plaintiffs a remedy. Treas. Br. 24-25 (internal quotation marks omitted). That argument is extraordinary considering the constitutional violation has led to dividend payments to Treasury totaling tens of billions of dollars. Excusing a violation of the Constitution to award the federal government an enormous financial windfall is not—in any sense of the word—"fair."

Relatedly, Defendants imply it would be unjust to enforce the Constitution here because officials lacked "knowledge" that Mr. DeMarco was serving in violation of the Appointments Clause. *Id.* at 24-25 (internal quotation marks omitted); FHFA Br. 31. As an initial matter, the premise is doubtful considering O.L.C. concluded over forty years ago that lengthy acting service raises Appointments Clause concerns and thus "may not continue indefinitely." *Status of*

the Acting Director, Office of Management and Budget, 1 Op. O.L.C. 287, 287 (1977). More significantly, there is no *mens rea* requirement for an Appointments Clause violation.

4. Ratification

Defendants also attempt to smuggle in a ratification argument that has never been raised before. FHFA Br. 32-33; Treas. Br. 29. This argument is forfeited. Opening Br. 33 n.3. Moreover, it fails on its own terms for several reasons.

First, allowing ratification of actions taken in violation of the Appointments Clause is inconsistent with the Supreme Court's instruction that remedies in this context should "create incentives to raise Appointments Clause challenges." *Lucia*, 138 S. Ct. at 2055 n.5 (brackets and internal quotation marks omitted).

Second, Defendants never explain how officers who are unconstitutionally insulated from removal may themselves ratify the decision of an official unconstitutionally serving in violation of the Appointments Clause. Opening Br. 33 n.3.

Third, Defendants do not even assert, much less supply evidence, that any of the alleged ratifiers "ma[d]e a detached and considered judgment" with "knowledge of all the material facts relating to the decision." *Adv. Disposal Servs. East, Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016) (internal quotation marks omitted).

Fourth, an officer may ratify a decision only if he had the power "to do the act

ratified *at the time the act was done*." *FEC v. NRA Pol. Victory Fund*, 513 U.S. 98, 98 (1994) (internal quotation marks omitted; emphasis added). Here, none of the later Directors had the power to authorize the Third Amendment "at the time" it was adopted—indeed, none of the subsequent Directors FHFA identifies was even employed by the agency in August 2012.

Finally, agency law (which governs ratification, *id.*) provides that a ratification is "not effective" if it would cause "adverse and inequitable effects on the rights of third parties." RESTATEMENT (THIRD) OF AGENCY § 4.05 (Mar. 2022 update). There can be little doubt that ratification here would have "adverse and inequitable effects" on Plaintiffs' rights.

II. Plaintiffs Were Harmed by the Unconstitutional Removal Restriction and Are Entitled to a Meaningful Remedy.

A. The Former President's Statement Conclusively Establishes that Plaintiffs Are Entitled to Retrospective Relief.

Former President Trump's letter describes the Net Worth Sweep as a "scam," "socialism," and "a travesty brought to you by the Obama/Biden administration," and says that the Trump Administration "was denied the time it needed to fix this problem because of the unconstitutional restriction on firing Mel Watt." In the face of these unequivocal statements, it is Defendants and not Plaintiffs who are asking this Court to credit an implausible factual narrative. Under *Collins v. Yellen*, the

Trump Letter "clearly" shows that Plaintiffs should prevail on their removal claim and are entitled to retrospective relief. 141 S. Ct. 1761, 1788-89 (2021).

FHFA misses the point regarding President Trump's statement that he would have "sold the government's common stock in these companies at a huge profit." FHFA Br. 55. It asserts "the government did not own common stock," *id.*, but Treasury owns *warrants* that it may convert to nearly 80% of the Companies' common stock at its discretion. Opening Br. 44-45. Although FHFA is correct that the common stock traded for a small value, FHFA Br. 55, the common stock had a low value *because of* the liquidation preference on Treasury's senior preferred stock, *see* Opening Br. 44-45. The massive liquidation preference on Treasury's senior preferred stock guarantees that the Companies' more junior shares—including any common stock owned by Treasury—will never generate dividends or any other compensation for those who own the more junior shares. Thus, for the government to convert its warrants to common stock and then sell that common stock "at a huge profit"—as President Trump stated—the liquidation preference would need to be eliminated. *Id.*

Defendants also ask the Court to ignore the former President's statement because his administration argued in court that the removal restriction was unconstitutional while defending the Net Worth Sweep against legal challenges. But that merely reveals the President considered himself bound by the statute until *a*

court declared it unlawful and hewed to the Department of Justice's usual practice of defending agency actions in court without regard to whether the incumbent administration agreed with them as a policy matter. The Trump Administration's legal filings cast no doubt on the veracity of President Trump's letter.

The Court must credit President Trump's letter under *Collins*, *see* Opening Br. 38-39, but the Court could not reject Plaintiffs' position as implausible even without it. Defendants attempt to obscure the matter, but Director Calabria and the Trump Administration were clear about how they planned to recapitalize the Companies and end the conservatorships: by raising new capital for the Companies through the public sale of additional common stock. *See* Testimony of Treasury Secretary Steven Mnuchin, *Housing Finance Reform: Next Steps: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 116th Cong. 30 (Sept. 10, 2019) ("[W]e will have to raise third-party capital."); *CNBC Interview with FHFA Director Mark Calabria*, CNBC 07:02-07:09 (Apr. 1, 2020), https://cnb.cx/3KRDGV9 ("It's always been my view that an exit from conservatorship is going to require a large capital raise by Fannie and Freddie."). As a matter of basic financial economics, such a capital raise could not have been carried off so long as Treasury was the senior equity holder and entitled to 100% of the Companies' profits; no investor would purchase new shares of stock under these

circumstances. Treasury appears to agree, acknowledging that its "liquidation rights limit the companies' ability to raise capital." Treas. Br. 34 (cleaned up).

Defendants argue that Plaintiffs' position is implausible because the Trump Administration was unable to complete its housing finance reform plans during the roughly two years after Director Watt's term expired. But Defendants ignore the sequential nature of the steps involved in the Trump Administration's plan. To take just one example, the Companies obviously could not recapitalize by selling new stock to private investors without knowing how much capital they needed to raise—a complex regulatory issue that Director Calabria did not resolve until a few weeks before President Trump left office. *See* 85 Fed. Reg. 82,150 (Dec. 17, 2020). Had FHFA started this process two years sooner, when President Trump first took office, the administration would have had time to complete its plan before President Trump's term ended.

Contrary to Defendants' suggestions, reducing the liquidation preference to zero or converting Treasury's senior preferred stock to common stock would not have meant "renounc[ing]" Treasury's investment "so that others can profit instead." FHFA Br. 48. Recapitalizing the Companies and releasing them from conservatorship would have greatly *enhanced* the overall value of Treasury's investment by making its common stock warrants much more valuable. Under Plaintiffs' requested remedy, Treasury would still own the vast majority of the

Companies' equity—warrants to obtain 79.9% of the Companies' common stock for a nominal price *plus* whatever *additional* common stock Treasury acquired if it converted its massive position in senior preferred stock into common—in other words, if Treasury were to convert its senior preferred stock to common, it would likely own over 99 percent of the common stock of the Companies. The total value of the Companies' equity, and by extension Treasury's overall investment, may well increase if the Companies were put on a path to returning to private control rather than continuing under the permanent control of bureaucrats. Director Calabria acknowledged as much, telling Congress that as part of an issuance of new stock Treasury could "sell off its shares to recoup the taxpayer investment." *Hearing Before H. Comm. on Fin. Servs.* 2:17:10–20 (Sept. 16, 2020), https://bit.ly/3Kzu557.

In the face of these facts, Defendants must come forward with clear evidence that Plaintiffs are wrong about how the removal restriction thwarted the Trump Administration's pursuit of housing finance reform plans that would have benefitted Plaintiffs. *See* Opening Br. 47. Defendants not only fail to meet *that* burden but balk at the idea of even having to meet a burden of *production*. Treas. Br. 40-41; FHFA Br. 55-56. Treasury contends that imposing a burden of production on the government in light of the President's letter "cannot be squared" with *Collins*. Treas. Br. 41. But *Collins* said a statement like this "clearly" shows harm; when plaintiffs

provide the very thing *Collins* asked for, the government should *at least* have to meet a burden of production to insist the contrary.

Defendants' reliance on Justice Kagan's *Collins* concurrence is misplaced. The Trump Administration had two goals—returning the Companies to private control *and* selling Treasury's investment in a way that would maximize value for taxpayers. *See* Opening Br. 38. The *only* way to accomplish both goals was for Treasury and FHFA to work together to recapitalize the Companies through a new stock issuance. As the district court found, however, the PSPAs could not be amended unilaterally by Treasury. Opening Br. 51. Without control over FHFA, the President was reduced "to a cajoler-in-chief" when pursuing his policy objectives. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 502 (2010).

The Federal Circuit recently endorsed some of Defendants' arguments, *Fairholme Funds, Inc. v. United States*, No. 2020-1912, 2022 WL 518222, at *19-20 (Fed. Cir. Feb. 22, 2022), but it did so with no briefing from the parties on any of these issues. Moreover, the opinion purported to follow Fifth Circuit precedent; but just last week, that court—with the benefit of adversarial briefing—remanded, rather than rejected, an identical removal claim. *Collins v. Yellen*, No. 17-20364, 2022 WL 628645 (5th Cir. 2022) (en banc). The Eighth Circuit followed the same course after

Collins. *Bhatti v. FHFA*, 15 F. 4th 848, 854 (8th Cir. 2021).[4] Thus, the Federal Circuit's decision is an outlier.

Defendants also erroneously suggest that Director Watt's policies were no different from Director Calabria's. That suggestion is wrong in at least two critical respects.[5] First, Director Watt repeatedly emphasized that, in his view, it was "the role of Congress, not FHFA, to make decisions that chart the path out of conservatorship." *See The Status of the Housing Finance System After Nine Years of Conservatorship: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 115th Cong. 4 (May 11, 2017). Director Calabria, in contrast, viewed FHFA as statutorily obligated "to fix [the Companies] and then release them from

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[4] These decisions refute Defendants' contention that Plaintiffs' "claim and requested relief" are somehow "waived." Treas. Br. 17. Plaintiffs' removal claim is identical to the one at issue in *Collins* and *Bhatti*, and the Supreme Court, the en banc Fifth Circuit, and the Eighth Circuit all declined to treat this claim and the requested relief as forfeited. Moreover, many of the facts that the Supreme Court's decision in *Collins* makes relevant to the appropriate remedy arose after the filing of the complaint in this case. While that might justify a remand so that Plaintiffs can file a supplemental pleading, 6A WRIGHT & MILLER, FED. PRAC. & PROC. § 1509 (3d ed.), it is not a reason to affirm dismissal of a meritorious constitutional claim.

[5] FHFA emphasizes the Mr. Phillips personally thought the Trump Administration could have worked with Director Watt. FHFA Br. 49. But the key question is what the Trump Administration *concluded*, not what Mr. Phillips thought, and he was unequivocal that the administration decided to "wait for Director Watt's term to end and to have our appointee" before moving forward. *Interview with Craig Phillips, Former Counselor to the Secretary of the Treasury*, SitusAMC—On the Hill, at 10:14 to 11:05, https://bit.ly/3sl08yU.

conservatorship." Mark A. Calabria, *Prepared Remarks at Mortg. Bankers Ass'n. Nat'l Secondary Mkt. Conf. & Expo 2019* (May 20, 2019), https://bit.ly/3AtBWfH.

Director Watt "emphasize[d]" to Congress that his capital rule "is not connected in any way to any efforts or ideas others may have about recapitalizing and releasing the Enterprises from conservatorship." *Ten Years of Conservatorship: The Status of the Housing Finance System: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 115th Cong. 30 (May 23, 2018). In stark contrast, Director Calabria stressed that his capital rule was a "critical step" "toward responsibly ending the 12-year conservatorships." *Prepared Remarks of Dr. Mark A. Calabria, Director of FHFA, at Financial Stability Oversight Council Principals Meeting* (Sept. 25, 2020), https://bit.ly/3I37FGW. Thus, Director Watt's steadfast insistence that FHFA would not lead the Companies out of conservatorship was directly contrary to Calabria's view that FHFA was *legally obligated* to do so.

B. Plaintiffs Are Entitled to an Injunction That Redresses Their Injury.

Because Plaintiffs have shown the removal restriction harmed them, they are entitled to an injunction putting Plaintiffs in the position they would be in were it not for the unconstitutional removal restriction. The prior administration's public statements provide this Court a roadmap for doing so. Opening Br. 40–44.

FHFA makes several "threshold" arguments against this remedy, but all of them fail. First, FHFA contends that Plaintiffs' requested relief is barred by 12

U.S.C. § 4617(f). But that provision lacks the clear statement necessary to bar all remedies for a constitutional claim. *See Webster v. Doe*, 486 U.S. 592, 603 (1988). *Collins* implicitly recognized this: After the Court spent pages analyzing and applying § 4617(f) to bar a *statutory* claim, the Court made no mention of the provision with respect to the *constitutional* claim. The second half of the Court's opinion would have been pointless if, all along, § 4617(f) barred the removal claim.

Next, FHFA asserts that remedying a separation-of-powers violation somehow violates the separation of powers itself. FHFA Br. 47. Other than generally quoting Article II, FHFA cites nothing to support this puzzling argument. Any time a new administration controls the executive branch, it may have to take actions to remedy a constitutional violation that occurred during a prior administration. The federal government's duty to obey court orders is not an "affront to the separation of powers." *Id.* Moreover, far from undermining Executive Branch discretion, Plaintiffs' proposed remedy would vindicate it by giving effect to policy choices that the Trump Administration would have made absent the unconstitutional removal restriction.

Finally, FHFA dwells on the APA cause of action for an agency's failure to act. FHFA Br. 44-46. But Plaintiffs are not merely challenging FHFA's *failure* to act. Instead, Plaintiffs' requested relief would effectively invalidate actions taken by Defendants that established the massive liquidation preference on Treasury's

Government Stock. This remedy is thus a subset of the relief requested in Plaintiffs' complaint—which was an unwinding of the Net Worth Sweep by deeming past dividend "payments as a pay down of the liquidation preference." Compl., RE 17, PageID# 271.

But even if the Court conceives of Plaintiffs' requested remedy as a mandatory rather than prohibitive injunction, that would not change the analysis. The "difference between mandatory and prohibitory injunctive relief does not warrant application of differing legal standards." *United Food & Com. Workers Union v. Sw. Ohio Reg'l Transit Auth*, 163 F.3d 341, 348 (6th Cir. 1998); *see also* 11A WRIGHT & MILLER, FED. PRAC. & PROC. § 2942 (3d ed.). To be clear, Plaintiffs are *not* seeking a "structural" injunction that would require ongoing judicial supervision, but an injunction like those "traditionally issued by courts of equity . . . upon termination of litigation," which "required a single simple act." *Brown v. Plata*, 563 U.S. 493, 554 (2011) (Scalia, J., dissenting) (internal quotation marks omitted).

FHFA cites no case refusing to provide a remedy for a successful separation-of-powers claim simply because the remedy requires the agency to take some action. The fact that courts frequently remedy separation of powers violations by invalidating government action does not imply that the courts are powerless to order the government to do what would have been done absent a violation of the Constitution. Indeed, the Supreme Court has at times cast separation of power

remedies in mandatory rather than prohibitory terms. *See Lucia*, 138 S. Ct. at 2055 (to "cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled").

CONCLUSION

The district court's judgment should be reversed.

Date: March 11, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and 6 Cir. R. 32 because this brief contains 6,499 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure and 6 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 using the 2016 version of Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of March, 2022, I filed the foregoing Reply Brief of Plaintiffs-Appellants Michael Rop, Stewart Knoepp, and Alvin Wilson 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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