IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
Civil No. 17-cv-02185 (PJS/HB)

ATIF F. BHATTI, *et al.*,

Plaintiffs,

v.

THE FEDERAL HOUSING FINANCE AGENCY, *et al.*,

Defendants.

TREASURY DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

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INTRODUCTION

In *Collins v. Yellen*, 141 S. Ct. 1761 (2021), the Supreme Court determined that a provision of the Housing and Economic Recovery Act of 2008 ("HERA") unconstitutionally insulated the Director of the Federal Housing Finance Agency ("FHFA") from presidential control. Finding that the subject of the plaintiffs' challenge—the "Third Amendment" to preferred stock purchase agreements between FHFA and Treasury to provide financial support to Fannie Mae and Freddie Mac (the "GSEs")—"could not be attacked," the Supreme Court remanded for consideration of the "extremely limited" issue of whether the plaintiffs could nonetheless demonstrate their entitlement to relief for "retroactive harm caused by any confirmed Director's actions" in implementing the Third Amendment's variable dividend formula. *Fairholme Funds, Inc. v. United States*, 26 F.4th 1274, 1305 (Fed. Cir. 2022). In response, Plaintiffs amended their complaint to challenge a separate part of Treasury's financial relationship with the GSEs (its liquidation preference) and seek a prospective injunction designed to increase the value of Plaintiffs' shares going forward. Because this amended complaint is based on little more than Plaintiffs' imagination, and wildly exceeds the scope of the remand in this case, the Court should conclude that there is "no viable remedy available" to Plaintiffs. *Id*. at 1304.

Plaintiffs' opposition brief, ECF No. 103 ("Opp'n"), is largely a restatement of their complaint and does not alter this conclusion. Plaintiffs offer no support for their theory that, in their alternate universe, the Trump Administration would have reduced Treasury's financial interest in the GSEs in the manner Plaintiffs hypothesize. Indeed, the former President at all times retained plenary control over Treasury and never directed, or even

developed any plans to direct, the actions Plaintiffs now seek to attribute to him. In the absence of well-pleaded factual allegations supporting their requested relief, Plaintiffs ask this Court to credit their rank speculation about hypothetical events, relieve them of their pleading burden, and afford them relief that would put them in a better situation than if the constitutional violation had never occurred. The Court should decline Plaintiffs' extraordinary request and dismiss this case.

ARGUMENT

I. *Collins* Provides No Support for the Legal Theories Posited in Plaintiffs' Amended Complaint.

In their opposition brief, Plaintiffs seek refuge in *Collins* and the Eighth Circuit's decision adopting *Collins*' reasoning and remanding to this Court for further proceedings. This gets them nowhere. *Collins* did not decide in Plaintiffs' favor any issue relevant to Defendants' motions to dismiss; indeed, *Collins* makes clear that Plaintiffs' amended complaint asserts no cognizable claim to relief.

A. Plaintiffs' Amended Complaint Sets Forth New Claims to Relief.

When they filed their original complaint in 2017, Plaintiffs—like the plaintiffs in *Collins*—challenged the Third Amendment, in particular its provision requiring the GSEs "to pay Treasury a quarterly dividend starting in 2013 and continuing forever that is equal to their entire net worth." *E.g.*, First Am. Compl. ¶ 55, ECF No. 27; *see also Bhatti v. FHFA*, 15 F.4th 848, 852 (8th Cir. 2021) (noting Plaintiffs' allegation that the Third Amendment "would collapse the value of their holdings"). In *Collins*, however, the Supreme Court denied Plaintiffs' request to "vacate the third amendment," *see Bhatti*, 15

F.4th at 853, as a remedy for HERA's unconstitutional removal restriction. *See Fairholme Funds*, 26 F.4th at 1305 (*Collins* explained that "the original implementation of the net worth sweep could not be attacked."). Thus, while the "relevant action" granting Plaintiffs standing to litigate their original complaint was the Third Amendment, *Bhatti*, 15 F.4th at 852, any present claim to relief would have to be directed at "actions that confirmed Directors have taken to *implement* the third amendment during their tenures," *id*. at 853 (quoting *Collins*, 141 S. Ct. at 1787).[1]

On remand, however, Plaintiffs filed an amended complaint setting forth an entirely different theory of harm than was at issue either in *Collins* or in their original complaint. By necessity, Plaintiffs no longer challenge the Third Amendment itself. Instead, they challenge a feature of the original stock purchase agreements between Treasury and FHFA—Treasury's liquidation preference. They seek an injunction requiring "Defendants to either (a) reduce the liquidation preference on Treasury's senior preferred stock to zero . . .; or (b) convert Treasury's senior preferred stock to common stock," Second Am. Compl., Prayer for Relief, ECF No. 87 ("SAC"). Plaintiffs allege such relief is justified in light of a laundry list of hypotheticals that Plaintiffs' speculate might have occurred in the absence of the removal restriction.

The amended complaint finds no support in *Collins*. *See* Mem. in Supp. of Treasury

[1] The Supreme Court emphasized that "there is no reason to regard" any such action as "void." *Collins*, 141 S. Ct. at 1787; *see also* id. at 1795 (Thomas, J., concurring) (expressing "serious[] doubt" that GSE shareholders would be able to establish their entitlement to a remedy, *i.e.*, that "any relevant action by an FHFA Director violated the Constitution").

Defs.' Mot. to Dismiss at 12–15, ECF No. 93 ("MTD"). Plaintiffs' speculative assertions about what *might have happened* in an inherently unknowable counterfactual scenario are not factual allegations, and they do not allege that either of the "situations" in which *Collins* suggested the "statutory provision would clearly cause harm" actually happened. *See Collins*, 141 S. Ct. at 1789 (theorizing that such harm would be shown 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 the way"). Nor do Plaintiffs allege facts demonstrating that they suffered cognizable harm traceable to HERA's removal restriction that the Court could remedy with retrospective relief. *See* MTD at 12–23.

B. Plaintiffs Lack Standing to Pursue Their Amended Complaint.

In light of the above, Plaintiffs are plainly wrong to contend that the Eighth Circuit has "already held that Plaintiffs have standing." Opp'n at 10. The Eighth Circuit merely applied the Supreme Court's holding that the Third Amendment—and specifically "the variable dividend formula that swept the [GSEs'] net worth to Treasury and left nothing for their private shareholders"—allegedly caused GSE shareholders a "pocketbook injury" sufficient to confer standing. *Collins*, 141 S. Ct. at 1779; *see Bhatti*, 15 F.4th at 852. It said nothing about Plaintiffs pursuing a new claim seeking to cancel a liquidation preference that has been in place since 2008, to remedy injuries that were allegedly incurred through an attenuated chain of speculative events that hypothetically could have occurred

over a multi-year period in an alternate universe. *See, e.g.*, Opp'n at 9–10 (reiterating Plaintiffs' speculative allegations of harm based on series of hypothetical actions that allegedly "would have" been taken). Plaintiffs' amended complaint alleges no "pocketbook injury," only the kind of "highly attenuated chain of possibilities" that cannot confer standing. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013).[2]

C. Plaintiffs Fail to State APA Claims.

As explained in Treasury's motion, Plaintiffs have failed to meet the threshold requirements of challenging either agency action or inaction under the Administrative Procedure Act ("APA"). MTD at 24–27. Plaintiffs have no substantive response to this. Instead, they again invoke *Collins* and the Eighth Circuit's decision in this case. That tactic is even more puzzling here: *Collins*' discussion of the removal authority claim did not address the APA, and the Eighth Circuit *could not* have said anything about Plaintiffs' ability to assert APA claims because Plaintiffs' original complaint did not rely on the APA.

Plaintiffs' opposition brief, like their amended complaint, identifies no discrete, final agency action that is the subject of their challenge. *See, e.g.*, *Friends of the Earth, Bluewater Network Div. v. U.S. Dep't of the Interior*, 478 F. Supp. 2d 11, 25 (D.D.C. 2007) ("A sure sign that a complaint fails the 'final agency action' requirement is when 'it is not

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[2] Because the Third Amendment is no longer at issue in this litigation, Plaintiffs' assertions about the harm they allegedly suffered from that amendment itself can be discarded. *See, e.g.*, Opp'n at 11 (highlighting allegation that Third Amendment "stripped the [GSEs'] junior preferred and common stock of all economic value"). As for harm allegedly inflicted by the liquidation preference—which is what they now seek to eliminate—Plaintiffs assertion that "each dollar added to the liquidation preference harmed Plaintiffs by lengthening the road back to positive value for their shares," *id.*—through a purely speculative and highly attenuated chain of events—does not describe an Article III injury.

at all clear what agency action [plaintiff] purports to challenge" (citation omitted)). The closest Plaintiffs come is their assertion that they "challenge the actions taken by Director Watt 'to implement the third amendment.'" Opp'n at 13. But, as noted, Plaintiffs are challenging Treasury's liquidation preference—not the implementation of the Third Amendment, which changed the formula for calculating the dividends that the GSEs owed Treasury from a fixed rate to a variable one. Moreover, a vague reference to Director Watt's "implement[ation of] the third amendment," *id.*, does not identify the requisite "circumscribed, discrete agency action[]." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62 (2004) ("*SUWA*"). Indeed, Plaintiffs' brief confirms that that they are asserting a programmatic challenge—*i.e.*, that from "day one" of the Trump Administration, "FHFA continued to implement the PSPA provisions that deprived Plaintiffs of their shares' economic value." Opp'n at 13. Under the APA, however, Plaintiffs cannot seek such "wholesale" review of government programs; they must instead "direct [their] attack against some particular 'agency action' that causes [them] harm." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990); *see also, e.g.*, *Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001) ("While a single step or measure is reviewable, an on-going program or policy is not, in itself, a 'final agency action' under the APA.").

Plaintiffs' arguments in support of their purported challenge to agency inaction under section 706(1) of the APA are even weaker. Such a claim can proceed "only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *SUWA*, 542 U.S. at 64. But Plaintiffs do not identify any source of authority—much less a "legal obligation 'so clearly set forth that it could traditionally have been

enforced through a writ of mandamus,'" *Vietnam Veterans of America v. CIA*, 811 F.3d 1068, 1075–76 (9th Cir. 2016) (citation omitted)—commanding Treasury or FHFA to eliminate "the PSPA provisions granting Treasury a liquidation preference." Opp'n at 15. No such authority exists, *see* MTD at 27, and, as discussed above, the Supreme Court made clear that there was no reason to consider any action taken by FHFA as invalid merely because of the unlawful removal restriction.

Plaintiffs' only counter is that "if Plaintiffs prove they suffered harm from the unconstitutional removal restriction, Defendants would be 'legally required' to remedy that harm." Opp'n at 17. That is not how the APA works. Plaintiffs' entitlement to *some* remedy if they are ultimately successful on their claim does not establish that the action they seek to compel—the elimination of Treasury's liquidation preference—is "legally required." To state a claim under section 706(1), Plaintiffs must show that Treasury has withheld some ministerial, nondiscretionary act mandated by an independent legal obligation and that their requested relief *is itself* the discharge of that duty. Because they have not done so, their claim fails.

II. Rule 12(b)(6) Dismissal Is Warranted.

To withstand a motion to dismiss, a complaint must allege facts sufficient to "'raise a right to relief above the speculative level' and 'state a claim to relief that is plausible on its face.'" *Cleveland v. Whirlpool Corp.*, 550 F. Supp. 3d 660, 668 (D. Minn. 2021) (citation omitted). Plaintiffs fail to do so because, as their opposition brief confirms, their amended complaint is an exercise in speculation and conjecture.

A. The Court Need Not Credit Plaintiffs' Speculation and Conjecture.

Plaintiffs primarily attempt to use the Rule 12(b)(6) standard as a crutch, contending that Defendants' arguments require the Court to "disbelieve" Plaintiffs' "factual allegations." Opp'n at 21. Plaintiffs are not, however, relying on well-pleaded *factual* allegations, the truth of which a court is required to assume for purposes of deciding a motion to dismiss. *E.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). Their complaint is based on speculative assertions and legal conclusions about inherently unknowable subject matter—allegations about not what *actually* happened, but about what, in Plaintiffs' opinion, *could have* happened in an alternate universe of their own construction. For example, the central premise of Plaintiffs' claim to relief is that "but for the removal restriction, the [GSEs] would have raised capital by selling new shares of common stock in 2019, which would have required the elimination of the liquidation preference so that Treasury could exit its stake through a profitable sale." Opp'n at 37. That allegation is not entitled to a presumption of truth because it is not based in fact; no amount of discovery could "reveal evidence" in support of Plaintiffs' claim about what would have happened in an alternate universe. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *see also, e.g.*, *Carney v. Univ. of Akron*, No. 5:15-cv-2309, 2016 WL 4036726, at *8 n.8 (N.D. Ohio July 28, 2016) ("Plaintiff is not entitled to rely on revisionist history to support a legally and factually deficient claim.").

B. Former President Trump's Letter Is Irrelevant.

Plaintiffs' stubborn reliance on former President Trump's letter fails for similar reasons. *See* Opp'n at 21–26. Like the rest of Plaintiffs' complaint, the letter is

theoretical—it describes nothing that the former President did while President, only what he now surmises he "would have been able to accomplish" under hypothetical conditions. *See* ECF No. 87-1. The Court need not "second-guess the former President[]," Opp'n at 23, to disregard such *post hoc* speculation about what might have been.

Likewise, the "presumption of regularity" has no application here. *See id*. Plaintiffs incorrectly suggest that the doctrine requires courts take "the official statements of public officials at face value," *id*., but as the case they misleadingly cite makes clear, "[t]he presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary," directs courts to "presume that [such officers] have properly discharged their official duties." *United States v. Chem. Found.*, 272 U.S. 1, 14–15 (1926); *see also, e.g.*, *Wilburn v. Astrue*, 626 F.3d 999, 1003–04 (8th Cir. 2010). The doctrine is about *official* acts and duties—not *post hoc* speculation about hypothetical scenarios. *Cf. James Madison Project v. DOJ*, 302 F. Supp. 3d 12, 32 (D.D.C. 2018) ("The presumption of regularity applies to a public official's discharge of official duties, not to his or her uttering of official statements.").

A letter manufactured for the express purpose of this litigation is not an official act of a public officer or even a statement about President Trump's official actions while in office, and it is irrelevant to the disposition of Defendants' motions.

C. The Court Should Not Relieve Plaintiffs of Their Pleading Burden.

Plaintiffs recognize the doomed nature of their case when they assert that the Court should flip the burdens associated with pleading a plausible claim. *See* Opp'n at 22–24. Such an approach is inconsistent with *Collins*, where the Supreme Court emphasized that

"there is no reason to regard any of the actions taken by the FHFA in relation to the third amendment as void." 141 S. Ct. at 1787; *see also id*. at 1793 (Thomas, J., concurring). From this decision, it is clear that a validly appointed Director's actions are presumed lawful; it is the challenger's burden to plead facts demonstrating that they are not; and any uncertainty over the validity of those actions is properly resolved in the government's favor. And as described above, former President Trump's letter does not in any event constitute "a *prima facie* showing that the unconstitutional removal restriction inflicted compensable harm." Opp'n at 24.

Moreover, Plaintiffs' analogy to the *McDonnell Douglas* framework for analyzing employment discrimination claims, *see id*., is misplaced. Even if that framework were applicable here (it is not), and even if Plaintiffs had made out the equivalent of a *McDonnell Douglas prima facie* case here (they have not), a *prima facie* case merely requires a defendant accused of discrimination to identify its legitimate nondiscriminatory reason, while the plaintiff always has "[t]he ultimate burden." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The framework does not relieve a plaintiff of its burden of pleading a plausible claim under the relevant legal standard.

III. Plaintiffs Do Not Plausibly Allege That HERA's Removal Restriction Caused Them to Suffer Harm from Treasury's Liquidation Preference.

Shorn of its speculation and conjecture, Plaintiffs' complaint lacks any factual allegations giving plausible rise to their contention that "the removal restriction caused harm." Opp'n at 26. Most importantly, throughout his presidency, President Trump had plenary control over Treasury's financial interest in the GSEs through his removable-at-

will Treasury Secretary. *See* MTD at 16–18. Plaintiffs' primary response is to emphasize that, in their hypothetical retelling, the Trump Administration was committed to selling Treasury's stake "*for a large profit*," which according to Plaintiffs would have required "FHFA and the [GSEs] to take numerous steps." Opp'n at 38 (emphasis in original). Plaintiffs derive this purported commitment only from former President Trump's letter, not from a contemporaneous statement of his Administration's policy goals during the time he was allegedly impeded by HERA's removal restriction. Even setting that aside, it is implausible to conclude that, during the tenure of Director Watt, FHFA and the GSEs would not have taken the "five" allegedly "sequential" steps that Plaintiffs allege were "necessary" to achieve the Administration's goals, *id*. at 34, had the Trump Administration actually pursued those outcomes during that period of time.[3] *See* MTD at 17–18; *see also, e.g.*, Melvin L. Watt, Director, FHFA, *Statement before the U.S. Senate Committee on Banking, Housing, and Urban Affairs*, 115th Cong. 4 (May 11, 2017) (incorporated by Plaintiffs at SAC ¶ 62) (emphasizing that the GSEs need a capital buffer "to shield against short-term operating losses" and that FHFA would "take actions as necessary" to prevent losses and thus "additional draws of taxpayer support").

Plaintiffs' argument is also implausible on its own terms. The elimination of Treasury's liquidation preference would not itself result in any profit for Treasury. Such a profit could only result from further action by Treasury—but Plaintiffs plead no facts to

[3] Indeed, FHFA took several actions similar to Plaintiffs' proposed steps during Director Watt's tenure. *See* Mem. in Supp. of FHFA Defs.' Mot. to Dismiss at 7, 28–29, ECF No. 100.

support their speculation that Treasury had any concrete plan to take further action to generate any such profit during the time period relevant to Plaintiffs' complaint. Moreover, Plaintiffs' argument is premised on the assumption that the liquidation preference itself is a source of value for Treasury's shares. *E.g.*, Opp'n at 39 (attempting to account for the fact that Treasury and FHFA repeatedly negotiated to *increase* Treasury's liquidation preference on the theory that "all things being equal," doing so would allow the government to "receive more profit when later selling those shares"). Yet Treasury could have generated the same "huge profit" that Plaintiffs hypothesize by, for example, selling a portion of its preferred shares and their associated liquidation preference. This further renders implausible Plaintiffs' allegation that the Trump Administration would have inevitably eliminated the liquidation preference by simply writing it off prior to a hypothetical sale in Plaintiffs' alternate universe.

Nor can Plaintiffs' contention that "but for the removal restriction, the [GSEs] would have raised capital by selling new shares of common stock in 2019, which would have required the elimination of the liquidation preference," Opp'n at 37, be reconciled with the actions the Trump Administration actually took once the President's preferred FHFA Director was in place. *See* MTD at 21–23. Plaintiffs reduce the entire Trump Administration's agenda to the "two goals" that they now perceive to be most beneficial to them, *see* Opp'n at 30, but again ignore the general complexity of government policymaking and the host of competing policy objectives under consideration at any given point in time.

Even indulging Plaintiffs' oversimplification of these issues, there are no well-

pleaded factual allegations supporting the notion that the goals Plaintiffs identify—essentially, eliminating Treasury's liquidation preference in tandem with a public offering of Treasury's shares—were ever tangible, achievable priorities of the Trump Administration, much less policy outcomes that inevitably would have been accomplished had a different FHFA Director been in place two years earlier. Indeed, the actual documents Plaintiffs cite do not reference "selling Treasury's stake at a large profit," *id*. at 30, and Plaintiffs do not cite any contemporaneous statements articulating concrete plans to accomplish such a goal. And while Treasury's 2019 housing reform plan at least mentions the possibility of "[e]liminating all or a portion" of Treasury's liquidation preference, that document listed four other potential options for "recapitalizing" the GSEs, and noted that any particular one would require additional "careful consideration." MTD at 22–23. In other words, no option was a foregone conclusion, and there is simply no support—in the complaint, any of its incorporated documents, or anywhere else—for Plaintiffs' assertion that elimination of the liquidation preference was the "only option[] listed in the report that would permit the Trump Administration to pursue its goals." Opp'n at 40.

Because convenient *post hoc* supposition cannot substitute for well-pleaded factual allegations, Plaintiffs' claim to relief fails as a matter of law.

IV. The Relief Plaintiffs Seek Is Improper.

Plaintiffs suggest that they are entitled to a "reparative" injunction "restor[ing]" them to the "position they 'would have occupied in the absence' of the removal problem." Opp'n at 41 (quoting *Collins*, 141 S. Ct. at 1801 (Kagan, J., concurring)). For the reasons

discussed above, Plaintiffs' speculative allegations fail to demonstrate their entitlement to such an injunction here. As Justice Kagan emphasized in language immediately preceding Plaintiffs' quotation, Plaintiffs' requested injunction would require a showing that "the President's inability to fire an agency head affected the complained-of decision." *Collins*, 141 S. Ct. at 1801 (Kagan, J., concurring). Plaintiffs do not even identify which decision is the subject of their challenge, and do not come close to showing that the removal restriction prevented the Trump Administration from eliminating Treasury's liquidation preference. Thus, granting them their requested relief "would, contrary to usual remedial principles, put the plaintiffs 'in a better position' than if no constitutional violation had occurred." *Id*. (citation omitted).[4]

Even putting that aside, Plaintiffs' insistence that they are entitled to an injunction that would, in Plaintiffs' calculation, increase the value of their shares, cannot be squared with *Collins*' statement that GSE shareholders are entitled to only "retrospective" relief (if any). *Id*. at 1787. "[All] injunctions . . . seek prospective relief," *Smith v. City of Chicago*, No. 94 C 920, 2003 WL 57035, at *1 (N.D. Ill. Jan. 7, 2003), and Plaintiffs' requested "reparative" injunction is no exception. *See, e.g.*, *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 104 F.3d 1349, 1352 (D.C. Cir. 1997) (explaining prospective effect of reparative injunction).[5] Such relief is particularly inappropriate where there is no

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[4] Indeed, Plaintiffs have not shown their entitlement to an injunction of any kind because they have not made the required showing that, absent such relief, they are "certain" to suffer "great" and "irreparable" harm. *E.g.*, *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 826 F.3d 1030, 1037 (8th Cir. 2016) (citation omitted).

[5] This is not to suggest Plaintiffs would be entitled to damages, as there is no waiver of sovereign immunity that would authorize such relief in this suit against the federal

"continuing wrongful act to correct," because an injunction would "unduly intrude upon the operation of the [government]." *Lampkin v. Dist. of Columbia*, 886 F. Supp. 56, 62 (D.D.C. 1995). That is precisely the issue here—*Collins* upheld the Third Amendment, Plaintiffs identify no ongoing *unlawful act* of any confirmed Director, and any injunction would necessarily intrude upon the current Administration's operations and preferred policy objectives. In light of the "extreme limits" that *Collins* placed on similarly situated shareholders' ability to obtain retrospective relief, this Court should follow the lead of the Federal Circuit in similar circumstances and find that "there is no viable remedy available to" Plaintiffs. *Fairholme Funds*, 26 F.4th at 1304–05.

Denying Plaintiffs their requested injunction would also avoid the separation-of-powers issues identified in Treasury's motion. *See* MTD at 15–16. Plaintiffs' response cites no examples of courts ordering one presidential administration to effectuate the alleged policy preferences of a prior administration *to remedy violation of a constitutional provision designed to protect executive authority*. Plaintiffs do not answer the question how it would "make sense" for this Court to "wipe out an action approved or ratified by two different Presidents' directors under the guise of respecting the presidency," *Collins v. Mnuchin*, 938 F.3d 553, 594 (5th Cir. 2019), and the Court should decline to take such action here.

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government. *See, e.g.*, *Lane v. Pena*, 518 U.S. 187, 192 (1996). While a permissible "retrospective" remedy under *Collins* could potentially include an order vacating or setting aside agency action pursuant to the APA, *see, e.g.*, *Chamber of Commerce of U.S. v. SEC*, 443 F.3d 890, 908 (D.C. Cir. 2006), that remedy is not appropriate here given Plaintiffs' failure to plead proper APA claims.

CONCLUSION

For the foregoing reasons, and those stated in Treasury's motion, the Court should dismiss this case with prejudice.

Dated: May 2, 2022

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

ANDREW M. LUGER
United States Attorney

CRAIG R. BAUNE
Attorney ID No. 331727
600 US Courthouse
300 South Fourth Street
Minneapolis, MN 55415
(612) 664-5600

TERRY M. HENRY
Assistant Branch Director

/s/ *R. Charlie Merritt*
R. CHARLIE MERRITT (VA Bar No. 89400)
KATE TALMOR
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, DC 20005
(202) 616-8098
robert.c.merritt@usdoj.gov

Counsel for the Treasury Defendants