IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

J. PATRICK COLLINS, *et al.*, Plaintiffs, v. THE FEDERAL HOUSING FINANCE AGENCY, *et al.*, Defendants.	Civil Action No. 4:16-cv-03113

TREASURY DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

Defendants, the United States Department of the Treasury and Janet Yellen, in her official capacity as Secretary of the Treasury ("Treasury Defendants"), submit this reply in support of their motion to dismiss Plaintiffs' Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

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Introduction

In *Collins v. Yellen*, 141 S. Ct. 1761 (2021), the Supreme Court determined that a statutory removal provision unconstitutionally insulated the Director of the Federal Housing Finance Agency ("FHFA") from presidential control. Finding that the subject of Plaintiffs' challenge—the "Third Amendment" to preferred stock purchase agreements ("PSPAs") between FHFA and Treasury—"could not be attacked," the Supreme Court remanded the "extremely limited" issue of whether Plaintiffs could nonetheless demonstrate their entitlement to retrospective relief for "harm caused by any confirmed Director's actions" in implementing the Third Amendment. *Fairholme Funds, Inc. v. United States*, 26 F.4th 1274, 1305 (Fed. Cir. 2022). Plaintiffs have now amended their complaint to assert two completely new legal theories and seek sweeping injunctive relief that would both eliminate Treasury's liquidation preference on Fannie Mae and Freddie Mac stock with no benefit to the government (an action that the Trump Administration never pursued) and invalidate the Third Amendment. Rather than pursue the remand described by the Supreme Court, Plaintiffs seek the very relief the Supreme Court has already rejected. Because Plaintiffs' amended complaint is unsupported by either law or fact, the Court should conclude that there is "no viable remedy available" to Plaintiffs and dismiss this case. *See id.* at 1304.

Argument

I. The Court Should Dismiss Plaintiffs' Removal Claims.

Plaintiffs' opposition brief largely seeks refuge in the Supreme Court's decision in this case and the Rule 12(b)(6) standard. *See generally* Pls.' Resp. in Opp'n to Defs.' Mots. to Dismiss, ECF No. 86 ("Opp'n"). Neither provides support for Plaintiffs' position. The amended complaint asserts no cognizable claim to relief, and Plaintiffs' opposition brief adds little to the equation.

A. Plaintiffs Assert No Cognizable Claim to Relief.

To start, Plaintiffs' claims are not "cognizable under the APA," Opp'n at 6, because their

amended complaint fails to satisfy the APA's threshold requirements for challenging either specific agency action or inaction. *See* Treasury Defs.' Mot. to Dismiss at 16-18, ECF No. 83 ("MTD"). These arguments are not "foreclosed by the Supreme Court's decision," Opp'n at 6, because the Supreme Court's discussion of the removal authority claim before it did not address the APA at all. That the Supreme Court offered Plaintiffs an opportunity to make the difficult showing that they are entitled to retrospective relief based on the "actions that confirmed Directors . . . have taken to *implement* the third amendment," *id.* (quoting *Collins*, 141 S. Ct. at 1787), does not relieve Plaintiffs of their burden of *actually identifying* such an action in their amended complaint, which they have failed to do.

The closest Plaintiffs come to describing discrete final agency action is their assertion that they "challenge the actions taken by Director Watt 'to implement the third amendment.'" Opp'n at 7 (citation omitted). 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 Fannie Mae and Freddie Mac ("the GSEs") owed Treasury and did not alter or affect Treasury's liquidation preference. Plaintiffs have not identified any actions taken "to implement the third amendment" under the terms of the remand, *id.* at 7; instead, they seek injunctive relief against Treasury's liquidation preference (which is not itself final agency action and is not a feature of the Third Amendment). The APA does not permit Plaintiffs to seek wholesale review of FHFA's undifferentiated policies from "day one" of the Trump Administration that allegedly "deprived Plaintiffs of their shares' economic value." *Id.*; *see, e.g.*, *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (requiring that a plaintiff "direct its attack against some particular 'agency action' that causes it harm"); *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*." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). 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,'" *Viet. Veterans of Am. v. CIA*, 811 F.3d 1068, 1075-76 (9th Cir. 2016) (citation omitted)—commanding Treasury to either reduce its liquidation preference to zero or "convert its preferred stock to common stock," Opp'n at 9. No such authority exists. *See* MTD at 18. Plaintiffs' only counter is that if they are able to "prove they suffered harm from the unconstitutional removal restriction, Defendants *must* remedy that harm." Opp'n at 9. The assertion that Plaintiffs would be entitled to *some* remedy if they are ultimately successful on their claim does not establish that the remedy they actually seek to compel—the elimination of Treasury's liquidation preference—is "legally required" within the meaning of the APA. Rather, 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 (that exists outside of their lawsuit) and that their requested relief is thus *itself* the discharge of that duty. Because they have not done so, their claim fails.

Ultimately, Plaintiffs' amended complaint sets forth new, inherently speculative theories of harm that find no support in the Supreme Court's decision. Because they have not even attempted to allege that HERA's removal restriction "specifically caused an agency action," *Calcutt v. FDIC*, 37 F.4th 293, 315 (6th Cir. 2022), that "confirmed Directors have taken to *implement* the third amendment during their tenures," *Collins*, 141 S. Ct. at 1787, Plaintiffs' removal claims should be dismissed.

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

Beyond these threshold issues, Plaintiffs' amended complaint fails to allege sufficient facts to "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

1. The Court Need Not Credit Plaintiffs' Speculation.

Plaintiffs contend that Defendants' arguments require the Court to "disbelieve" Plaintiffs'

"factual allegations." Opp'n at 10. 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. Their amended complaint is instead based on speculative assertions and legal conclusions regarding inherently unknowable subject matter—allegations about not what *actually* happened, but about what, in Plaintiffs' opinion, *could have* happened in an alternative universe of their imagining. For example, the central premise of Plaintiffs' removal claim 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 17. That allegation is not entitled to a presumption of truth because it is not based in fact; there is no way to prove Plaintiffs' imaginative assertions about what might have happened at the end of an attenuated chain of hypothetical events multiple years into an alternative universe that never existed. *See, 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."). Such allegations cannot give rise to a plausible claim to relief.

Plaintiffs' reliance on former President Trump's letter, *see* Opp'n at 11-12, fails for similar reasons. Like the rest of the amended complaint, the letter is theoretical—it describes nothing the former President did while President, only what he now surmises he "would have been able to accomplish" under hypothetical conditions that never arose while he was in office. ECF No. 80-1. That kind of *post hoc* speculation is certainly not "dispositive under *Collins*," as Plaintiffs assert. Opp'n at 11. The Supreme Court's discussion of hypothetical conditions that, if present, would demonstrate that Plaintiffs suffered harm from the removal provision—*e.g.*, "suppos[ing]" that "the President *had made* a public statement expressing displeasure with actions taken by a Director," *Collins*, 141 S. Ct. at 1789 (emphasis added)—reinforces that Plaintiffs have made no such showing here. Unlike in the situation posited by the Supreme Court, Plaintiffs do not rely on any contemporaneous statement

from the former President that he would remove Director Watt—indeed, they do not marshal a single statement from former President Trump while in office expressing disagreement with any action that Director Watt either took or did not take with respect to the PSPAs. They have thus failed to establish the kind of tight causal connection between HERA's removal restriction and the President's ability to influence an action by the FHFA Director that the Supreme Court contemplated.[1]

2. Plaintiffs' Allegations of Harm Are Implausible.

Shorn of its speculation and conjecture, Plaintiffs' amended complaint lacks well-pleaded factual allegations giving plausible rise to their contention that "the removal restriction caused harm by preventing the Trump administration from implementing policies that would have benefitted Plaintiffs." Opp'n at 10. Most importantly, throughout his presidency, former President Trump had plenary control over Treasury's financial interest in the GSEs through his removable-at-will Treasury Secretary. *See* MTD at 11-12. 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 been accomplished through a "capital raise" that would have apparently "required FHFA and the [GSEs] to take numerous steps." Opp'n at 17-18. But Plaintiffs plead no facts suggesting that this was ever a tangible, achievable priority of the Trump Administration, much less a policy outcome that inevitably would have been accomplished had HERA not contained a restriction on the President's removal authority.[2] The relief Plaintiffs actually seek is

[1] Nor does the presumption of regularity, which Plaintiffs off-handedly reference, have any application here. *See* Opp'n at 11. That doctrine directs courts to "presume that [public officers] have properly discharged their official duties." *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926). It applies to official acts and duties of public officials—not to *post hoc* speculation about hypothetical events.

[2] Indeed, if the Court were to issue Plaintiffs' requested relief at this juncture, there is no indication that Treasury would be able to generate the massive profit that Plaintiffs now contend was such a policy focus of the Trump Administration. Even under Plaintiffs' own speculative theory, then, there is no basis for injunctive relief eliminating the liquidation preference now and in a vacuum—*i.e.*, absent any of the other conditions that Plaintiffs contend would justify such an action.

an injunction requiring Treasury to eliminate its liquidation preference without any corresponding benefit to Treasury. Had former President Trump actually been committed to pursuing *that* outcome while he was in office, he could have effectuated it via his plenary control over Treasury.

Nor can Plaintiffs' *post hoc* theories be reconciled with the actions the Trump Administration actually took once the President's preferred FHFA Director was in place. *See* MTD at 14-16. Those actions—*e.g.*, repeatedly *increasing* Treasury's liquidation preference, waiting to prepare a housing reform plan until September 2019, nearly three years into President Trump's and Secretary Mnuchin's tenures—bear no resemblance to Plaintiffs' hypotheses about the Trump Administration's housing policy goals in their alternative universe. They also reflect the general complexity of government policymaking, which requires difficult decisions about what policies to prioritize and where to allocate scarce resources. These realities make clear the implausibility of Plaintiffs' assertion that, in their alternate reality, the Trump Administration would have inevitably pursued the "two goals" that Plaintiffs now perceive to be most beneficial to them. Opp'n at 12. Indeed, the actual contemporaneous documents Plaintiffs cite do not articulate any concrete plans to facilitate a sale of Treasury's interest in the GSEs to private investors and otherwise generate the profit Plaintiffs now assert was a specific, predetermined outcome. And while the 2019 housing reform plan—unlike any other contemporaneous citation—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." *See* MTD at 15-16. It provides no support for Plaintiffs' claim that elimination of the liquidation preference was the "only option[] listed in the report that would permit the Trump administration to achieve its goals." Opp'n at 19.

Plaintiffs have gone to great lengths, many years after the fact, to manufacture a narrative designed to support a policy outcome that they now think would benefit them most. But there is no

factual support for the contention that Plaintiffs' imagined path was ever actually a plausible course of action. Because they are based on rank speculation, Plaintiffs' removal claims should be dismissed.

II. The Court Should Dismiss Plaintiffs' Appropriations Clause Claims.

Plaintiffs contend that their new Appropriations Clause claims are somehow "tee[d] up" by the Supreme Court's opinion. *See* Opp'n at 19. But that decision said nothing about the Appropriations Clause and cast no doubt on FHFA's funding structure. Rather, it made clear that the Third Amendment "bore no constitutional infirmity in its inception" and remanded only a limited remedial question relating to HERA's removal restriction. *See Collins v. Yellen*, 27 F.4th 1068, 1069 (5th Cir. 2022). This was no invitation for Plaintiffs to raise a new legal theory challenging the Third Amendment itself (and the overarching PSPAs) based on a different constitutional provision.

In any event, the Appropriations Clause claims are meritless. That much is clear from the plain text, which does not prohibit a statutory funding mechanism, like FHFA's, that unequivocally does not involve any "Money . . . drawn from Treasury." U.S. Const. art I, § 9, cl. 7; *see also* MTD at 18-20. Because the text is clear, Plaintiffs' claims fail. *E.g.*, *Martin v. Hunter's Lessee*, 14 U.S. 304, 338-39 (1816) ("If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible."). Plaintiffs attempt to rely on "structure," "history," and "tradition" to reach an alternate conclusion, *see* Opp'n at 20-21, but none of these arguments provide any support for the claim that Congress may never permit an agency to "self-fund" outside of "periodic, temporally bound appropriations," Am. Compl. ¶¶ 105, 111, ECF No. 80.

True, the Appropriations Clause appears near limitations on Congress's power in Article I, Section 9. But that placement does not change the language or meaning of the clause. Whatever limitations the Constitution places on Congress's ability to appropriate funds from the Treasury to federal agencies, Congress does not transgress them by promulgating a statute allowing FHFA to establish and collect assessments from regulated entities to cover costs and expenses. And in any

event, such an arrangement does not "ced[e]" Congress's "power of the purse," Opp'n at 21, because Congress retains plenary control over the manner in which FHFA receives its funding, *see* MTD at 20. As for history, Plaintiffs' brief contains many general assertions about what certain historical sources deem to be the importance of the "power of the purse" (an ambiguous term in its own right). *See* Opp'n at 21. What Plaintiffs do not provide, however, is any concrete support for the argument they assert here, *i.e.*, that the Appropriations Clause prevents Congress from allowing FHFA to draw its funding from assessments on regulated entities (*not* from the Treasury) and outside of an annual appropriations bill. Indeed, two courts have rejected similar arguments, and Plaintiffs cite no contrary authority supporting their "historical" interpretation. *See Bhatti v. FHFA*, 332 F. Supp. 3d 1206, 1217 (D. Minn. 2018), *reversed on other grounds*, 15 F.4th 848 (8th Cir. 2021); *Rop v. FHFA*, 485 F. Supp. 3d 900, 939 (W.D. Mich.), *on appeal*, No. 20-2071 (6th Cir.).

Plaintiffs fare no better in their attempts to cast FHFA's funding mechanism as "wholly unprecedented." Opp'n at 21. Plaintiffs do not appear to dispute the bedrock principle that Congress can "create governmental institutions reliant on fees, assessments, or investments rather than the ordinary appropriations process." *PHH Corp. v. CFPB*, 881 F.3d 75, 95 (D.C. Cir. 2018) (en banc), *abrogated on other grounds by Seila Law v. CFPB*, 140 S. Ct 2183 (2020); *accord Am. Fed'n of Gov't Emps., AFL-CIO, Loc. 1647 v. FLRA*, 388 F.3d 405, 409 (3d Cir. 2004). And although they attempt to draw distinctions between FHFA's funding provisions and those of the other self-funded federal entities cited in Treasury's motion, *see* Opp'n at 22, those distinctions are not legally meaningful. Each of these agencies, like FHFA, has the authority, consistent with the Appropriations Clause and "express statutory language," *id.*, to assess its own funding needs independent of a periodic, temporal congressional appropriation from the Treasury. *See, e.g.*, 12 U.S.C. § 16 (authorizing the Office of the Comptroller of the Currency to fund itself through assessments on regulated entities); 39 U.S.C. § 2401(a) (appropriating to the United States Postal Service "all revenues received by the Postal

Service" through its own activities); 8 U.S.C. § 1356 (authorizing United States Citizenship and Immigration Services to fund itself through the collection of user fees). None of the myriad other federal agencies that Congress has traditionally authorized to rely on some degree of self-funding have ever been held to be in violation of the Appropriations Clause, and Plaintiffs offer no limiting principle that would cabin their reading of the clause to FHFA.

Plaintiffs also emphasize that FHFA is not an "independent" agency. *See* Opp'n at 22. But Plaintiffs fail to explain why an agency's independence has any bearing on the Appropriations Clause analysis.[3] While Plaintiffs' lawsuit has confirmed the President's power to remove FHFA's Director at will, the President does not have, as Plaintiffs posit, a "blank check to tax and spend as he pleases." *Id.* Instead, Congress retains plenary control over FHFA's funding and can always alter the agency's method of funding if it has any concerns about the agency's operations. Plaintiffs now complain that the President has too much influence over FHFA's spending, but there is simply nothing in the Appropriations Clause that requires Congress to insulate agency expenditures from Presidential oversight.

Finally, even if Plaintiffs were correct on the merits, there is no basis to invalidate the Third Amendment or the PSPAs. *See* MTD at 23-25. Plaintiffs cite no decision holding that the proper remedy for an Appropriations Clause violation is vacatur of a prior agency action (much less an action that took place nearly ten years prior to the claim being raised). Instead, they rely solely on the concurring opinion in *All American Check Cashing*. But that concurrence incorrectly assumed—without citing any supporting authority—that an Appropriations Clause violation implicates "a government

[3] Plaintiffs' argument that this Court should follow a concurring opinion in *CFPB v. All-American Check Cashing, Inc.*, 33 F.4th 218 (5th Cir. 2022) (Jones, J., concurring), is meritless. *See* MTD at 20-23. That non-binding opinion is both inapposite here and unpersuasive in its reasoning. That Treasury's motion to dismiss highlighted certain differences between the respective funding structures at CFPB and FHFA as further distinguishing factors in no way signals Treasury's agreement with any aspect of the concurring opinion's characterization of CFPB's funding structure.

actor's authority to act." *All Am. Check Cashing*, 33 F.4th at 242 (Jones, J., concurring).[4] The concurring opinion's remedial discussion is inconsistent with the general principle in separation-of-powers cases that "vacatur of past actions is not routine," *John Doe Co. v. CFPB*, 849 F.3d 1129, 1133 (D.C. Cir. 2017), and the Supreme Court's remedial decision here, which declined the very relief Plaintiffs now seek and found "no reason to regard any of the actions taken by the FHFA in relation to the third amendment as void," *Collins*, 141 S. Ct. at 1787. In all events, equitable relief "does not follow from success on the merits as a matter of course," *Winter v. NRDC, Inc.*, 555 U.S. 7, 32 (2008), and equitable principles counsel against the massively (and self-evidently) disruptive result Plaintiffs seek. *See* MTD at 23-25. And while Plaintiffs contend that laches is inapplicable here because they "sued within the statute of limitations," Opp'n at 25,[5] laches is an equitable doctrine that may support curtailment of the type of equitable relief (*i.e.*, injunctive and declaratory relief against the Third Amendment and PSPAs) that Plaintiffs seek here. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 685 (2014).

Conclusion

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

Dated: September 9, 2022

Respectfully submitted,

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[4] The concurring opinion posited that "a government actor cannot exercise even its lawful authority using money the actor cannot lawfully spend." *All Am. Check Cashing*, 33 F.4th at 242 (Jones, J., concurring). But here, the PSPAs (including the Third Amendment) do not involve the expenditure of any FHFA funds. *See* MTD at 25.

[5] As explained in FHFA's motion, Plaintiffs did not assert their Appropriations Clause claims within the applicable statute of limitations. *See* FHFA Defs.' Mem. in Supp. of Mot. to Dismiss at 22, ECF No. 85.

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