No. 23-1051

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ATIF F. BHATTI; TYLER D. WHITNEY; MICHAEL F. CARMODY,

Plaintiffs-Appellants

v.

FEDERAL HOUSING FINANCE AGENCY; DEPARTMENT OF THE TREASURY; JANET L. YELLEN, in her official capacity as Secretary of the Treasury; SANDRA L. THOMPSON, in her official capacity as Acting Director of the Federal Housing Finance Agency,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA (No. 17-2185)

BRIEF OF PLAINTIFFS-APPELLANTS

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

In *Collins v. Yellen*, the Supreme Court held that a restriction on the President's ability to remove the Director of the Federal Housing Finance Agency was unconstitutional. The only remaining question, according to the Supreme Court, is whether the removal restriction harmed Fannie Mae and Freddie Mac shareholders. Plaintiffs have plausibly alleged that it did. The Supreme Court said that a public statement from the President explaining that he would have removed the FHFA Director would "clearly" show that the removal restriction caused harm. Former President Trump has provided just that. In response to the Supreme Court's decision, the former President stated that if he had controlled FHFA from the beginning of his Administration, he would have fired the FHFA Director.

Thus, there is nothing left for this Court to do but apply the Supreme Court's decision and order the district court to enter an injunction placing Plaintiffs in the position they would be in absent the unconstitutional removal restriction—or, at a minimum, to permit this case to move past the motion to dismiss stage. The district court's judgment, which misread *Collins*, imposed novel legal standards on Plaintiffs, and discounted Plaintiffs' plausible factual allegations, should be reversed.

This appeal raises important issues, and Plaintiffs request that the Court allocate 20 minutes to each side for oral argument.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. The district court entered final judgment on December 16, 2020, and Plaintiffs filed a timely notice of appeal on January 9, 2023. The district court's final order disposed of all claims, and this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Plaintiffs plausibly allege that they may obtain retrospective relief for compensable harm inflicted by the removal restriction the Supreme Court held unconstitutional in *Collins v. Yellen*. *Collins v. Yellen*, 141 S. Ct. 1761 (2021); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010); *Saxton v. Fed. Hous. Fin. Agency*, 901 F.3d 954 (8th Cir. 2018); *Cmty. Fin. Servs. Ass'n of Am. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616 (5th Cir. 2022).

STATEMENT OF THE CASE

A. Fannie Mae, Freddie Mac, and the Net Worth Sweep.

Fannie Mae and Freddie Mac ("the Companies") are for-profit companies that sell mortgage-backed securities. App. 84; R. Doc. 87, at 4. By insuring and securitizing mortgages, the Companies support the multi-trillion-dollar housing finance market and help make homeownership possible for millions of Americans. *Id.*

The Companies are regulated by the Federal Housing Finance Agency

(FHFA). App. 86; R. Doc. 87, at 6. In 2008, Congress passed and President Bush signed the Housing and Economic Recovery Act (HERA), the statute which created FHFA and appointed the agency to regulate the Companies. *Id.* HERA established FHFA as an independent agency with a single Director. *Id.* HERA granted the single Director significant powers. Most important here, HERA empowers the Director to appoint FHFA as the Companies' conservator. *Id.* If the Director exercises this power, FHFA is not "subject to the direction or supervision of any other agency of the United States." *Id.* (quoting 12 U.S.C. § 4617(a)(7)). The Director exercised this power in September 2008, putting the Companies into conservatorship. *Id.* The Companies remain in conservatorship to this day.

In 2008, acting as conservator of the Companies, FHFA entered into two agreements on the Companies' behalf with the Treasury Department. App. 86–87; R. Doc. 87, at 6–7. These agreements are known as Preferred Stock Purchase Agreements (PSPAs). *Id.* Under the PSPAs, Treasury agreed to provide the Companies with a funding commitment that the Companies could draw upon if their liabilities exceeded their assets. App. 87; R. Doc. 87, at 7. In return, Treasury received several benefits. *Id.* First, Treasury received senior preferred stock that carried a liquidation preference. App. 88; R. Doc. 87, at 8. A liquidation preference gives a shareholder the right to receive funds before other shareholders in the event the company is liquidated. *Id.* Treasury's initial liquidation preference was for $1 billion and Treasury's liquidation preference was set to increase by one additional dollar for each dollar the Companies drew from Treasury's funding commitment. *Id.* Treasury's senior preferred stock also entitled it to quarterly dividends before all other shareholders. *Id.* Second, FHFA agreed that the Companies would issue warrants entitling Treasury to buy 79.9% of their common stock at a nominal price. App. 87; R. Doc. 87, at 7. Finally, the Companies were to pay Treasury a quarterly market-based periodic commitment fee, although Treasury waived the fee in every quarter in which it could have been charged. App. 88–89; R. Doc. 87, at 8–9.

FHFA and Treasury amended the PSPAs several times. App. 89; R. Doc. 87, at 9. Most relevant here is the Third Amendment of August 2012, in which FHFA and Treasury imposed what is known as the Net Worth Sweep. App. 91; R. Doc. 87, at 11.[1] The Net Worth Sweep, a policy developed in part by Obama White House officials, *id.*, forces the Companies to pay Treasury their *entire net worth* (minus a small capital buffer) every quarter. *Id.* In other words, the Companies are bound to pay Treasury 100% of their comprehensive income and retained assets—in perpetuity. *Id.* This new arrangement resulted in massive payments to Treasury,

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[1] In January 2021, FHFA and Treasury agreed to amend the PSPAs for a fourth time. App. 112; R. Doc. 87, at 32. The amendments increased the amount of "net worth" the Companies could retain under the sweep. *Id.* In addition, the amendments permitted Treasury's liquidation preference to increase in an amount equal to the Companies' retained earnings. *Id.* The Supreme Court held that these amendments did not moot shareholders' claims for retrospective relief. *Collins*, 141 S. Ct. at 1780.

totaling $300 billion—approximately $109 billion more than the Companies received from Treasury. *See* App. 93; R. Doc. 87, at 13 (noting that Fannie Mae disbursed $181 billion to Treasury while Freddie Mac disbursed $119 billion). Despite Fannie and Freddie's extraordinary profits in the years following the Net Worth Sweep, *see* App. 91; R. Doc. 87, at 11, the Net Worth Sweep guaranteed that the Companies could never pay down Treasury's liquidation preference, App. 93; R. Doc. 87, at 13. The Net Worth Sweep thus stripped the Companies' junior preferred and common stock of all economic value by guaranteeing that any profits the Companies generate for investors would go to Treasury. App. 92–93; R. Doc. 87, at 12–13; *see also* App. 92; R. Doc. 87, at 12 ("An internal Treasury document dated August 16, 2012, expressed the same sentiment: 'By taking all of their profits going forward, we are making clear that the [Companies] will *not* ever be allowed to return to profitable entities.'").

B. The Removal Restriction Prevents the Trump Administration from Enacting Its Preferred Policies.

The Trump Administration sought to unwind these policies but was unable to do so because of HERA's removal restriction, later held unconstitutional by the Supreme Court in *Collins*, 141 S. Ct. at 1783–84.

HERA's removal restriction provided that the FHFA Director served for a five-year term and could only be removed by the President "for cause." App. 86; R. Doc. 87, at 6; 12 U.S.C. § 4512(b)(2). Thus, President Trump was unable to nominate an FHFA Director in line with his Administration's policy goals. App. 96; R. Doc. 87, at 16. Instead, when President Trump took office, the Obama-appointed, long-time Democratic Congressman Mel Watt served as director of FHFA. App. 93–96; R. Doc. 87, at 13–16. Director Watt still had two years left in his statutory term and could not be fired without cause. App. 96; R. Doc. 87, at 16. Director Watt was the last remaining Obama-appointed regulator leading a federal agency in the Trump Administration. App. 97; R. Doc. 87, at 17.

The Trump Administration, meanwhile, had two overarching goals for Fannie Mae and Freddie Mac. First and foremost, the Trump Administration planned to lead the Companies out of conservatorship as quickly as possible. *Id.* Additionally, the Trump Administration planned to end government ownership of the Companies by selling off Treasury's stake in the Companies at a large profit. *Id.* The Administration intended to achieve these goals by selling new shares of the Companies' common stock to investors. App. 101; R. Doc. 87, at 21. For that to work, though, two things had to happen. First, the Net Worth Sweep had to be eliminated so that the Companies could actually retain profits. After all, no private investor would purchase stock in a company that has its net worth stripped by the government each quarter. App. 92; R. Doc. 87, at 12. Second, and relatedly, Treasury's liquidation preference had to be eliminated. App. 102–05; R. Doc. 87, at 22–25. Here again, no private investor would purchase stock if Treasury's massive liquidation preference entitled it to billions of dollars before all other shareholders saw a single dollar. *Id.* The Trump Administration planned to eliminate Treasury's liquidation preference by either writing the liquidation preference down to zero or converting Treasury's senior preferred shares (which carried the liquidation preference) to common stock (or some combination of the two). App. 102; R. Doc. 87, at 22. Either approach would have allowed Treasury to sell its stake in the Companies for a large profit as part of the recapitalization—achieving the Administration's goals. App. 101–02; R. Doc. 87, at 21–22; App. 104; R. Doc. 87, at 24.

But the Trump Administration was not able to achieve its goals of leading the Companies out of conservatorship and into private ownership due to the removal restriction. App. 105; R. Doc. 87, at 25; App. 114; R. Doc. 87, at 34. The Trump Administration and Director Watt disagreed on at least two critical issues. First, they disagreed about implementing the Net Worth Sweep. App. 107–08; R. Doc. 87, at 27–28. Second, they disagreed about whether the executive branch could or should lead the Companies out of conservatorship without further congressional action. App. 106; R. Doc. 87, at 26. Director Watt thought that any effort to release the Companies from conservatorship should occur by legislation, while the Trump Administration thought it both lawful and desirable for the executive branch to act without further legislation. App. 106–08; R. Doc. 87, at 26–28. This standoff continued until Director Watt's term ended two years into the Trump presidency.

App. 109; R. Doc. 87, at 29.

Finally, after Director Watt's statutory term ended in January 2019, President Trump was able to appoint an FHFA director in line with his Administration's policy goals. App. 96; R. Doc. 87, at 16. Once able to select his own Director, President Trump moved quickly. President Trump announced who he would choose to serve as acting FHFA director and nominated a permanent director the month before Director Watt's term expired. App. 96–97; R. Doc. 87, at 16–17. And President Trump installed a new acting director the same day Watt's term ended, despite statutory authority allowing President Trump to keep Watt in a holdover capacity following the end of his term. *Id.* (citing 12 U.S.C. § 4512(b)(4)).

In April 2019, the Senate confirmed President Trump's choice for FHFA Director, Mark Calabria. App. 111; R. Doc. 87, at 31. Although Director Calabria and Treasury took several key steps toward accomplishing the Administration's goals of leading the Companies out of conservatorship and into private ownership, they were ultimately unable to complete the tasks with the time remaining in President Trump's term. *See id.* With only two years to accomplish the Administration's goals, Director Calabria and Treasury simply "ran out of time." App. 114; R. Doc. 87, at 34; App. 117–18; R. Doc. 87, at 37–38 (quoting Andrew Ackerman, *Biden to Nominate Sandra Thompson to Lead Fannie and Freddie's Overseer*, WALL ST. J. (Dec. 14, 2021), https://on.wsj.com/3e0IZSI.).

C. The Supreme Court Agrees With Shareholders that the Removal Restriction Is Unconstitutional and Remands for a Remedy.

Plaintiffs are individual shareholders of Fannie Mae and Freddie Mac. App. 83; R. Doc. 87, at 3. They argued that the Net Worth Sweep must be set aside because, among other reasons, the FHFA was unconstitutionally structured as an independent agency with a single director removable only for cause. The district court dismissed their complaint. While this case was pending on appeal, the Supreme Court decided *Collins*—another lawsuit brought by Fannie and Freddie shareholders—and held that the for-cause removal restriction was unconstitutional. 141 S. Ct. at 1783–84.

The Supreme Court held that HERA's "for-cause restriction on the President's removal authority violates the separation of powers." *Id.* Rather than dictate a particular remedy, the Supreme Court remanded for the lower courts to determine whether the unconstitutional restriction "inflict[ed] compensable harm" on the Companies' shareholders. *Id.* at 1789. While recognizing that "an unconstitutional provision is never really part of the body of governing law," the Court acknowledged that "it is still possible for an unconstitutional provision to inflict compensable harm." *Id.* at 1788–89. The Court provided illustrative examples in which "the statutory provision would clearly cause harm," including 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."

Id. at 1789. Because the Court could not "rule[] out" that Plaintiffs suffered compensable harm, it concluded that the question of remedy "should be resolved in the first instance by the lower courts." *Id.* President Biden fired Director Calabria and nominated a director "who reflects the administration's values" within *hours* of the Supreme Court handing down its opinion. App. 118; R. Doc. 87, at 38.

Applying the Supreme Court's instruction, this Court remanded the case to the district court to determine whether Plaintiffs can demonstrate harm. *Bhatti v. FHFA*, 15 F.4th 848 (8th Cir. 2021).

D. Former President Trump Says He Would Have Fired Director Watt But For the Unconstitutional Removal Restriction.

Back in the district court, Plaintiffs amended their Complaint to comply with the Supreme Court's instruction to allege compensable harm caused by the unconstitutional removal restriction. App. 81; R. Doc. 87, at 1. Plaintiffs alleged, among other things, that the unconstitutional removal restriction prevented the Trump Administration from achieving its goals of ending the conservatorships and moving the Companies out of government ownership. As an attachment to their Complaint, Plaintiffs provided a signed letter from former President Trump to Senator Rand Paul. App. 129; R. Doc. 87-1, at 2; *see also Letter from Donald Trump to Sen. Rand Paul*, REAL CLEAR POLITICS (Nov. 11, 2021), https://bit.ly/3ped1sP. In the letter, President Trump explains exactly the steps he would have taken but for the unconstitutional removal restriction. *Id.* President Trump acknowledges that "the

Supreme Court has raised" a question "about what I would have been able to accomplish if I had been able to fire the incompetent Mel Watt from day one of my Administration." *Id.* President Trump directly answers that question: "From the start, I would have fired former Democrat Congressman and political hack Mel Watt from his position as Director and would have ordered FHFA to release these companies from conservatorship." *Id.* He further explains: "My Administration would have also sold the government's common stock in these companies at a huge profit and fully privatized the companies. The idea that the government can steal money from its citizens is socialism and is a travesty brought to you by the Obama/Biden administration." *Id.* As to the effect of the unconstitutional removal restriction, President Trump concludes that "[m]y Administration was denied the time it needed to fix this problem because of the unconstitutional restriction on firing Mel Watt. It has to come to an end and courts must protect our citizens." *Id.*

Defendants moved to dismiss Plaintiffs' amended complaint. The district court granted the motions and again dismissed Plaintiffs' complaint. App. 373; R. Doc. 119, at 29. Plaintiffs appealed.

SUMMARY OF ARGUMENT

The Supreme Court has already held that the restriction on the President's ability to remove the FHFA director is unconstitutional. The only remaining question is whether that restriction harmed Plaintiffs by preventing the President from removing the FHFA director and implementing policies that would have benefitted the Companies' shareholders. The Supreme Court held that a public statement from the President expressing his displeasure with the FHFA director and explaining that the restriction prevented him from removing the director from office would "clearly" show that restriction harmed the shareholders. Former President Trump has issued just such a statement—explaining that, were it not for the removal restriction, he would have removed the FHFA director and taken other actions that would have benefitted shareholders.

Plaintiffs allege further facts supporting their claim for relief within the counterfactual framework the Supreme Court instructed the lower courts to apply. Plaintiffs plausibly allege that the Trump Administration: (1) intended to take the Companies out of conservatorship and privatize them; (2) took several steps to achieving those goals; and (3) was unable to achieve those goals because of the two years lost to the unconstitutional removal restriction. The complaint supports these factual allegations with statements made and actions taken by Trump Administration officials. Under *Collins*, Plaintiffs are entitled to a remedy.

Further, no threshold issue would bar Plaintiffs' requested relief. Plaintiffs have alleged agency action. The Supreme Court and this Court have already held that Plaintiffs challenge FHFA's actions to implement the nationalization of Fannie Mae and Freddie Mac. Nor does 12 U.S.C. § 4617(f) bar Plaintiffs' claims. That provision "prohibits relief where the FHFA action at issue fell within the scope of the Agency's authority as a conservator," but *permits* relief "if the FHFA *exceeded* that authority." *Collins*, 141 S. Ct. at 1776 (emphasis added). Here, Plaintiffs allege that FHFA exceeded its authority in maintaining the Net Worth Sweep and the attendant liquidation preference after President Trump was unconstitutionally barred from firing the Director. And even if the Court disagrees with that analysis, section 4617(f) does not provide the kind of "clear statement" required to deprive Plaintiffs of *any* remedy for a constitutional violation. *Webster v. Doe*, 486 U.S. 592, 603 (1988).

In sum, Plaintiffs have satisfied the motion to dismiss standard, and the district court's dismissal should be reversed.

ARGUMENT

I. Standard of Review.

This Court reviews the district court's decision to grant a motion to dismiss de novo. *Dunbar v. Wells Fargo Bank*, 709 F.3d 1254, 1256 (8th Cir. 2013). The Court must "accept the factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff[s'] favor." *Rydholm v. Equifax Info. Servs. LLC*, 44 F.4th 1105, 1108 (8th Cir. 2022).

II. Plaintiffs Plausibly Allege their Entitlement to a Remedy for the Separation of Powers Violation Recognized by the Supreme Court.

A. Plaintiffs' Removal Remedy Allegations—Including A Dispositive Statement from Former President Trump—Satisfy the Motion to Dismiss Standard.

Plaintiffs have plausibly alleged that they were harmed by the unconstitutional removal restriction. Plaintiffs have provided a direct statement by former President Trump explaining that he would have fired Director Watt but for the unconstitutional restriction—the kind of evidence the Supreme Court said would "clearly" demonstrate harm. *Collins*, 141 S. Ct. at 1789. Even beyond that, Plaintiffs have alleged a body of facts showing that President Trump would have fired Director Watt and, with control over FHFA, pursued policies that would have benefitted Plaintiffs. To avoid the straightforward conclusion that Plaintiffs have stated a claim for a remedy, the district court misread *Collins*, imposed novel legal standards, and discounted Plaintiffs' plausible allegations.

In *Collins*, the Supreme Court held that the structure of FHFA violated the separation of powers. *Id*. at 1783. Although the unconstitutional statutory provision was "automatically displace[d]" by the Constitution, the Court further held that the removal restriction could nevertheless "inflict compensable harm." *Id.* at 1788–89. And specifically in the context of litigation over the Net Worth Sweep, the Court said "the possibility that the unconstitutional restriction on the President's power to remove a Director of the FHFA could have such an effect cannot be ruled out." *Id.*

at 1789.

The Supreme Court left the question of whether plaintiffs can show that they are entitled to a remedy to the lower courts to resolve in the first instance. *Collins*, 141 S. Ct. at 1788–89. The Court reasoned that plaintiffs may have an "entitlement to retrospective relief." *Id.* at 1788. The Court went on to provide examples in which the unconstitutional removal restriction "would *clearly* cause harm." *Id.* at 1789 (emphasis added). For example, the Court explained, "suppose that the President had made a public statement expressing displeasure with actions taken by a Director and had asserted that he would remove the Director if the statute did not stand in the way." *Id.* In "th[at] situation[], the statutory provision would clearly cause harm." *Id.* The Court acknowledged that the shareholders argued that, absent the removal restriction, "the President might have replaced one of the confirmed Directors who supervised the implementation of the third amendment, or a confirmed Director might have altered his behavior in a way that would have benefited the shareholders." *Id.* The Supreme Court then remanded for the lower courts to evaluate that question in the first instance. *Id.* Thus, the Court sent the case back to the lower courts to determine whether evidence supported a conclusion that the President desired to remove the director but did not do so because of the removal restriction.

In line with the Supreme Court's instructions to adopt a counterfactual framework, Plaintiffs allege facts showing what President Trump *would* have done absent the unconstitutional removal restriction. In particular, Plaintiffs allege that President Trump *would* have replaced Director Watt absent the unconstitutional removal restriction and that a confirmed Director appointed by President Trump at the beginning of his term *would* have acted differently than Director Watt in a way that benefited shareholders.

In fact, plaintiffs have provided more than just counterfactual allegations. Although it is not Plaintiffs' burden to present evidence at the motion to dismiss stage, Plaintiffs have nonetheless presented *direct evidence* of President Trump's intent to have managed the FHFA absent the removal restriction and specifically to have fired Director Watt—straight from President Trump himself. Plaintiffs attached to their First Amended Complaint a letter from former President Trump to Senator Rand Paul explaining the actions he would have taken in the first two years of his Administration had the unconstitutional removal restriction not been in place. App. 129; R. Doc. 87-1, at 2. In the letter, President Trump focuses on "the need to privatize Fannie Mae and Freddie Mac," and "what [he] would have been able to accomplish if [he] had been able to fire the incompetent Mel Watt from day one of [his] Administration." *Id.* President Trump acknowledges the Supreme Court's decision in *Collins* and recognizes that "[t]he Supreme Court's decision asks what I would have done had I controlled FHFA from the beginning of my Administration, as the Constitution required." *Id.* President Trump leaves no doubt as to the answer to that question. He explains in no uncertain terms:

> From the start, I would have fired former Democrat Congressman and political hack Mel Watt from his position as Director and would have ordered FHFA to release these companies from conservatorship. My Administration would have also sold the government's common stock in these companies at a huge profit and fully privatized the companies. The idea that the government can steal money from its citizens is socialism and is a travesty brought to you by the Obama/Biden administration. My Administration was denied the time it needed to fix this problem because of the unconstitutional restriction on firing Mel Watt.

Id.

That should be the end of any dispute over whether Plaintiffs are entitled to a retrospective remedy based upon their presidential removal claim. *Collins* states that "a public statement" by the President "expressing displeasure with actions taken by a Director" and "assert[ing] that he would remove the Director if the statute did not stand in the way" would "clearly" show that the removal restriction harmed shareholders. 141 S. Ct. at 1789. In other words, that public statement would be dispositive. Here, the former President has provided just such a statement in direct response to the Supreme Court's decision.

The Supreme Court instructed plaintiffs to present a counterfactual theory of what President Trump would have done absent the unconstitutional removal restriction, particularly focusing on the former President's intent. Plaintiffs have presented direct, probative evidence about the former President's intent *from the former President himself*. That fact conclusively answers the question of what

President Trump would have done absent the unconstitutional removal restriction. That fact *alone* precludes dismissal for failure to state a claim.

Even putting aside Plaintiffs' extraordinary *direct* evidence proving President Trump's intent, plaintiffs also allege a body of probative *circumstantial* evidence which independently demonstrates that plaintiffs can make out their case for relief.

The complaint alleges that "[f]rom the beginning, the Trump Administration had two primary policy objectives for Fannie and Freddie: (1) releasing the Companies from conservatorship as promptly as practicable; and (2) ending government ownership of the Companies by selling Treasury's stake at a large profit." App. 97; R. Doc. 87, at 17. Plaintiffs pointed to *fourteen* different statements from President Trump and Trump Administration officials expressing those goals. *See* App. 97–100; R. Doc. 87, at 17–20; App. 102–03; R. Doc. 87, at 22–23. Below are just a handful of Plaintiffs' specific factual allegations outlining the Trump Administration's goals and steps taken towards those goals:

- "Steven Mnuchin said in an interview shortly after President-elect Trump nominated him to serve as Treasury Secretary that the new administration intended to get [Fannie and Freddie] out of government control." App. 97; R. Doc. 87, at 17 (internal quotation marks omitted); *see also* App. 98; R. Doc. 87, at 18 ("In testimony before the House Financial Services Committee in the summer of 2017, Secretary Mnuchin stated that leaving [Fannie and

Freddie] in conservatorship makes no sense." (internal quotation marks omitted)).

- "President Trump's eventual pick for FHFA Director, Mark Calabria, then serving as Vice President Pence's chief economist, said that the Trump administration is committed to ending the conservatorship of Fannie Mae and Freddie Mac." *Id.* (internal quotation marks omitted); *see also* App. 99; R. Doc. 87, at 19 ("In a speech after becoming FHFA Director, Mr. Calabria stated that the centerpiece of our strategy is to end the Fannie and Freddie conservatorships." (internal quotation marks omitted)).
- "In 2018, the Executive Office of the President issued a report outlining numerous proposals to end the conservatorship of Fannie Mae and Freddie Mac and transition[] Fannie Mae and Freddie Mac to fully private entities." App. 98; R. Doc. 87, at 18 (internal quotation marks omitted).
- "In a March 2019 directive, President Trump instructed Treasury to consult with FHFA and develop proposals for [e]nding the conservatorships of Fannie and Freddie." *Id.* (internal quotation marks omitted).
- "During Director Calabria's tenure, FHFA also sent an annual report to Congress stating that FHFA's end-state vision for the Enterprises is to return [them] to operating as fully-private companies outside of conservatorship." App. 100; R. Doc. 87, at 20 (internal quotation marks omitted).

- "In September 2019, Treasury issued a report in response to the President's March 2019 directive. On page one, the report stated that the Companies' conservatorships should come to an end. The Treasury report also stated that the Companies should be recapitalized and exit conservatorship as promptly as practicable. On the same day, FHFA issued a press release praising the Treasury report and saying that [a]fter nearly 11 years, ending the conservatorships of Fannie Mae and Freddie Mac is now a top priority for this Administration and the FHFA." App. 99; R. Doc. 87, at 19 (internal quotation marks and citations omitted).
- "Mr. Mnuchin said the new administration wanted to privatize the Companies and that [i]t makes no sense that these are owned by the government." App. 103; R. Doc. 87, at 23 (internal quotation marks omitted).
- "Director Calabria said he expected that, as part of a public offering of new shares of Fannie and Freddie stock, Treasury would sell off its shares to recoup the taxpayer investment." *Id.* (internal quotation marks omitted).

Plaintiffs further allege that, given the financial condition of the Companies when President Trump took office, App. 100; R. Doc. 87, at 20, the Trump Administration could not immediately accomplish its stated goals of releasing the Companies from conservatorship without certain preparatory steps, *id.* Plaintiffs provide support for this factual allegation with a statement from Director Calabria, who explained that:

"A precondition for responsibly ending the conservatorships is that the Enterprises must be well-regulated and well-capitalized, such that once Fannie Mae and Freddie Mac exit, they never have to return." *Id.* (quoting Statement of Dr. Mark A. Calabria, FHFA Director, Before the U.S. House of Representatives Committee on Financial Services (Oct. 22, 2019), https://bit.ly/33HPKYj). This process would take time. "Although the Companies had returned to sustained profitability by 2017, building up the capital reserves necessary to exit conservatorship solely through retained earnings would have taken many years." App. 101; R. Doc. 87, at 21.

Thus, Plaintiffs allege, "[t]o achieve its objective of ending the conservatorships as promptly as practicable, the Trump Administration's policy was to recapitalize the Companies in part by having the Companies sell new shares of common stock to private investors." *Id.* The complaint quotes a statement from Secretary Mnuchin outlining this plan. He explained: "So we really see two things. One, retaining earnings, that is one way we will accumulate capital. And then, two, we will have to raise third-party capital." *Id.* (quoting *Housing Finance Reform: Next Steps: Hearing Before the S. Comm. On Banking, Housing, and Urban Affairs*, 116th Cong. 30 (Sept. 10, 2019)). Secretary Mnuchin also stated that, in his view, the Companies "can raise a very significant amount of capital from the private sector." *Id.*; *see also id.* ("It's always been my view that an exit from conservatorship is going to require a large capital raise by Fannie and Freddie.").

The Trump Administration planned to raise this needed capital "through a series of [stock] issuances." *Id.* But "[t]o raise billions of dollars of capital in the private markets, the new issuances of common stock that the Trump administration intended for the Companies to sell would need to be attractive to private investors." App. 102; R. Doc. 87, at 22. "The only way to make such stock attractive to private investors was to eliminate the liquidation preference on Treasury's senior preferred stock." *Id.* That is because "[t]he large liquidation preference on Treasury's senior preferred stock, combined with the fact that Treasury's senior preferred stock has priority over all other stock issued by the Companies, prevented all shareholders in the Companies other than Treasury from ever receiving a return on their investments." *Id.*; *see also* App. 103; R. Doc. 87, at 23 ("[T]he Companies' common stock has no economic value so long as that liquidation preference remains.").

For that reason, "[p]rivate investors would not purchase a new issuance of common stock in the Companies so long as the liquidation preference remained." App. 102; R. Doc. 87, at 22. "Therefore, a necessary step in fulfilling the Trump Administration's goal of recapitalizing the Companies through a new issuance of common stock and releasing them from conservatorship was to eliminate the liquidation preference on Treasury's senior preferred stock." *Id.* "That step could be accomplished in either of two ways: (1) by writing down the liquidation preference to zero and promising not to further increase the liquidation preference in the absence of additional draws on Treasury's funding commitment; or (2) by converting Treasury's senior preferred stock to common stock." *Id.* Plaintiffs allege further support for this allegation in a September 2019 Treasury report, "which responded to the President's March 2019 directive and listed ending the conservatorships as a top priority in fulfilling the President's mandate." App. 104; R. Doc. 87, at 24. There, "Treasury recommended that the administration consider (1) [e]liminating all or a portion of the liquidation preference of Treasury's senior preferred shares; or (2) exchanging all or a portion of that interest for common stock or other interests in the Companies." *Id.* (internal quotation marks omitted). This indicates that in addition to either simply eliminating the liquidation preference in full or converting to common in full, the Administration could have eliminated the liquidation preference by writing it down in part and converting the rest to common stock.

Having alleged ample facts establishing the Trump Administration's plan for the Companies as well as the steps necessary to complete that plan, Plaintiffs further allege that the Trump Administration was unable to complete its plan because of the unconstitutional removal restriction. When President Trump took office, Director Watt still had two years left to serve and could not be fired without cause under HERA's removal restriction. "So long as Director Watt was at the helm of FHFA, the Trump Administration was unable to make progress on its policy objectives for Fannie and Freddie." App. 105; R. Doc. 87, at 25; *see also* App. 105–09; R. Doc. 87, at 25–29 (outlining the policy disagreements between Director Watt and the Trump Administration). The Trump Administration understood that "we need to wait really for Director Watt's term to end to and to have our appointee," and made the decision "to wait for a nominee" to begin effectively implementing its plan for the Companies. App. 109; R. Doc. 87, at 29 (statement from former senior Treasury official Craig Phillips). "In sum, although the Administration was committed to selling Treasury's stake in the Companies and ending the conservatorships, Director Watt's unconstitutionally protected tenure did nothing but cost the Administration critical time—two full years—in pursuing those goals." *Id.*

When President Trump was finally able to nominate his own chosen Director, "the Trump Administration could at last begin the process of planning and implementing the concrete steps necessary to release the Companies from conservatorship and end government ownership." App. 111; R. Doc. 87, at 31. Plaintiffs allege that "[t]here were five key steps necessary for the Companies to exit conservatorship—the first four of which Director Calabria and Treasury completed in whole or in part." *Id.*; *see also* App. 112–14; R. Doc. 87, at 32–34 (outlining the five steps). And Plaintiffs further allege that several of these steps were "*sequential*," App. 114; R. Doc. 87, at 34, and "could not be carried out unilaterally by Treasury," App. 115; R. Doc. 87, at 35.

As for timing, "Director Calabria repeatedly said that he anticipated that the

Companies would sell new shares of stock to private investors in 2021." App. 116; R. Doc. 87, at 36. "When the Trump administration ended, FHFA and Treasury were on track to position the Companies to sell a new issuance of common stock in 2021—roughly two and a half or three years after Director Watt's term ended in January 2019." *Id.* Thus, "[i]f President Trump had fired Director Watt and installed his own FHFA director in January 2017, the administration would have been able to start pursuing its policy objectives for Fannie and Freddie two years sooner." App. 116–17; R. Doc. 87, at 36–37. "But for the removal restriction," App. 117; R. Doc. 87, at 37, then, "President Trump would have fired Director Watt at the start of his Administration and the Companies would have raised capital by selling new shares of common stock in 2019," *id.* And "[b]efore such a stock issuance occurred," as explained above, FHFA and Treasury would have had to "remove the liquidation preference on Treasury's senior preferred stock because the liquidation preference impeded the Companies' ability to sell new stock and Treasury's ability to monetize its warrants in subsequent stock offerings by the Companies." App. 116–17; R. Doc. 87, at 36–37.

Plaintiffs' allegations are further supported by the Trump Administration's last official word on the matter, contained in a January 2021 letter agreement between FHFA (on behalf of the Companies) and Treasury, which turned off cash dividend payments under the Net Worth Sweep while directing those amounts to be added to the liquidation preference instead. App. 112–13; R. Doc. 87, at 32–33; App. 197; R. Doc. 100-2, at 14. Included in the agreement was a "Commitment to Develop Proposal to Resolve Conservatorship." App. 206; R. Doc. 100-2, at 23. "In order to facilitate the exit from conservatorship," *id.*, the agreement specified, "Treasury and the Enterprise commit to work to restructure Treasury's investment and dividend amount in a manner that facilitates the orderly exit from conservatorship, ensures Treasury is appropriately compensated, and permits the Enterprise to raise third-party capital and make distributions as appropriate," *id.* As Plaintiffs have alleged, the Administration only could have achieved these goals through elimination of the liquidation preference, whether through a write-down, conversion, or some combination of the two.

All of this publicly available information is confirmed by former President Trump's statement. App. 129; R. Doc. 87-1, at 2. He stressed that he would have "sold the government's *common* stock in these companies at a huge profit." *Id.* (emphasis added). President Trump's reference to the government profiting from common stock reveals how his administration planned to change the Companies' capital structures; if Treasury's senior preferred shares remained outstanding with a multi-billion-dollar liquidation preference, no economic value could ever be realized by Treasury through the sale of common stock it obtained after exercising its warrants. Thus, this reference necessarily implies that the Net Worth Sweep would be ended and the liquidation preference on the Treasury's senior preferred stock would be reduced to zero.

Taking these factual allegations together, Plaintiffs have clearly stated a claim for relief. Plaintiffs plausibly allege—indeed, with ample support that goes beyond Plaintiffs' burden at this motion to dismiss stage—that the Trump Administration: (1) intended to take the Companies out of conservatorship and privatize the Companies; (2) took several key steps to achieving those goals; and (3) was unable to achieve those goals because of the two years lost to the unconstitutional removal restriction.

B. Any Uncertainty Should Be Resolved In Plaintiffs' Favor.

Plaintiffs' allegations should entitle them to relief under any standard. As just explained, Plaintiffs have alleged the precise hypothetical evidence *Collins* said would "clearly" show harm in the form of a statement from the President, and they additionally have alleged extensive circumstantial evidence showing that Director Watt's removal protection has harmed them. But to the extent there is any uncertainty, the Court should hold that Defendants may avoid Plaintiffs' requested remedy only by making a clear showing that the removal restriction did *not*, in fact, harm Plaintiffs. Several doctrines support this conclusion.

For one, "where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue." 2 McCormick on Evidence § 337 (8th ed. 2022); *see Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 626 (1993) (observing that it is "entirely sensible to burden the party more likely to have information relevant to the facts about [the matter at issue] with the obligation[s] to demonstrate [those] facts").

Here, we already know what the former President thinks, and any non-public facts relevant to this issue are in the exclusive possession of Defendants and their former officers and employees. Under these circumstances, Defendants should bear the burden. *Cf. Gomez v. Toledo*, 446 U.S. 635, 641 (1980) (defendant bears burden of establishing entitlement to qualified immunity because it "depends on facts peculiarly within the knowledge and control of the defendant" and "will frequently turn on factors which a plaintiff cannot reasonably be expected to know."). Just as courts shift the burden of persuasion once a plaintiff makes a *prima facie* case of employment discrimination, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), or a violation of the Equal Protection Clause, *see Alexander v. Louisiana*, 405 U.S. 625 (1972), the Court should hold that Plaintiffs have made (at the very least) a *prima facie* showing that the unconstitutional removal restriction inflicted compensable harm. The burden should thus shift to Defendants to disprove harm.

The "presumption of regularity" also counsels that courts should take the official statements of public officials at face value. *United States v. Chem. Found.*, 272 U.S. 1, 14–15 (1926). As the United States represented to the Supreme Court on behalf of then-President Trump, that presumption "carries the utmost force with respect to the President himself." Br. for the United States at 78, *Trump v. Int'l Refugee Assistance Project*, Nos. 16-1436, 16-1540, 2017 WL 3475820 (U.S. Aug. 10, 2017). Only "clear evidence to the contrary" may overcome the presumption of regularity and permit a court to reject the reasons given by a public official regarding an official act. *Chem. Found.*, 272 U.S. at 14–15; *see also Nat'l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 174 (2004) ("[W]here the presumption is applicable, clear evidence is usually required to displace it."). If the Court determines the presidential statement is not dispositive, it should require Defendants to come forward with—as the United States previously put it—"the clearest showing to the contrary." Br. for the United States, *supra*, at 78. Absent that showing, the Court should not second-guess the statement of a former President of the United States describing the President's own thought process.

The only way for Defendants to prevail now is if this Court says the statement from the former President of the United States—about the former President's *own* thinking—is false. But that ruling would call for judges to inquire into the supposed "'real' reasons" the President did not attempt to terminate Director Watt. *Reno v. Am.-Arab Anti-Discrimination Comm. (AAADC)*, 525 U.S. 471, 491 (1999). Even if Defendants conjured up some argument about alleged "real" reasons, "a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy." *Id.*

Burden shifting also takes into account "substantive policy." Mueller & Kilpatrick, 1 Federal Evidence § 3.3 (4th ed. 2022); *see Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 209 (1973) (allocation of burden of proof is "a question of policy and fairness based on experience"). The Constitution itself sets forth the policy interest here—the separation of powers "protects individual liberty." *Bond v. United States*, 564 U.S. 211, 223 (2011). To ensure that policy is not illusory, the Court should place the burden on the government to show that an unconstitutional removal restriction did not cause harm given the former President's unequivocal statement.

Moreover, the treatment of an agency that fails to follow the APA's notice-and-comment procedures also supports placing the burden on the government. When an agency fails to satisfy the notice-and-comment requirement, courts find harmless error only if it is clear the failure did not affect the agency's decision; "if there is any uncertainty at all as to the effect of that failure," the error cannot be deemed harmless. *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002). Otherwise, the agency could simply ignore notice and comment and then evade judicial review by asserting that the failure to consider public comments did not affect the agency's decision. *Id.* at 96–97.

The same principle suggests the burden should be placed on the government. The dangers highlighted by *Sugar Cane Growers* are especially concerning where, as here, the government has changed hands from one political party to another that has little interest in vindicating the prior administration's policy goals. For two years, Democratic appointee Mel Watt stymied a Republican administration's policy goals in violation of the Constitution, harming Plaintiffs in the process. And now, a Democratic administration is back in power and seeks to argue that Director Watt's tenure made no difference at all. In this way, holding the constitutional error harmless would permit officials from one political party to evade judicial review of a separation-of-powers violation from which their party benefitted. The Court should reject this all's-fair-in-politics understanding of the separation of powers and require a clear showing from Defendants before concluding that the removal restriction did not harm Plaintiffs.

C. The District Court Misread *Collins*, Discounted Plaintiffs' Well-Pleaded Allegations, and Imposed a Novel Heightened Evidentiary Standard, Among Other Errors.

The district court's dismissal failed to account for much of the Plaintiffs' well-pleaded factual allegations outlined above. As for the allegations the district court did consider, the district court misread *Collins* to bar a wide set of claims, discounted several of Plaintiffs' critical factual allegations, and created and imposed on plaintiffs a heightened evidentiary standard that finds no support in *Collins* or any other source of law. These fundamental errors pervade the district court's opinion.

First, the district court misread the Supreme Court's instruction in *Collins*. The district court stated that "Plaintiffs' legal theory reads far too much into *Collins*." App. 359; R. Doc. 119, at 15. With respect, the district court read far too *little* into *Collins*. The district court read *Collins* to bar constitutional claims completely—holding that "plaintiffs cannot directly attack any of the agency's actions as unconstitutional." App. 358; R. Doc. 119, at 14. Under the district court's reading, *Collins* implicitly limited Plaintiffs to "only seek a remedy for the agency's actions under the APA by identifying an agency action that was" arbitrary and capricious "or otherwise not in accordance with law." *Id.* (quoting 5 U.S.C. § 706(2)(A)). This extraordinary limitation finds no support in the Supreme Court's decision, which remanded broadly for the lower courts to determine whether the unconstitutional removal restriction "inflict[ed] compensable harm" on the Companies' shareholders. *Collins*, 141 S. Ct. at 1789. The Supreme Court in no way stated that Plaintiffs would be limited to a narrow class of APA claims in making that showing. If the Supreme Court intended to bar Plaintiffs from making constitutional arguments in support of their entitlement to a remedy for a constitutional violation, it would have said so.

Second, the district court improperly discounted Plaintiffs' allegations surrounding President Trump's letter by creating—and imposing on Plaintiffs—a novel requirement that any statement by the President be "contemporaneous," App. 361; R. Doc. 119, at 17, and "*publicly* expressed." App. 362; R. Doc. 119, at 18. As an initial matter, even putting aside whether the district court's new requirement for a "publicly expressed" statement is valid, President Trump's letter here *was* publicly expressed. The letter was made available to the public on a broadly accessible news website. *See Letter from Donald Trump to Sen. Rand Paul*, REAL CLEAR POLITICS (Nov. 11, 2021), https://bit.ly/3ped1sP. Thus, even accepting that "[r]equiring a contemporaneous expression of displeasure and a desire to remove makes sense," App. 361; R. Doc. 119, at 17, the publicly available letter from former President Trump satisfies that standard.

The district court's requirement for a contemporaneous explanation, meanwhile, makes no sense. President Trump is explaining what he *would have done* in a counterfactual situation made relevant for the first time by a Supreme Court decision that issued after he left office. Under the district court's reasoning, a sitting President would have to make a public, contemporaneous statement for *every* action he would like to take but cannot take because of some limitation on his authority. And here, President Trump would have had to do so with *no prior notice* of that requirement. This would be an exercise in absurdity, not a basis for denying relief for constitutional harms.

To the extent the novel requirement for a contemporaneous presidential statement is based in an analogy to the requirement that administrative agencies provide contemporaneous explanations, that analogy fails. The Supreme Court has provided two "values" underlying the doctrine that agencies may not rely on post-hoc justifications in litigation. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020). Those two values are: (1) to "instill[] confidence" in an administrative agency's given reasons, *id.*, such that a reviewing court has "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question," *Auer v. Robbins*, 519 U.S. 452, 462 (1997); and (2) to preserve "the orderly functioning of the process of review" of agency action. *Regents*, 140 S. Ct. at 1909 (quoting *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 94 (1943)). Neither value would be advanced by extending the rule against post hoc justifications to the remedial analysis in this case.

The "reasoned explanation requirement of administrative law," *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019), of course does not apply to Plaintiffs, who are private citizens. Nor does the reasoned explanation requirement apply to former Presidents. To the extent there may be reason to doubt the credibility of President Trump's letter, that credibility judgment cannot be made at the motion to dismiss stage, when the court must "view[ ] the facts in [the] complaint as true and grant[ ] all reasonable inferences" in the plaintiff's favor. *McIvor v. Credit Control*

Servs., 773 F.3d 909, 912 (8th Cir. 2014). In addition, the reasoned explanation requirement is particularly inapt here where the question is not why President Trump took a particular action but rather what would have happened in the counterfactual world where HERA's for-cause removal protection did not inhibit President Trump from firing Director Watt.

Likewise, the "orderly functioning" value of contemporaneous agency explanations does not apply here. Plaintiffs amended their complaint after the Supreme Court instructed Plaintiffs and the lower courts to engage in a counterfactual inquiry. This was Plaintiffs' first chance to provide the counterfactual evidence the Supreme Court envisioned. Plaintiffs—or President Trump for that matter—had no way of knowing that they needed to amass counterfactual evidence *before* the Supreme Court established the counterfactual test. If anything, the value of "orderly functioning" dictates a ruling for Plaintiffs. After the Supreme Court announces a new rule of law that requires Plaintiffs to proffer a novel form of evidence, a lower court may not bar relief because Plaintiffs did not produce the evidence *before any Court* indicated such evidence might be needed. Thus, there is no risk here of "forcing both litigants and courts to chase a moving target" with a post-hoc justification. *Regents*, 140 S. Ct. at 1909. If there is any such risk, it is in the district court's novel limitations on Plaintiffs' ability to seek relief for the constitutional harm recognized by the Supreme Court.

Third, the district court created and imposed on Plaintiffs new, heightened evidentiary requirements for stating a claim for a remedy under *Collins*. The district court stated that "courts should require *a very strong showing* that the former President in question would, in fact, have fired the director and would, in fact, have been successful in implementing the action that the plaintiffs allege would have occurred if the President had not been mistaken about the scope of his removal authority." App. 361–62; R. Doc. 119, at 17–18 (emphasis added); *see also* App. 362; R. Doc. 119, at 18 ("Due regard for the enormous reliance interests of the American public in the regular functioning of government likewise calls for a very high showing before courts entertain such claims."). The district court based this new, standard on a policy judgment that granting Plaintiffs relief would "throw[] the government into chaos," and undermine the policies of the current presidential administration. *Id.*

This heightened requirement for a "very strong showing," *id.*, or "very high showing," App. 362; R. Doc. 119, at 18, contradicts the Supreme Court's decision in *Collins.* There, the Supreme Court provided an example which the Court said would "clearly" involve compensable harm. The example consisted *solely* of a statement by a President. *Collins*, 141 S. Ct. at 1789 ("Or suppose that the President had made a public statement expressing displeasure with actions taken by a Director and had asserted that he would remove the Director if the statute did not stand in the way. In [that] situation[], the statutory provision would clearly cause harm."). The Supreme Court did not impose any additional, heightened evidentiary requirement for a "very strong showing." App. 361–62; R. Doc. 119, at 17–18. The district court erred in creating this new standard contrary to the Supreme Court's instructions and imposing it on Plaintiffs at the motion to dismiss stage.

Fourth, the district court improperly based its analysis on a policy judgment that Plaintiffs' relief would be too sweeping or invasive to the current Administration. The district court reasoned that "opening the door" to Plaintiffs' claim—the very kind of claim the Supreme Court envisioned—would "throw[] the government into chaos," "undermine[] years' worth of agency action," and "interfere[] with the policies of a duly elected succeeding administration[.]" *Id*. For one, this broad policy consideration is wholly outside the bounds of the district court's limited inquiry at the motion to dismiss stage. For another, the district court's reasoning fails on its own terms. Separation of powers cases of course often carry significant policy implications. And a presidential Administration may have to take actions it might otherwise not take in order to remedy a constitutional violation that occurred during a prior Administration. *Cf. Regents*, 140 S. Ct. at 1901 (requiring the Trump Administration to adhere to the Obama Administration's DACA program); *see also Milliken v. Bradley*, 433 U.S. 267, 281 (1977) ("The scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."). That inherent fact of remedies in the separation of powers context provides no basis for dismissing Plaintiffs' claims out of hand. Indeed, doing so would create perverse incentives by making the prospect of a remedy inversely related to significance of the government's violation.

And Plaintiffs' proposed remedy is retrospective in nature, as the Supreme Court recognized. Plaintiffs request retrospective relief. *See* App. 82; R. Doc. 87, at 2 ("Plaintiffs are therefore entitled to retrospective relief to put them in the position they would have been in were it not for the unconstitutional removal restriction."); *see also* App. 126; R. Doc. 87, at 46 (requesting "an injunction that restores Plaintiffs to the position they would have been in were it not for the unconstitutional removal restriction"); *see also Rop v. FHFA*, 50 F.4th 562, 576 (6th Cir. 2022) ("But, on appeal, like in *Collins*, shareholders ask only for relief effecting a zeroing out of Treasury's liquidation preference or converting of Treasury's senior preferred stock to common stock. The Court identified this as retrospective relief, *Collins*, 141 S. Ct. at 1787 & n.22, and this request for retrospective relief is tethered to shareholders' argument that the Recovery Act's removal restriction is unconstitutional."). Finally, the principal practical effect of Plaintiffs' requested remedy would be to put Fannie and Freddie in a *stronger* financial position, which if anything would *expand* the policy options of the current Administration.

At the motion to dismiss stage, the district court was required to take

Plaintiffs' plausible allegations as true. Instead, the district court imposed novel and heightened pleading standards, discounted Plaintiffs' plausible allegations, and chose to disbelieve a former President of the United States. As to *Collins*, the district court read the Supreme Court's decision to permit too little and require too much. *Collins* permits Plaintiffs to seek retrospective relief for their constitutional claims. And *Collins* does not require some heightened showing of certainty to demonstrate harm. Plaintiffs have provided exactly what *Collins* envisioned—a statement from a President expressing that he would have fired the FHFA Director but for the unconstitutional removal restriction. Under the proper and straightforward reading of *Collins*, Plaintiffs have stated a claim for retrospective relief.

Indeed, Plaintiffs have done precisely what the Supreme Court called for. The Supreme Court instructed Plaintiffs, and in turn the lower courts, to determine what *would* have happened absent the unconstitutional removal restriction. That is—by definition—a counterfactual exercise. Plaintiffs' duty under the Court's framework was to allege facts that establish what would have happened under different circumstances. Plaintiffs did just that—and more. Indeed, President Trump's letter takes all speculation out of the matter. App. 129; R. Doc. 87-1, at 2. To the extent the district court nevertheless found the framework too speculative, that is a quarrel with the Supreme Court's holding in *Collins*, not with the sufficiency of plaintiffs' allegations. *See* App. 365; R. Doc. 119, at 21 ("Writing alternate histories of this sort is the work of fiction authors, not federal judges."). In the end, the district court may disagree with the Supreme Court's prescription of a counterfactual inquiry, but that is not a proper basis for dismissal of the complaint.

D. As this Court and the Supreme Court Have Indicated, Plaintiffs Have Alleged Agency Action.

Collins made clear that because "the removal restriction violates the Constitution," *all that is left to be determined* is "the shareholders' request for relief." *Collins*, 141 S. Ct. at 1787. Plaintiffs are identically situated to the shareholders in *Collins*: They own the same types of shares, brought the same constitutional claim, and challenge the same agency action. Here too, the only remaining question is whether Plaintiffs have adequately alleged harm.

Despite that clear holding, the district court reached beyond the Supreme Court's instructions to find that Plaintiffs somehow do not even challenge agency action in the first place. App. 370–71; R. Doc. 119, at 26–27. That holding is foreclosed by both *Collins* and this Court's remand decision. *Collins* held that the challengers could seek retrospective relief for "the actions that confirmed Directors" (as distinct from acting directors who were not subject to the removal restriction) "have taken to *implement* the third amendment." 141 S. Ct. at 1787. "That harm," the Supreme Court explained, "is alleged to have continued after the Acting Director was replaced by a succession of confirmed Directors, and it appears that any one of those officers could have renegotiated the companies' dividend formula with

Treasury." *Id.* at 1781. "Accordingly, continuing to implement the third amendment was a decision that each confirmed Director has made since 2012." *Id.* It was this "subset of actions" for which the challengers could seek "retrospective relief." *Id.* at 1787.

This Court likewise already recognized that "[t]he only question is about remedy with respect to only the actions that confirmed Directors have taken to *implement* the third amendment during their tenures." *Bhatti*, 15 F.4th at 853 (internal quotation marks omitted). Thus, this Court remanded to the district court "to determine if the shareholders suffered 'compensable harm' and are entitled to 'retrospective relief.'" *Id.* at 854.

Both this Court's earlier decision in this case and the Supreme Court's decision in *Collins* thus explain that Plaintiffs may seek a remedy for "'actions that confirmed Directors have taken to *implement* the third amendment.'" *Id.* at 853 (quoting *Collins*, 141 S. Ct. at 1787). Plaintiffs do precisely that, alleging that the "third amendment imposed the Net Worth Sweep, under which the Companies were required to pay Treasury a quarterly dividend starting in 2013 and continuing forever that is equal to their entire net worth." App. 91; R. Doc. 87, at 11. Specifically, Plaintiffs challenge the actions taken by Director Watt "to *implement* the third amendment" while "the unconstitutional removal provision inflicted harm." *See Collins*, 141 S. Ct. at 1788–89; *see also* App. 107–08; R. Doc. 87, at 27–28.

As the former President's statement makes clear, the unconstitutional provision inflicted harm from "day one of [his] Administration." App. 129; R. Doc. 87-1, at 2. During that time, FHFA continued to implement the PSPA provisions that deprived Plaintiffs of their shares' economic value—including the provisions entitling Treasury to senior preferred stock, implementing the third amendment's Net Worth Sweep, and providing for Treasury's liquidation preference. App. 81–82; R. Doc. 87, at 1; App. 107–08; R. Doc. 87, at 27–28; App. 112; R. Doc. 87, at 32. Thus, Plaintiffs challenge the precise actions that *Collins* and this Court held could be challenged for retrospective relief.

The district court's agency action holding makes little sense after *Collins* and this Court's earlier decision. But as explained, the actions Director Watt took to implement the third amendment while the unconstitutional removal restriction inflicted harm—*i.e.*, his implementation of the PSPA provisions that the Trump administration wanted to eliminate (*e.g.*, continuing to sweep the profits of the companies to the Treasury)—are precisely what Plaintiffs challenge.

Plaintiffs have pointed to "conduct" and "action" that repeatedly harmed them—the transfer of value from the Companies' shareholders to Treasury through both quarterly dividends and increases in the liquidation preference. *See Collins*, 141 S. Ct. at 1779. Those actions easily fall within the APA's definition of agency "action," "which is meant to cover comprehensively every manner in which an agency may exercise its power." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001). Likewise, Defendants' failure to return that ill-gotten value to the shareholders is not only "unlawful conduct" that harmed Plaintiffs under Article III, but also agency action under the APA, which defines the term "agency action" to include an agency's "failure to act," 5 U.S.C. § 551(13). And even apart from the APA, Defendants' actions and omissions are "unlawful conduct" that has harmed Plaintiffs within the meaning of Article III, *Collins*, 141 S. Ct. at 1779, thus providing basis for suit under the equitable power of the Court invoked in Count I.

The phrasing of Plaintiffs' requested *remedy* does not alter the particular agency *action* they challenge: the implementation of the PSPA provisions that swept the Companies' dividends to Treasury and increased Treasury's liquidation preference while the Trump administration was in office. For example, a court might enter an order "setting aside" an agency action or, alternatively, a substantively identical order "directing the elimination of" the same agency action. That one order is phrased in affirmative language and the other negative does not change the fact that both apply to agency *action*. Indeed, Plaintiffs' complaint uses that same language, requesting "an order *setting aside* the agency action maintaining Treasury's liquidation preference," App. 122; R. Doc. 87, at 42 (emphasis added); App. 124; R. Doc. 87, at 44—*i.e.*, the PSPA provisions granting Treasury a liquidation preference—or, alternatively, an order directing Defendants to "eliminate Treasury's liquidation preference," App. 126; R. Doc. 87, at 46. The distinction between an order "setting aside" agency action and one "requiring the elimination of" agency action, however, is a distinction without a difference and certainly has no effect on whether Plaintiffs challenge agency "action" in the first place. *See* 33 WRIGHT & MILLER, FED. PRAC. & PROC. JUDICIAL REVIEW § 8307 (2d ed. Apr. 2021 update) (APA's instruction "to 'set aside' illegal agency action" is one example of statutes that, "even if they do not use the term 'injunction' as such, create remedies that are functionally similar"). Nothing about the language in Plaintiffs' requested relief casts doubt on the fact that they challenge agency action, as *Collins* and the Eighth Circuit already made clear.

Moreover, Plaintiffs have also plausibly alleged a claim to compel agency action unlawfully withheld under 5 U.S.C. § 706(1). Any argument that this claim would not satisfy the requirements of § 706(1) fails. The APA defines "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, *or failure to act*." 5 U.S.C. § 551(13) (emphasis added). The Supreme Court held that "a 'failure to act' is properly understood to be limited, as are the other items in § 551(13), to a *discrete* action." *Norton v. S. Utah Wilderness All. (SUWA)*, 542 U.S. 55, 63 (2004). In addition, "the only agency action that can be compelled under the APA is action legally *required*." *Id*. In sum, "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Id.* at 64.

As the Supreme Court explained, these "limitations rule out several kinds of challenges." *Id.* For example, the "limitation to discrete agency action precludes the kind of broad programmatic attack" the Court had previously rejected in *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990), where an environmental group tried to challenge the Bureau of Land Management's entire "land withdrawal review program"—thus seeking "*wholesale* improvement of this program," which was not a discrete action within the meaning of § 551(13). *Norton*, 542 U.S. at 64. In *Norton v. SUWA* itself, another environmental organization sought a court order directing the Bureau of Land Management to comply with a statutory directive "to manage" particular lands "so as not to impair the suitability of such areas for preservation as wilderness." *See id.* at 65 (quoting 43 U.S.C. § 1782(c)). The Court held that "a general order compelling compliance" with the duty to "manage" lands so as not to "impair" them was not sufficiently discrete because an open-ended order like that would "inject[] the judge into day-to-day agency management." *Id.* at 66–67. The Court gave other examples, such as statutory mandates to "manage wild free-roaming horses and burros in a manner that is designed to achieve and maintain a thriving natural ecological balance" or to "manage the New Orleans Jazz National Historical Park in such a manner as will preserve and perpetuate knowledge and understanding of the history of jazz." *Id.* at 67 (cleaned up).

Here, the agency action sought to be compelled could not be more different from a broad statutory mandate to "manage wild . . . burros in a manner that is designed to achieve . . . ecological balance." 16 U.S.C. § 1333(a). The requested relief is straightforward: The liquidation preference is either zero or it is not. *See* App. 126; R. Doc. 87, at 46. An order compelling Treasury to convert its preferred stock to common stock is similarly straightforward: The stock is either senior to other preferred shareholders in receiving dividends or it is not. There is no risk of "day-to-day agency management" by the courts. *Norton*, 542 U.S. at 67.

To be sure, when "the manner of" an agency's "action is left to the agency's discretion" by statute, a court "has no power to specify what the action must be." *Id.* at 65. But there is no such discretion available to FHFA here. If Plaintiffs prove they suffered harm from the unconstitutional removal restriction, Defendants would be "legally required" to remedy that harm by carrying out the steps that the Trump Administration would have taken absent the unconstitutional removal restriction. They do not have *discretion* to decide whether Plaintiffs are "entitled to retrospective relief" because *Collins* explained that Plaintiffs would be entitled to a remedy in that situation. Thus, even if Plaintiffs' claims are best understood as seeking to compel agency action unlawfully withheld, Plaintiffs have stated a claim under § 706(1).

E. Section 4617(f) Does Not Bar Plaintiffs' Claims.

Section 4617(f), which generally provides that "no court may take any action to restrain or affect the exercise of [the] powers or functions of the Agency as a conservator," 12 U.S.C. § 4617(f), does not bar Plaintiffs' removal remedy claims. This provision "prohibits relief where the FHFA action at issue fell within the scope of the Agency's authority as a conservator," but *permits* relief "if the FHFA *exceeded* that authority." *Collins*, 141 S. Ct. at 1776 (emphasis added). "Where the FHFA does not exercise but instead exceeds those powers or functions, the anti-injunction clause imposes no restrictions." *Id.*

As an initial matter, the district court erroneously stated that "Plaintiffs do not dispute that any FHFA action with respect to the liquidation preference is within the scope of the agency's authority as conservator." App. 372; R. Doc. 119, at 28. In fact, Plaintiffs affirmatively argued that FHFA acted outside its authority, and thus § 4617(f) could not bar Plaintiffs' claims. *See* App. 326; R. Doc. 114, at 107 (explaining that "our theory was this was unlawful[] unconstitutional agency action that was outside the agency's authority. And I think everyone agrees, and the Supreme Court agreed, that if the agency is acting outside of its authority, that 4617(f) doesn't apply."). And Plaintiffs alleged that Director Watt exceeded his authority by continuing to exercise the powers of FHFA Director when, but for HERA's unconstitutional removal protection, President Trump would have removed him from office. App. 124; R. Doc. 87, at 44 ("Because of the unconstitutional removal restriction, Watt's actions as head of FHFA were taken without observance of procedure required by law—namely Article II of the Constitution.").

In any case, *Collins* is best read as indicating that when HERA's unconstitutional removal provision "inflict[s] compensable harm" in this way, it does so because the Director's activities cease to be authorized. *Collins*, 141 S. Ct. at 1789. True, the Court held that Plaintiffs were not entitled to an automatic remedy absent any showing of harm. *Id.* at 1787–89 (declining to find the Third Amendment void *ab initio*). But the Court also held that if Plaintiffs can show compensable harm, they are entitled to a remedy. *Id.* The majority provides two examples of how the removal provision could cause compensable harm—a court blocking removal and the President indicating he would have removed the official but for the statutory removal protection. *Id*. In concurrence, Justice Thomas, who joined the majority, explained that "[a] removal restriction may unconstitutionally insulate an officer such that his actions are unlawful. If the President tries to remove an official but a court blocks this action, then that official is not lawfully occupying his office and would likely be acting without authority." *Id*. at 1793 n.6 (Thomas, J., concurring). While Justice Thomas does not expressly mention the Presidential statement example, the majority placed both it and the example of a removal blocked by a court on the same footing. In both circumstances, therefore, the insulated official would be acting beyond his constitutional authority.

Even assuming (incorrectly) that FHFA acted within its authority as conservator at all times on all matters, § 4617(f) lacks the clear statement required to bar all remedies for a *constitutional* claim. *See Webster*, 486 U.S. at 603. "The Supreme Court has long held that a statutory bar to judicial review precludes review of constitutional claims only if there is 'clear and convincing' evidence that the Congress so intended." *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 308 (D.C. Cir. 2014). "[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster*, 486 U.S. at 603.

There is no such evidence or clear intent here. The Supreme Court has already implicitly recognized that § 4617(f) contains no such clear statement. The Supreme Court applied § 4617(f) to bar Plaintiffs' *statutory* claim yet made no mention of the provision with respect to Plaintiffs' *constitutional* claim despite extensive analysis of that claim. The entire second half of the Supreme Court's opinion would have been superfluous if the simple answer were that § 4617(f) barred the removal claim entirely. The better answer is that § 4617(f) has no bearing here.

Indeed, if § 4617(f) in fact barred all remedies for a proven constitutional claim, the statute would raise serious constitutional questions. As the Supreme Court explained in *Webster*, [w]e require this heightened showing in part to avoid the serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster*, 486 U.S. at 603 (internal quotation marks omitted). Similarly here, the Court need not raise a "serious constitutional question" as to § 4617(f), because Defendants cannot make the required "heightened showing" of Congress's clear intent to bar all relief for Plaintiffs' constitutional claims. *Id.*

F. Treasury's Role Does Not Dispel the Harm from the Constitutional Violation.

In *Collins*, Justice Kagan wrote a separate opinion, joined only by Justices Breyer and Sotomayor, contending that the removal restriction did not harm Plaintiffs because "FHFA's policies were jointly created by the FHFA and Treasury and . . . the Secretary of the Treasury is subject to at will removal by the President." *Collins*, 141 S. Ct. at 1802 (Kagan, J., concurring in part and dissenting in part) (cleaned up). The President's ability to remove the Treasury Secretary at will, Justice Kagan reasoned, "seems sufficient" to show the removal restriction did not harm the plaintiffs. *Id.*

Whatever force Justice Kagan's argument may have had with respect to the decision to *adopt* the Net Worth Sweep, which Treasury could have vetoed, it does not apply to FHFA and Director Watt's decision to maintain the status quo rather than position Fannie and Freddie for exiting conservatorship, as the Trump administration desired. As an initial matter, the Third Amendment was an agreement between FHFA and Treasury and could not be amended unilaterally by Treasury. App. 115–16; R. Doc. 87, at 35–36. More significantly, the constitutional problem is that the President of the United States wanted to return the Companies to private control *in a particular way* that required FHFA's cooperation and would have benefited Plaintiffs. Under our constitutional structure, the President was entitled to pursue that policy rather than being put to the choice of either sitting idly by until Director Watt's term ended or attempting to address the situation through whatever second-best alternatives he could carry out through Treasury acting alone.

The President had a policy he intended to implement; but as the President himself has made clear, the removal restriction prevented him from implementing that policy during his administration. Even under Justice Kagan's opinion, that entitles Plaintiffs to a remedy, for Justice Kagan "agree[d] that plaintiffs alleging a removal violation are entitled to injunctive relief . . . when the President's inability to fire an agency head affected the complained-of decision." *Collins*, 141 S. Ct. at 1801.

The restriction violated the Constitution and harmed Plaintiffs. Accordingly, Plaintiffs should be put in the position they would have been in but for the unconstitutional removal restriction.

CONCLUSION

The district court's judgment should be reversed.

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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 because this brief contains 12,384 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

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As required by Eighth Cir. R. 28A(h), this brief and the addendum have been scanned for viruses and are virus-free.

Date: March 2, 2023

/s/ David H. Thompson
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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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