No. 22-20632

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PATRICK J. COLLINS; MARCUS J. LIOTTA; WILLIAM M. HITCHCOCK,

Plaintiffs-Appellants,

v.

DEPARTMENT OF THE TREASURY;
FEDERAL HOUSING FINANCE AGENCY;
SANDRA L. THOMPSON; JANET YELLEN

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS (No. 4:16-cv-03113)

BRIEF FOR THE TREASURY DEPARTMENT

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CERTIFICATE OF INTERESTED PERSONS

Collins v. Mnuchin, No. 22-20632

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

The Treasury Department respectfully requests oral argument in this case. This case concerns whether the district court correctly resolved a remedial issue remanded to it from the Supreme Court following the Supreme Court's decision in *Collins v. Yellen*, 141 S. Ct. 1761 (2021). The Court's resolution of that issue has implications for the government's multi-billion-dollar rescue of the mortgage giants Fannie Mae and Freddie Mac. The government believes oral argument could provide substantial assistance to this Court in understanding the issues in the case.

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STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 2201. On November 21, 2022, the district court granted defendants' motion to dismiss the suit. ROA.1511-23. Plaintiffs timely filed a notice of appeal on December 6, 2022. ROA.1527. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

To avert the catastrophic impact on the housing market that would result from the collapse of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the enterprises), Congress enacted the Housing and Economic Recovery Act of 2008 (Recovery Act), which created the Federal Housing Finance Agency (FHFA) and empowered it to act as conservator or receiver of the enterprises. 12 U.S.C. §§ 4511, 4617(a). Congress recognized that federal financial assistance of vast proportions could be required to prevent the enterprises' collapse and authorized the Treasury Department to "purchase any obligations and other securities issued by" the enterprises. *Id.* §§ 1455(*l*)(1)(A), 1719(g)(1)(A).

After FHFA placed the enterprises into conservatorship, Treasury immediately purchased senior preferred stock in each entity and committed to provide up to $100 billion in taxpayer funds to each enterprise to avoid insolvency. Between 2008 and 2012, the preferred stock purchase agreements (Purchase Agreements) were amended three times. The first two amendments substantially increased Treasury's capital commitment to the enterprises. The Third Amendment replaced a fixed dividend obligation with a variable dividend equal to the amount, if any, by which the enterprises' net worth exceeds a capital buffer.

In *Collins v. Yellen*, 141 S. Ct. 1761 (2021), the Supreme Court held that a statutory provision that placed limits on the President's authority to remove FHFA's Senate-confirmed Director was unconstitutional. The Supreme Court further held, however, that the unconstitutional removal provision had no bearing on the adoption of the Third Amendment to the Purchase Agreements between FHFA as conservator and Treasury because, at the time the parties agreed to the Third Amendment, FHFA was headed by an Acting Director, who was removable at the President's will. While recognizing that there was no reason to assume that the removal restriction had any effect on the later implementation of the Third Amendment by confirmed Directors, the Court concluded that it was theoretically possible that the restriction prevented the President from altering the implementation of the Third Amendment in a manner that would have benefited plaintiffs. The Supreme Court therefore remanded the case for the district court to determine whether plaintiffs could establish such harm, entitling them to further relief.

The issues presented in this appeal are:

1. Whether the district court correctly concluded that plaintiffs had failed to plausibly allege that the removal restriction harmed them by preventing President

Trump from writing off the Treasury Department's financial interests in the enterprises.

2. Whether the district court correctly dismissed plaintiffs' claim that FHFA's funding structure violates the Appropriations Clause, a claim asserted for the first time on remand, because it exceeded the Supreme Court's mandate on remand.

STATEMENT OF THE CASE

A. Fannie Mae and Freddie Mac

Congress created Fannie Mae and Freddie Mac to, among other things, provide liquidity to the mortgage market by purchasing residential loans from banks and other lenders, thereby providing lenders with capital to make additional loans. *See Collins v. Yellen*, 141 S. Ct. 1761, 1770-71 (2021). The enterprises finance these purchases by borrowing money in the credit markets and by packaging many of the loans they buy into mortgage-backed securities, which they sell to investors. *Id.* Fannie Mae and Freddie Mac are private, publicly traded companies. *Id.*

B. The 2008 Housing Crisis and the Recovery Act

With the 2008 collapse of the housing market, Fannie Mae and Freddie Mac experienced overwhelming losses due to a dramatic increase in default rates on residential mortgages. *See Collins*, 141 S. Ct. at 1771. At the time, the enterprises owned or guaranteed over $5 trillion of residential mortgage assets, representing nearly half the United States mortgage market. *Id.* Their failure would have had a catastrophic impact on the national housing market and economy.

The enterprises lost more in 2008 ($108 billion) than they had earned in the past 37 years combined ($95 billion). *See Collins*, 141 S. Ct. at 1771 (citing FHFA, Office of Inspector Gen., WPR-2013-002, *Analysis of the 2012 Amendments to the Senior Preferred Stock Purchase Agreements* 5 (2013)). As a result, the enterprises faced capital shortfalls, and private investors were unwilling to provide Fannie Mae and Freddie Mac with the capital they needed to weather their losses and avoid receivership and liquidation. *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 601 (D.C. Cir. 2017).

In July 2008, Congress enacted the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654. The legislation created FHFA to supervise and regulate the enterprises and granted FHFA the authority to act as conservator or receiver of the enterprises, if necessary. 12 U.S.C. §§ 4511, 4617(a). FHFA is headed by a single Director nominated by the President and confirmed by the Senate. *Id.* § 4512(a), (b)(1). The statute provided that the Director was to serve a five-year term and could be removed during that term only for cause. *Id.* § 4512(b)(2). The Recovery Act further states that, "[i]n the event of the death, resignation, sickness, or absence of the Director," the President may designate one of three Deputy Directors to serve as Acting Director until the Director returns or a new Director is confirmed. *Id.* § 4512(f). "Since its inception, the FHFA has had three Senate-confirmed Directors, and in times of their absence, various Acting Directors have been selected to lead the Agency on an interim basis." *Collins*, 141 S. Ct. at 1771. FHFA is funded through annual assessments on the entities FHFA regulates. 12 U.S.C. § 4516.

Recognizing that an enormous commitment of taxpayer funds could be required, Congress also amended the enterprises' statutory charters to authorize Treasury to "purchase any obligations and other securities issued by" the enterprises upon "Treasury's specific determination that the terms of the purchase would 'protect the taxpayer,'" *Perry Capital*, 864 F.3d at 600 (quoting 12 U.S.C. §§ 1455(*l*)(1)(A), 1719(g)(1)(A)), and to "exercise any rights received in connection with such purchases." 12 U.S.C. §§ 1455(*l*)(1)(A), (2)(A), 1719(g)(1)(A), (2)(A).

C. Conservatorship and the Purchase Agreements

FHFA, then-led by Director James Lockhart, placed the enterprises into conservatorship in September 2008. *Collins*, 141 S. Ct. at 1772. One day later, Treasury purchased senior preferred stock in each enterprise. *Id.* at 1772-73. Under the Purchase Agreements, Treasury committed to provide up to $100 billion in taxpayer funds to each enterprise to maintain their solvency by ensuring that their assets were at least equal to their liabilities. *Id.*

The Purchase Agreements entitled Treasury to four principal contractual rights. *Collins*, 141 S. Ct. at 1773. First, Treasury received preferred stock with a senior liquidation preference of $1 billion for each enterprise, plus a dollar-for-dollar increase each time the enterprises drew upon Treasury's funding commitment. *Id.*[1] Second, Treasury received warrants to purchase the enterprises' common stock. *Id.* Third, Treasury would be entitled to a periodic commitment fee. *Id.* Fourth, Treasury was entitled to quarterly dividends equal to 10% of its liquidation preference. *Id.*

Treasury's initial funding commitment soon proved to be inadequate. *Collins*, 141 S. Ct. at 1773. To address this problem, in May 2009, FHFA and Treasury agreed to double Treasury's funding commitment to $200 billion per enterprise. *Id.*

In December 2009, in the face of ongoing losses, Treasury and FHFA amended the Purchase Agreements for a second time to allow the enterprises to draw unlimited amounts from Treasury to cure net-worth deficits until the end of 2012, at which point Treasury's funding commitment would be fixed. *Collins*, 141 S. Ct. at 1773.

As of June 30, 2012, the enterprises had drawn $187.5 billion from Treasury's funding commitment, making Treasury's liquidation preference $189.5 billion, including the initial $1 billion senior liquidation preference for each enterprise. *See Collins*, 141 S. Ct. at 1773. Under the terms of the original Purchase Agreements, the enterprises' dividend obligations to Treasury were thus nearly $19 billion per year. Between 2009 and 2011, the enterprises could not pay these substantial dividend

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[1] "A liquidation preference is a priority right to receive distributions from the [enterprises'] assets in the event they are dissolved." *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 216 n.6 (D.D.C. 2014) (quotation marks omitted).

obligations out of their earnings and drew on Treasury's funding commitment to pay them. *See id.*

D. The Third Amendment

In August 2012, Treasury and FHFA (headed by Acting Director Edward DeMarco) agreed to modify the Purchase Agreements for a third time. *Collins*, 141 S. Ct. at 1773. This "Third Amendment" broke the draws-to-pay-dividends cycle by replacing the previous fixed dividend obligation with a variable dividend equal to the amount, if any, by which the enterprises' net worth for the quarter exceeded a capital buffer. *Id.* at 1774. The Third Amendment thus ensured that the enterprises would not deplete Treasury's vital capital commitment prematurely and that the enterprises would play their central role in the housing market for the foreseeable future. *See id.* at 1777 (stating that the Third Amendment assured "a stable secondary mortgage market"). The Third Amendment did not amend or alter Treasury's liquidation preference rights.

E. Additional Amendments

In May 2013, President Obama nominated Melvin Watt to serve as FHFA Director; he was confirmed by the Senate and sworn into office on January 6, 2014. *See* ROA.1513. In 2017, Director Watt and the Secretary of the Treasury negotiated an amendment to the Purchase Agreements under which Treasury agreed to permit the enterprises to retain up to $3 billion each in internal capital, rather than paying those funds to Treasury as cash dividends. ROA.1513.[2] In exchange for the forgone cash dividends, Treasury received a $3 billion increase in its liquidation preference for each enterprise. *See* ROA.1513.

Director Watt served until his term expired in January 2019. ROA.1513. At the end of Director Watt's term, President Trump designated Joseph Otting to serve as Acting Director. That same month, President Trump nominated Mark Calabria to serve as Director. The Senate confirmed Calabria as Director in April 2019. ROA.1513.

On September 27, 2019, Treasury and FHFA (then led by Director Calabria) entered into a letter agreement under which the parties agreed to allow the enterprises to increase their internal capital buffers from $3 billion each to $25 billion (for Fannie Mae) and $20 billion (for Freddie Mac).[3] In exchange for allowing the enterprises to retain additional capital, Treasury received a $22 billion increase in its liquidation preference in Fannie Mae and a $17 billion increase in its liquidation preference for Freddie Mac.

In January 2021, Treasury and FHFA agreed to another amendment to the Purchase Agreements. Pursuant to that amendment, Treasury and FHFA agreed to

[2] *See also* Letter from Steven T. Mnuchin, Secretary of the Treasury, U.S. Dep't of the Treasury, to Melvin L. Watt, Director, FHFA (Dec. 21, 2017), https://perma.cc/8EUJ-V5DE.

[3] U.S. Dep't of the Treasury, *Treasury Department and FHFA Modify Terms of Preferred Stock Purchase Agreements for Fannie Mae and Freddie Mac* (Sept. 30, 2019), https://go.usa.gov/xF6NS.

suspend all quarterly cash dividend payments until the enterprises build sufficient capital to meet specified thresholds. *Collins*, 141 S. Ct. at 1774. Once those thresholds are met, cash dividend payments to Treasury will resume. *Id.* at 1774-75. In the meantime, the dividends that the enterprises would have paid to Treasury in cash under the Third Amendment are added to Treasury's liquidation preference. *Id.*

F. Prior Proceedings

A. Plaintiffs, who are three enterprise shareholders, filed this suit challenging the Third Amendment in October 2016. In their initial complaint, they asserted that the Third Amendment should be set aside because (1) FHFA and Treasury exceeded their statutory authority in agreeing to the Third Amendment and (2) the President lacked the authority to remove FHFA's Acting Director at will at the time the Third Amendment was signed. ROA.1514. The district court dismissed plaintiffs' complaint; this Court, sitting en banc, reversed the district court's judgment; and the Supreme Court granted certiorari. *Collins*, 141 S. Ct. at 1775.

In its subsequent decision, the Supreme Court rejected both of plaintiffs' claims and declined to set the Third Amendment aside. The Supreme Court first held that FHFA lawfully exercised its statutory conservatorship authority when it agreed to the Third Amendment and that, as a result, the shareholders' statutory challenge to the Third Amendment was barred by the Recovery Act's "anti-injunction" provision. *Collins*, 141 S. Ct. at 1775-78; 12 U.S.C. § 4617(f).

The Court then addressed the constitutionality of the statutory restriction on the President's authority to remove FHFA's Senate-confirmed Director. *Collins*, 141 S. Ct. at 1783-87. That provision states that "[t]he Director shall be appointed for a term of 5 years, unless removed before the end of such term for cause by the President." 12 U.S.C. § 4512(b)(2). The Supreme Court held that, under its prior decision in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), Congress could not, consistent with the separation of powers, limit the President's authority to remove FHFA's Director, and the restriction was therefore invalid. *Collins*, 141 S. Ct. at 1783-87.

The Supreme Court further held, however, that the unconstitutional removal restriction had no bearing on FHFA's agreement in August 2012 to the Third Amendment because FHFA was headed by an Acting Director at the time, and the Acting Director was removable at will by the President. *Collins*, 141 S. Ct. at 1781-83. The Court therefore rejected plaintiffs' request to set the Third Amendment aside. *Id.* at 1788.

The Supreme Court also held that, with respect to the later implementation of the Third Amendment by confirmed Directors, there was "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. However, because it remained "possible" that actions taken by Senate-confirmed Directors while implementing the Third Amendment could have resulted in harm to shareholders, the Supreme Court remanded the case for the district court and this Court to decide whether the shareholders were entitled to retrospective relief. *Id.* at 1789.

B. Following remand to the district court, plaintiffs filed an amended complaint. *See* ROA.1176. In the amended complaint, plaintiffs assert that the removal restriction harmed them because it allegedly prevented President Trump from "eliminat[ing] . . . the 'liquidation preference' on the Treasury Department's senior preferred stock." ROA.1177. To remedy that purported harm, they seek an injunction "direct[ing] [FHFA and Treasury] to eliminate the liquidation preference on Treasury's senior preferred stock (either by writing down the liquidation preference . . . to zero or by converting Treasury's senior preferred stock to common stock)." ROA.1221.

The amended complaint also asserts new constitutional claims that are directed at the manner in which FHFA is funded. ROA.1212-13. Specifically, plaintiffs allege that Congress violated the Appropriations Clause in choosing to fund FHFA's operations through fees assessed on regulated entities. ROA.1212-14. That constitutional violation, plaintiffs further assert, requires that the Third Amendment be set aside because FHFA adopted the Amendment at a time when the agency was funded through unconstitutional means. ROA.1214.

The district court granted FHFA's and Treasury's motions to dismiss the amended complaint. ROA.1511-23. The court rejected plaintiffs' assertion that the removal restriction prevented President Trump from eliminating Treasury's liquidation preference. ROA.1518-21. The court first dismissed as implausible plaintiffs' allegation that President Trump wished to write-off Treasury's liquidation preference as part of a plan to end the conservatorships. The court noted that, although plaintiffs relied on policy documents indicating that the former President was interested in ending the conservatorships, those documents did not suggest the President had settled on a "concrete plan" on how to do it, let alone that he had decided to end the conservatorships by writing-off Treasury's financial interests in the enterprises. ROA.1519. Indeed, those documents suggested just the opposite, as they "emphasize[d] the importance of protecting Treasury's economic interests in the [enterprises]." ROA.1519.

The court also found that plaintiffs' suggestion that the restriction prevented the President from eliminating Treasury's liquidation preference was inconsistent with the actions Director Watt and President Trump's chosen Director, Mark Calabria, undertook. ROA.1520-21. The court stressed that plaintiffs failed to identify any action that Director Watt took "to obstruct the policy goals of the Trump Administration" nor any indication that "a Trump-appointed director's actions might have differed from Director Watt's actions." ROA.1520. To the contrary, the record showed that Director Watt and Director Calabria "took similar steps to enable the [enterprises] to retain capital while simultaneously amending the [Purchase Agreements] to *increase* Treasury's liquidation preferences." ROA.1520. Nothing in plaintiffs' complaint indicated that President Trump wished to eliminate Treasury's liquidation preference but could not do so due to the removal restriction. Plaintiffs' claim that President Trump's Administration would have written-off Treasury's liquidation preference if not for the removal restriction was thus pure "speculation." ROA.1520-21.

The court also rejected plaintiffs' belated attempt to challenge the Third Amendment on the ground that FHFA's funding structure violates the Appropriations Clause. ROA.1522. The court concluded that plaintiffs waived any such claim by failing to raise it in their original complaint in 2016 or at any time prior to filing their amended complaint on remand in 2022, and that the mandate rule barred plaintiffs from raising it now. ROA.1522-23. In so holding, the court rejected plaintiffs' contention that the Supreme Court's removal authority ruling in *Collins* represented an "intervening change of law" that allowed plaintiffs to bring a claim they had previously waived. ROA.1522 (quoting ROA.1414). The court emphasized that the Supreme Court had decided the removal authority issue and remanded on a "narrow" remedial question related to that ruling. ROA.1523. Plaintiffs' attempt to add a new Appropriations Clause claim accordingly "exceed[ed] the scope of [the Supreme Court's] mandate." ROA.1523.

SUMMARY OF ARGUMENT

I. In its decision in this case, *Collins v. Yellen*, 141 S. Ct. 1761 (2021), the Supreme Court concluded that the statutory provision limiting the President's authority to remove FHFA's Senate-confirmed Director was unconstitutional, but the

Court declined to provide plaintiffs with the primary remedy they sought: the invalidation of the Third Amendment to the preferred stock Purchase Agreements. The Supreme Court remanded the case, however, to provide plaintiffs with an opportunity to show that they were harmed by the statutory provision during the later implementation of the Third Amendment. On remand, plaintiffs claim that the unconstitutional provision purportedly prevented President Trump from eliminating Treasury's liquidation rights in the enterprises and seek an injunction that would zero-out Treasury's liquidation preference either directly or by requiring Treasury to convert its preferred stock to less valuable common stock.

The district court properly recognized that plaintiffs' theory of harm and their proposed remedy suffer from a number of fatal defects. The premise of plaintiffs' asserted injury is that President Trump wanted to reduce dramatically *Treasury*'s liquidation preference in the enterprises but was prevented from doing so by the removal restriction limiting his authority to remove FHFA's Director. But President Trump controlled Treasury's interest in the enterprises at all times and could have directed the Secretary of the Treasury to reduce that interest, if he so desired. And there is no indication that any FHFA Director would have objected to such a course, nor any plausible reason why any Director would have done so.

Plaintiffs' theory of injury is also at odds with the actions President Trump's chosen FHFA Director took during his Administration. Had President Trump wished to make a significant change to the Purchase Agreements by eliminating

Treasury's liquidation preference, he could have selected a Director "who would carry out that vision, either in action or in litigation." *Collins v. Mnuchin*, 938 F.3d 553, 594 (5th Cir. 2019) (en banc), *rev'd on other grounds*, 141 S. Ct. 1761; *see also Collins v. Yellen*, 27 F.4th 1068, 1069-70 (5th Cir. 2022) (Haynes, J., dissenting) (emphasizing that President Trump "certainly could have picked different Directors who would carry out a different vision, if he sought that"). He did not. Nor is there is any need to speculate about whether President Trump would have ordered a confirmed Director to renegotiate the Purchase Agreements in a manner that dramatically reduced Treasury's liquidation preference. President Trump's Senate-confirmed Director, in fact, renegotiated the Purchase Agreements twice. In both cases, the Director agreed to amend the agreements to *increase* Treasury's liquidation preference. Plaintiffs' contention that President Trump wished to zero-out that preference is utterly without basis.

Plaintiffs' claim that the Trump Administration had settled on a plan to write-off Treasury's liquidation preference is also belied by the very documents on which plaintiffs rely, including a post-Presidency letter that former President Trump sent to Senator Rand Paul. As the district court stated, those documents not only make clear that the Administration had not settled on a specific plan, they also repeatedly "emphasize the importance of protecting Treasury's economic interests in the [enterprises]." ROA.1519. No plausible reading of those documents supports the notion that former President Trump planned to eliminate Treasury's valuable liquidation preference, at no cost to the enterprises and with no corresponding benefit to Treasury. The district court properly rejected plaintiffs' request for an injunction that would take that drastic action.

II. The district court also correctly dismissed plaintiffs' Appropriations Clause claims. This Court's mandate rule bars lower courts from considering on remand any claims or issues beyond the scope of the remand order, including any claims that were previously waived. *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004); *General Universal Sys., Inc. v. HAL, Inc.*, 500 F.3d 444, 453 (5th Cir. 2007). As the district court correctly concluded, plaintiffs' two new Appropriations Clause claims fall well outside the scope of the Supreme Court's remand order. That order (and this Court's corresponding mandate to the district court) was limited to the narrow question whether plaintiffs were entitled to any retrospective relief in connection with their removal authority claim. *See Collins*, 141 S. Ct. at 1788. Nothing in that mandate invoked the Appropriations Clause or opened the door for plaintiffs to raise new constitutional claims they had otherwise waived by failing to raise them at the outset of this litigation.

Nor does the narrow exception to the mandate rule for an intervening change in law apply here. Even if a relevant change in the legal landscape had occurred—which it has not—this Court has declined to apply that exception where plaintiffs failed to raise available arguments in a timely manner. *See United States v. McCrimmon*, 443 F.3d 454, 461-62 (5th Cir. 2006). Nothing prevented plaintiffs from bringing their Appropriations Clause claims at the outset of this case. Because plaintiffs failed to do so, those claims are waived and the district court's dismissal of them should be affirmed.

Should this Court reach the merits of plaintiffs' Appropriations Clause claims, it should reject them. The Appropriations Clause prohibits the expenditure of government funds except "in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Congress's decision to fund FHFA's activities through fees assessed on the entities the agency oversees complies with that requirement. In the Recovery Act, Congress prescribed the source, amount, duration, and purpose of FHFA's funding. *See* 12 U.S.C. § 4516. The Recovery Act thus more than satisfies the classic elements of an appropriation. FHFA's funding mechanism is also in keeping with Congress's well-established practice of funding agencies through the collection of fees, a practice that dates back to the establishment of the Post Office in 1792. That "[l]ong settled and established practice," *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)), negates any suggestion that the Appropriations Clause prohibits Congress from funding agency operations through collected fees.

Plaintiffs' challenge to FHFA's funding mechanism relies almost entirely on this Court's recent decision holding unconstitutional the "unique" funding mechanism of a different federal agency, the Consumer Financial Protection Bureau (CFPB). *Consumer Fin. Servs. Ass'n of Am.* (*CFSA*) *v. CFPB*, 51 F.4th 616, 632 (5th Cir. 2022), *cert. granted* , No. 22-448, 2023 WL 2227658 (U.S. Feb. 27, 2023), *and cert. denied*, No. 22-663, 2023 WL 2227679 (U.S. Feb. 27, 2023). The Supreme Court recently granted the government's petition for a writ of certiorari from this Court's decision in *CFSA*, thereby limiting the case's precedential value.

But even if the Supreme Court concludes that the means through which CFPB is funded violates the Appropriations Clause, that holding would not mean that FHFA's funding mechanism also does so. Unlike CFPB, FHFA does not receive its funds through another agency, which itself is not funded through annual appropriations. FHFA is thus not "double-insulated" from Congressional control, the key reason why this Court found CFPB's funding mechanism to be problematic. *CFSA*, 51 F.4th at 623. Moreover, the Recovery Act imposes strict controls on FHFA's collection and use of the funds it receives, allowing the agency to collect only those fees sufficient to provide for its reasonable costs and expenses in carrying out four areas of work and requiring any funds left over at the end of the year to be counted against the following year's assessment. Through these statutory commands, Congress maintains control of the FHFA's funding.

STANDARD OF REVIEW

This Court reviews a district court's grant of a motion to dismiss de novo. *See Copeland v. Wasserstein, Perella & Co.*, 278 F.3d 472, 477 (5th Cir. 2002). This court also reviews de novo a district court's interpretation of its remand order and application of the mandate rule. *United States v. Lee*, 358 F.3d 315, 320 (5th Cir. 2004).

ARGUMENT

I. Plaintiffs Have Not Plausibly Alleged That They Were Harmed By The Unconstitutional Removal Restriction.

In its decision in this case, the Supreme Court concluded that the statutory provision limiting the President's authority to remove FHFA's Senate-confirmed Director was unconstitutional, but the Court further held that the provision had no bearing on FHFA's adoption of the Third Amendment because FHFA was headed by an acting Director not subject to the removal provision at the relevant time. *Collins v. Yellen*, 141 S. Ct. 1761, 1787-88 (2021). The Court therefore declined to provide plaintiffs with the primary remedy they sought: the invalidation of the Third Amendment. Though expressing doubt on the matter, the Supreme Court remanded this case to provide plaintiffs with an opportunity to show that the unconstitutional provision harmed them during the later implementation of the Third Amendment by Senate-confirmed Directors and that they are entitled to retrospective relief for such harm. *Id.* at 1789. As this Court has explained, to establish an entitlement to relief for a removal authority violation under *Collins,* plaintiffs must establish: "(1) a substantiated desire by the President to remove the unconstitutionally insulated actor, (2) a perceived inability to remove the actor due to the infirm provision, and (3) a nexus between the desire to remove and the challenged actions taken by the insulated actor." *CFSA v. CFPB*, 51 F.4th 616, 632 (5th Cir. 2022), *cert. granted*, No. 22-448, 2023 WL 2227658 (U.S. Feb. 27, 2023), *and cert. denied*, No. 22-663, 2023 WL 2227679 (U.S. Feb. 27, 2023).

The district court correctly concluded that plaintiffs have failed to plausibly allege a connection between the removal restriction and the action (or, more precisely, the failure to take action) that purportedly caused them harm. Plaintiffs speculate that, were it not for the removal restriction, President Trump would have "eliminate[d] the liquidation preference on Treasury's senior preferred stock," an action that would have benefitted plaintiffs. Br. 19. They therefore seek an injunction that would require Treasury to write off its liquidation preference at no cost to the enterprises.

Plaintiffs' claim that President Trump would have given away Treasury's liquidation rights if not for the removal restriction is not remotely plausible. President Trump controlled Treasury's interests in the enterprises at all times and could have ordered the Secretary of the Treasury to forgo those interests if he so desired. Plaintiffs' theory also cannot be squared with actions of the former President's confirmed FHFA Director, which involved agreements to increase Treasury's liquidation rights. Indeed, the key documents on which plaintiffs rely make clear that protecting Treasury's investment was of paramount importance to the Trump Administration. For these and the reasons set forth below, plaintiffs have not established a nexus between the removal provision and the harm they allegedly experienced. The district court therefore rightly rejected their request for further relief.

A. Treasury's Status as a Counterparty to the Purchase Agreements Makes Clear That the Statutory Removal Restriction Did Not Preclude the President from Directing the Implementation of the Third Amendment as He Deemed Appropriate.

The President's control over the Secretary of the Treasury—FHFA's contractual counterparty—negates any attempt by plaintiffs to show that the Recovery Act's removal restriction prevented the President from altering the implementation of the Third Amendment in a manner that would have benefited the enterprises and their shareholders at Treasury's expense. *See Collins v. Mnuchin*, 938 F.3d 553, 594 (5th Cir. 2019) (concluding that, in light of Treasury's status as a contractual counterparty, "[t]his is thus a unique situation where we need not speculate about whether [there was] appropriate presidential oversight"), *rev'd on other grounds*, 141 S. Ct. 1761; *see also Collins*, 141 S. Ct. at 1802 (Kagan, J., concurring in part and concurring in the judgment) (noting that Treasury's involvement as a counterparty "seems sufficient to answer the question the Court kicks back").

Plaintiffs nevertheless speculate that, absent the removal restriction, President Trump would have removed FHFA's confirmed Director Melvin Watt in January 2017 and replaced him with a different Director. Br. 20. Plaintiffs further contend that this hypothetical Director would have renegotiated the Purchase Agreements in a manner that benefited the enterprises and its shareholders by reducing Treasury's interest in the enterprises in order to make the enterprises' stock more attractive to new private investors. Br. 25-30. Plaintiffs assert that this Director would have renegotiated the Purchase Agreements between Treasury and the enterprises to "eliminate the liquidation preference on Treasury's senior preferred stock." Br. 27 (quoting ROA.1196). Plaintiffs opine that this might have been "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.* (quoting ROA.1196).

Plaintiffs' theory thus turns on the proposition that President Trump wanted to dramatically reduce Treasury's interest in the enterprises which might (plaintiffs conjecture) have enabled the enterprises to raise capital from other sources. Even accepting for purposes of argument the unsupported premise that President Trump wanted to dramatically reduce Treasury's interest in the enterprises without any corresponding benefit to Treasury or taxpayers, the Recovery Act's removal restriction did not impair his ability to pursue that goal. From his first day in office, President Trump could have directed the Secretary of the Treasury to give up Treasury's dividend rights in the enterprises, to eliminate or reduce its liquidation preference, or to trade in its preferred shares for less valuable common shares. In short, the President had "plenary authority" over Treasury's stake in the enterprises and could have reduced that stake at any time if he so desired. *Collins*, 938 F.3d at

594. The removal restriction had no bearing on the President's oversight authority with respect to Treasury's interests.

Plaintiffs do not dispute that the President could have directed Treasury to take these or similar actions. They urge, however, that the President's will was thwarted by the removal restriction because President Trump purportedly wished to take actions to end the conservatorships in "*a particular way*" that required FHFA's cooperation. (Br. 45). This speculation fails on its own terms. The "particular way" plaintiffs allege that President Trump wanted to end the conservatorships was through a write-down of Treasury's liquidation preference. That action did not require FHFA's cooperation. Even making the improbable assumption that FHFA would have opposed an attempt by Treasury to forgo a contractual benefit, nothing would have prevented Treasury from doing so unilaterally. For years, Treasury voluntarily waived the periodic commitment fee to which it was entitled under the initial stock purchase agreements, *see Collins*, 141 S. Ct. at 1773 n.4, and it could have done the same with other contractual benefits.

Moreover, even if FHFA's agreement were required, it is implausible that Director Watt (or any FHFA Director) would have opposed an amendment that, at no cost to the enterprises, eliminated Treasury's liquidation preference or converted Treasury from a preferred to common shareholder, thus paving the way for the enterprises' recapitalization. Plaintiffs declare that the "principal practical effect" of an injunction eliminating Treasury's liquidation preference "would be to put Fannie and Freddie in a *stronger* financial position." Br. 41. And plaintiffs have emphasized that Director Watt described the Third Amendment as "especially irresponsible" because it limited the amount of internal, private capital the enterprises could retain, *see* Supplemental En Banc Brief of Plaintiffs-Appellants at 31, *Collins v. Yellen*, No. 17-20364 (5th Cir. Dec. 12, 2018) (quoting Melvin L. Watt, Director, FHFA, Statement Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs (May 11, 2017), https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-Melvin-L-Watt-Director-FHFA-Before-the-US-Senate-Committee-on-Banking-Housing-and-Urban-Affairs-05112017.aspx.) There is no basis for plaintiffs' speculation that Director Watt, or any FHFA Director serving as conservator, would have objected to an offer that would have benefited the enterprises by relieving them of contractual obligations at no cost to themselves.

The implausibility of plaintiffs' argument is further underscored by the materials on which plaintiffs rely. Plaintiffs cite (Br. 28) statements made by a former Treasury official, Craig Phillips, in a press interview in which Mr. Phillips stated that some members of the Trump Administration had decided it was preferrable to wait until the end of Director Watt's tenure to pursue housing and enterprise reform issues. Br. 28; *see also* ROA.1202 (¶ 72). Phillips does not mention Treasury's liquidation preference, nor suggest that he or anyone in the Administration wished to eliminate that liquidation preference, but was prevented from doing so by Director Watt. Moreover, in the same interview, Mr. Phillips emphasized that Director Watt's views on the conservatorships were '"not terribly different than [current] Director Calabria's,' that Watt thought the conservatorships should end, 'felt very strongly' that the Net Worth Sweep should end, and 'would have actually done almost anything [Treasury] wanted to do.'" *Bhatti v. FHFA*, No. 17-CV-2185 (PJS/JFD), 2022 WL 17741246, at *8 (D. Minn. Dec. 16, 2022) (quoting Interview by Tim Rood with Craig Phillips, SitusAMC, 10:28-10:52, https://www.situsamc.com/resources-insights/podcasts/hill-episode-10-craig-phillips-former-counselor-us-secretary-treasury). In addition, as the district court stressed, plaintiffs have identified no instance in which Director Watt took any specific action to obstruct the policy goals of the Trump Administration, ROA.1520, let alone evidence indicating that he would have opposed a cost-free write-off of Treasury's interest in the enterprises.

Plaintiffs are on no firmer ground in urging that Treasury's ability to unilaterally forgo its liquidation preference would have been insufficient to accomplish that hypothetical aim (Br. 28-29) because eliminating the liquidation preference was the last of "five key steps" that they claim would have been necessary to recapitalize the enterprises and allow them to exit the conservatorships. *See* ROA.1204-06 (delineating the five steps). Those purported five steps are (1) end the net worth dividend; (2) cease paying Treasury quarterly cash dividends; (3) develop a regulatory framework for determining the amount of capital the enterprises would be required post-conservatorship; (4) hire financial advisors to develop regulatory and business plans for raising capital; and (5) eliminate Treasury's liquidation preference.

ROA.1204-1206. Plaintiffs do not explain why these steps had to be undertaken sequentially, nor why President Trump could not have accomplished the first, second, and fifth step by simply ordering the Secretary of the Treasury to reduce or forgo Treasury's interests in the enterprises. Plaintiffs' allegations also fail to establish plausibly that President Trump had settled on a plan to eliminate Treasury's liquidation preference. *See infra* pp. __

But even assuming President Trump had adopted plaintiffs' alleged five-step plan and further assuming that each step required FHFA's agreement, plaintiffs again offer no plausible reason to conclude that Director Watt opposed any of those steps. With regard to the first two steps, as noted, Director Watt favored amending the Purchase Agreements to allow the enterprises "to retain the profits they were earning and build their net worth back up rather than being forced to hand every dollar over to Treasury" and "to build capital." ROA.1204-05. He, like any FHFA Director, would have had every reason to welcome an amendment to the Purchase Agreements that reduced the enterprises' dividend payments to Treasury and allowed them to increase their capital. And, in fact, Director Watt negotiated such an amendment with President Trump's Treasury Secretary in December 2017. *See supra* p. __ (describing amendment to the Purchase Agreements under which Treasury agreed to forgo cash dividends so that the enterprises could retain additional capital); *see also* ROA.1520 (noting that Director Watt "took similar steps to enable the [enterprises] to retain capital steps" as the steps later taken by Director Calabria) With regard to plaintiffs' third "step," Director Watt also promulgated a proposed rule governing "the amount of capital that would be required once [the enterprises] were under private control," ROA.1205. *See* 83 Fed. Reg. 33,312 (July 17, 2018). That proposal, in fact, supplied the "foundation" for the final rule FHFA promulgated under Director Calabria. 85 Fed. Reg. 82,150, 82,150 (Dec. 17, 2020). And there is no reason to assume Director Watt would not have undertaken the minimal step of "hir[ing] financial advisors" to explore the possibility of a stock offering, plaintiffs' proposed fourth step. ROA.1206. Indeed, plaintiffs nowhere suggest that Director Watt would have opposed any of these measures, and any such suggestion would be implausible, as is their assertion that Director Watt's tenure and the removal restriction prevented President Trump from taking any of their proposed steps.

B. The Actions Taken by the Directors President Trump Selected Provide an Independent Basis for Rejecting Plaintiffs' Theory of Harm.

The actions of the Directors appointed by President Trump following Director Watt's resignation provide an independent basis for rejecting plaintiffs' conjecture about what President Trump would have done with respect to the Purchase Agreements had the removal restriction not existed. *See Collins*, 938 F.3d at 594; *see also Collins v. Yellen*, 27 F.4th 1068, 1069-70 (5th Cir. 2022) (Haynes, J., dissenting). President Trump appointed two Directors during his Administration: an Acting Director in January 2019 and a Senate-confirmed Director in April 2019. *Collins*, 938 F.3d at 594. If President Trump had wished to bring about the significant reduction in Treasury's rights that plaintiffs propose, he would have "install[ed] someone who would carry out th[at] policy vision." *Id.* He did not. Instead, the Directors President Trump appointed continued to defend the Third Amendment. Although the Directors, along with Treasury, "consistently reevaluated" the Purchase Agreements, *Collins*, 141 S. Ct. at 1781, at no point did either Director negotiate a change in Treasury's rights along the lines plaintiffs propose (a change that, in plaintiffs' view, Treasury would have readily accepted).

Under the confirmed Director chosen by President Trump (Mark Calabria), FHFA and Treasury twice altered the terms of Purchase Agreements. First, on September 27, 2019, the parties entered into a letter agreement under which the enterprises' internal capital buffers were increased from $3 billion to $25 billion (for Fannie Mae) and $20 billion (for Freddie Mac).[4] In exchange for allowing the enterprises to retain additional capital, Treasury received a $22 billion increase in its liquidation preference in Fannie Mae and a $17 billion increase in its liquidation preference for Freddie Mac. Thus, far from negotiating a reduction in Treasury's liquidation rights—as plaintiffs argue the President's hypothetical Director would have done—the President's chosen Director agreed to an increase in those rights.

Second, in January 2021, the parties agreed to amend the Purchase Agreements by suspending all quarterly cash dividend payments to Treasury until the enterprises

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[4] *Treasury Department and FHFA Modify Terms of Preferred Stock Purchase Agreements for Fannie Mae and Freddie Mac, supra.*

build sufficient capital to meet specified thresholds. *Collins*, 141 S. Ct. at 1774. Once those thresholds are met, cash dividend payments to Treasury will resume. *Id.* at 1774-75. In the meantime, the dividends that the enterprises would have paid to Treasury in cash under the Third Amendment are added to Treasury's liquidation preference. *Id.* Thus, rather than taking action to reduce "the liquidation preference [on Treasury's senior preferred stock] to zero" and end further increases to the liquidation preference or to "exchange[]" some or all of Treasury's senior preferred stock "for common stock," Br. 27 (quotation marks omitted), President Trump's selected Director did precisely the opposite. He renegotiated the Purchase Agreements in a way that increases the enterprises' internal, non-Treasury-funded capital in exchange for an increase in Treasury's liquidation rights. (By plaintiffs' own account, the January 2021 agreement did "nothing" to aid them. *See* Plaintiffs Letter, *Collins v. Yellen*, No. 19-422 (U.S. Mar. 31, 2021)). In other words, in selecting a hand-picked Director, President Trump chose an individual whose approach to the Purchase Agreements was entirely at odds with the approach plaintiffs now seek to attribute to the former President.

C. Plaintiffs' Theory of Injury and Their Proposed Remedy Fail for Additional Reasons.

For the reasons explained above, plaintiffs cannot show that the Recovery Act's removal restriction thwarted the President from renegotiating the Purchase Agreements in a manner that would have benefited private shareholders. While either of the grounds discussed suffices to reject plaintiffs' request for further relief on their removal claim, plaintiffs' request also fails for additional reasons.

Plaintiffs' theory of injury is premised on the notion that President Trump had settled on a plan to eliminate Treasury's liquidation preference but was prevented from doing so by the Recovery Act's removal restriction. As discussed, *supra* Part I.B., the suggestion that President Trump wished to eliminate Treasury's liquidation preference cannot be squared with the actions his chosen Director undertook. That President Trump never ordered Treasury to take action to reduce its liquidation preference or convert its shares also underscores the absence of any foundation for plaintiffs' theory.

As the district court correctly concluded, plaintiffs' contention that President Trump had settled on a plan to eliminate Treasury's liquidation preference in the enterprises is also undermined by the very documents on which plaintiffs rely. *See* ROA.1519; ROA.1522 (concluding that "[p]laintiffs' evidence of harm is contradictory"). In asserting that President Trump had decided to write-off Treasury's liquidation preference, plaintiffs rely primarily on a 2019 Housing Reform Plan issued by the Treasury Department. *See* Br. 27; ROA.1197-98 ((citing U.S. Dep't of the Treasury, *Housing Reform Plan* (Sept. 2019), https://perma.cc/VPS6-6974 (Housing Reform Plan)).

That Plan does not suggest that Treasury had decided to forgo its liquidation preference or other rights at no cost to enterprises. The Plan discusses various ways the enterprises might be recapitalized during the conservatorships. Housing Reform Plan 27. In that discussion, it identifies "[e]liminating all or a portion" of Treasury's liquidation preference or "exchanging all or a portion of that [liquidation preference] for common stock or other interests in the [enterprise]" as one possible "option[]" among five "[p]otential approaches to recapitalizing an [enterprise]." *Id.* The Plan also identified other options, including "[a]djusting the variable dividend on Treasury's senior preferred shares" or "[p]lacing the [enterprise] in receivership." *Id.* The Plan does not endorse any of the options or discuss their feasibility. Instead, the Plan recognized that each option "poses a host of complex financial and legal considerations" that would require "careful consideration." *Id.*

The Plan also makes clear that "protecting taxpayers" from future bailouts and ensuring that "the Federal Government is properly compensated for any explicit or implicit support it provides to the [enterprises]" should be central components of any reform of the enterprises. Housing Reform Plan 1, 28. And the Plan expressly stated that, in the event Treasury were to allow the enterprises to recapitalize through retaining more of their earnings, it should do so "with appropriate compensation to Treasury for any deferred or forgone dividends." *Id.* Nothing in the Plan suggested Treasury would simply have forgone its interests in the enterprises, notwithstanding its continued commitment of hundreds of billions of dollars of taxpayer funds, and restored the enterprises to the flawed model that necessitated the conservatorships and taxpayer-funded bailouts.

Plaintiffs' reliance on the 2021 January letter agreement between Treasury and FHFA (headed at the time by President Trump's chosen Director Mark Calabria) is similarly misplaced. Br. 29-30. As discussed, FHFA and Treasury agreed to amend the Purchase Agreements in a manner that increased Treasury's liquidation preference. Plaintiffs cite a section of the agreement entitled "Commitment to Develop Proposal To Resolve Conservatorship," under which Treasury and FHFA "commit[ted] to work" on a proposal "to establish a timeline and process to terminate the conservatorship and raise capital." Br. 30 (quoting ROA.1377); ROA.1377. That section does not state, nor even suggest, that Treasury had settled on a plan that involved writing-off its valuable liquidation preference. To the contrary, the section makes clear that any proposal developed by the parties would have to "fairly compensate[] taxpayers for the support they have provided and continue to provide" and "ensure[] Treasury is appropriately compensated." ROA.1377. That plaintiffs rely on an agreement that *increased* Treasury's liquidation preference to support their allegation that President Trump wished to *eliminate* that preference, only underscores the absence of any support for their theory.

Plaintiffs do not compensate for the lack of any basis for their argument by asserting that the Supreme Court's decision in *Collins* does not require "proof of a 'concrete plan.'" Br. 39. *Collins* requires plaintiffs challenging an unlawful removal restriction to establish that the provision caused them compensable harm. *Collins*, 141 S. Ct. at 1789; *CFSA*, 51 F.4th at 632-33. Plaintiffs claim that they were harmed by the removal provision in this case because it allegedly thwarted the specific plan that President Trump and his Administration had adopted for ending the conservatorship and recapitalizing the enterprises, a plan that, according to plaintiffs, necessarily involved eliminating Treasury's liquidation preference. *See* Br. 26-28; *see also* Br. 27 (asserting that their allegations "establish[] the Trump Administration's plan for the Companies as well as the steps necessary to complete that plan"). In other words, while *Collins* might not require plaintiffs to establish a "concrete plan" in every case, the theory of injury that plaintiffs have pursued necessarily depends on the existence of such a plan. In any event, plaintiffs' failure goes far beyond the failure to identify a "concrete plan." Every circumstance on which plaintiffs attempt to rely demonstrates that there was no presidential intention to eliminate liquidation preferences. As noted, the President could have directed Treasury to propose an amendment to that effect or to waive the liquidation preferences unilaterally. He did not do so. And the agreements negotiated by the Directors appointed by the President did not eliminate liquidation preferences; they increased them.

D. Former President Trump's Post-Presidency Letter Does Not Advance Plaintiffs' Theory of Harm and Proposed Remedy.

In attempting to establish that the removal restriction prevented President Trump from eliminating Treasury's liquidation preference, plaintiffs place considerable emphasis on a November 2021 letter in which now-former President Trump stated that he would have fired Director Watt absent the removal restriction.

See Br. 20-22, 32-34. Former President Trump's letter only underscores the flaws in plaintiffs' theory of injury. As plaintiffs note, the Supreme Court suggested that the shareholders in *Collins* might be able to establish harm by showing "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," *Collins*, 141 S. Ct. at 1789. The Supreme Court referred to the possibility of a statement the President "had made" during his time in office, not one made in a letter a year after leaving office. Notwithstanding plaintiffs' criticism, the district court was quite clearly correct to follow the Supreme Court's guidance and look to the contemporaneous public statements that the President "had made" during his Presidency rather than to consider dispositive later statements that correspond to no statements made or actions taken during his administration. Indeed, plaintiffs acknowledge that they are unable to muster any contemporaneous "public statement[s]" from the President "expressing displeasure with actions taken by [Watt]" with respect to the conservatorships, the Purchase Agreements, or the implementation of the Third Amendment, and "assert[ing] that he would remove the Director if the statute did not stand in the way." *Id.* In any event, for the reasons discussed, plaintiffs' argument founders not only on the absence of any contemporaneous statement but on the abundant record demonstrating that the Trump Administration at no time sought to eliminate Treasury's liquidation preference or settled on a plan to do so (and, in fact, did the opposite).

Even on its own terms, the November 2021 letter from former President Trump does not advance plaintiffs' argument. As discussed above, President Trump could have directed the Secretary of the Treasury to sell Treasury's stock in the companies or otherwise reduce Treasury's interest at any time. He did not do so, and his post-Presidency letter confirms that he had no interest in gratuitously reducing Treasury's stake in the enterprises. Instead, he states that his "Administration would have . . . sold the government's common stock in these companies at a huge profit." Br. 21 (quotation marks omitted). That assertion is at odds with plaintiffs' contention that the former President wanted simply to write-off Treasury's valuable liquidation preference or forgo its more valuable preferred shares.[5]

There is also little basis for assuming that President Trump considered himself bound by the Recovery Act's removal restriction. *See CFSA*, 51 F.4th at 633 (stating that, to establish that a removal restriction caused harm, the plaintiff must establish, among other things, "a perceived inability to remove the actor due to the infirm

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[5] Plaintiffs contend that the former President's letter is entitled to a "presumption of regularity" and should therefore be taken at face value. Br. 32 (quotation marks omitted). The "presumption of regularity" attaches to "the official acts of public officers"—*i.e.*, acts undertaken in the discharge of their "official duties." *Beverly v. United States*, 468 F.2d 732, 743 (5th Cir. 1972) (quoting *United States v. Chemical Found.*, 272 U.S. 1, 14 (1926)). Plaintiffs cite no support for the proposition that the presumption applies to a private letter sent by a former government official after his government service has ended. In any event, as explained above, even taken at face value, the letter fails to support plaintiffs' claim that President Trump would have written-off Treasury's interest in the enterprises but was prevented by the removal restriction from doing so.

provision"). The Trump Administration did not defend the constitutionality of the removal restriction and argued before the district court, the courts of appeals, and the Supreme Court that the provision was invalid and unenforceable. *See, e.g.*, *Collins*, 141 S. Ct. at 1775. The Administration was of the view, later affirmed by the Supreme Court, that the President at all times had plenary authority to remove FHFA's Director if he so desired.

Consistent with that understanding, plaintiffs have not demonstrated that "the President had attempted to remove [Director Watt] but was prevented from doing so by a lower court decision holding that he did not have 'cause' for removal." *Collins*, 141 S. Ct. at 1789. Nor, as noted, have plaintiffs identified any contemporaneous statements from the President "expressing displeasure with actions taken by [Watt]" and "assert[ing] that he would remove the Director if the statute did not stand in the way." *Id.* Despite his Administration's belief that he had the authority to do so, President Trump never attempted to remove the Director or order the Director to take specific actions. Nor is there any indication that he was prevented from doing so. Those facts also negate the underlying premise of plaintiffs' alleged injury.

E. Plaintiffs Bear the Burden of Establishing That the President Would Have Eliminated Treasury's Liquidation Preferences But For the FHFA Director's Removal Restrictions.

Plaintiffs cannot salvage their position by insisting that the government bears the "burden" of proving that a constitutional violation caused no harm where a plaintiff makes "a *prima facie* showing that [an] unconstitutional removal restriction inflicted compensable harm," Br. 31-32, or by urging that the Court should resolve in their favor any "uncertainty" over whether and how the Trump Administration would have amended the Purchase Agreements but for the unconstitutional removal provision, Br. 34.

The Supreme Court emphasized in *Collins* that "there is no reason to regard any of the actions taken by the FHFA in relation to the third amendment[, including actions taken by confirmed Directors,] as void." 141 S. Ct. at 1787; *see also id.* at 1793 (Thomas, J., concurring) (explaining that the "mere existence of an unconstitutional removal provision, too, generally does not automatically taint Government action by an official unlawfully insulated"). Thus, contrary to plaintiffs' suggested approach, the Supreme Court made clear that a validly appointed Director's actions are presumed lawful and thus any uncertainty over the validity of those actions is properly resolved in the government's favor.

In any event, for the reasons explained above, plaintiffs have not established a "*prima facie* case" that the removal restriction prevented President Trump from renegotiating the Purchase Agreements to the plaintiffs' benefit. Nor is there any uncertainty over whether and how the Trump Administration would have amended the Purchase Agreements but for the removal provision. As discussed, to establish harm stemming from the removal restriction, plaintiffs would have to show that the removal restriction prevented President Trump from reducing Treasury's interest in the enterprises. As explained, plaintiffs cannot do so given that President Trump had plenary authority over the Secretary of the Treasury and could have directed the Secretary to forgo or reduce Treasury's interests at any time. Moreover, plaintiffs' claim that the removal restriction thwarted President Trump's alleged desire to eliminate Treasury's liquidation preference at no cost to the enterprises is at odds with the actions his chosen Directors and Director Watt took and with the key materials on which plaintiffs rely.

II. The Mandate Rule Forecloses Review Of Plaintiffs' Appropriations Clause Claims, Which Are Without Merit In Any Event.

After this case was remanded to the district court, plaintiffs submitted an amended complaint that included—for the first time—two claims asserting that FHFA's funding mechanism violates the Appropriations Clause. ROA.1212-14 (Count II); ROA.1216-17 (Count IV). The district court correctly concluded that these new claims are barred by this Court's mandate rule, which "requires a district court on remand to effect [this Court's] mandate and do nothing else." ROA.1517 (quoting *General Universal Sys., Inc. v. HAL, Inc.*, 500 F.3d 444, 453 (5th Cir. 2007)). The Supreme Court's and this Court's mandate to the district court to consider the narrow remedial issue discussed above did not invite plaintiffs to assert entirely new constitutional claims that plaintiffs could have, but did not, raise during prior proceedings. If this Court were to reach the merits of plaintiffs' Appropriations Clause claims, it should reject them. FHFA's funding mechanism is consistent with the Appropriations Clause and with longstanding, well-established practice.

A. The Appropriations Clause Claims Are Outside the Mandate of this Court's Remand Order.

"Absent exceptional circumstances, the mandate rule compels compliance on remand with the dictates of a superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court." *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004). Thus, in this Circuit, "only those discrete, particular issues identified by the appeals court for remand are properly before" the district court. *United States v. McCrimmon*, 443 F.3d 454, 460 (5th Cir. 2006) (quotation marks omitted); *see also General Universal Sys.*, 500 F.3d at 453 ("In implementing the mandate, the district court must 'take into account the appellate court's opinion and the circumstances it embraces.'" (quoting *Lee*, 358 F.3d at 321)). As relevant to this case, the mandate rule specifically bars "litigation of issues . . . waived, for example because they were not raised in the district court." *Lee*, 358 F.3d at 321.

Here, plaintiffs plainly waived the Appropriations Clause claims they now seek to assert. They did not raise those claims in their 2016 complaint, in their briefs in the district court, in their briefs on appeal in this Court, nor in their briefing before the Supreme Court. *See, e.g.*, *General Universal Sys.*, 500 F.3d at 453 (explaining that "[b]y failing to brief any arguments against the Customer Defendants, [the plaintiff] waived any claims against the Customer Defendants," and could not reassert those claims on remand); *see also Park v. Direct Energy GP, LLC*, 832 F. App'x 288, 295 (5th Cir. 2020) (per curiam) (providing that a claim not raised in a complaint is waived and cannot be considered by the district court or this Court on appeal). Accordingly, in their decisions that led to the remand, neither the district court, this Court, nor the Supreme Court mentioned, let alone addressed, any argument that the Third Amendment should be set aside because FHFA's funding structure violates the Appropriations Clause.

The Supreme Court's mandate to this Court and this Court's corresponding mandate to the district court to "fulfill the Supreme Court's remand order," *Collins*, 27 F.4th at 1069, were limited to the narrow remedial issue addressed at *supra* Part I: namely, whether "the unconstitutional restriction on the President's power to remove a [Senate confirmed] Director of the FHFA" caused them "compensable harm" during the "implementation of the third amendment" by such Directors. *Collins*, 141 S. Ct. at 1788-89. As noted above, although the Supreme Court agreed with plaintiffs (and the government) that the statutory removal restriction was unconstitutional, it declined to set the Third Amendment aside because FHFA was headed by an acting Director, who was removable at the President's will, when it agreed to the amendment. *See id.* at 1781-83, 1787. It therefore declined to grant plaintiffs the primary relief they sought—the invalidation of the Third Amendment. The Supreme Court further concluded, however, that there remained a "possibility" that the unconstitutional removal provision caused plaintiffs' compensable harm during the later "implementation of the third amendment" by Senate-confirmed Directors. *See id.* at 1788-89. The Supreme Court then remanded the case for this Court and the district court to determine whether plaintiffs could establish that such harm had in fact occurred. *See id.* Thus, whether plaintiffs were entitled to further relief on their removal authority claim was the sole issue open to the district court on remand.

Nothing in either the "letter [or] the spirit" of that narrow mandate opened the door to a new set of claims based on an entirely different constitutional provision and theory that was not presented to the district court, this Court, or the Supreme Court. *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002) (quotation marks omitted); *General Universal Sys.*, 500 F.3d at 453. Plaintiffs note (Br. 47-48) that the Supreme Court described FHFA's funding mechanism in the section of its opinion that provided background on FHFA's creation. *See Collins*, 141 S. Ct. at 1772. But that passing reference in no way suggests that the Supreme Court viewed its remand order as embracing theretofore unraised claims challenging that funding mechanism on distinct constitutional grounds. As noted, the Supreme Court's remand order was directed solely at the question whether plaintiffs could establish an entitlement to further retrospective relief on their removal authority claim.

Nor does the exception to the mandate rule that permits district courts to consider previously waived arguments when "there has been an intervening change of law by a controlling authority," *McCrimmon*, 443 F.3d at 460, apply here. Even where, unlike here, a relevant change in the legal landscape occurs, this Court has declined to apply the change-in-law exception when the argument plaintiffs seek to raise on remand "existed" in earlier proceedings and there was no "directly opposing precedent" that would have rendered that argument "futile." *Id.* at 461-62. Plaintiffs' Appropriations Clause claims existed when this case was first before the district court more than five years ago, and no directly opposing precedent barred plaintiffs from asserting those claims then. Indeed, enterprise shareholders in related litigation challenging the Third Amendment brought claims challenging FHFA's funding mechanism in complaints filed not long after plaintiffs filed this suit in 2016. *See* Plaintiffs' Complaint for Declaratory and Injunctive Relief at 7, ¶ 20, 63, ¶ 142, *Rop v. FHFA*, No. 17-cv-497, ¶¶ 20, 142 (W.D. Mich. June 1, 2017); Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief at 1, ¶ 1, 5, ¶ 14, 32-33, ¶ 85, *Bhatti v. FHFA*, No. 17-cv-02185, ¶¶ 1, 14, 85 (D. Minn. Aug. 4, 2017). Plaintiffs proffer no "viable explanation [n]or extraordinary circumstance for failing to raise" their Appropriations Clause claims at the outset of this case. *McCrimmon*, 443 F.3d at 463. Thus, even assuming a relevant change in law had occurred, it would not excuse plaintiffs' failure to raise their Appropriations Clause claims in their initial complaint or subsequent briefing.

In any event, no change in law occurred here. Plaintiffs first assert that the Supreme Court's decision in this case "provides an intervening change in controlling law." Br. 49. The district court correctly rejected that assertion, which is plainly incorrect. ROA.1521-23. As discussed above, the Supreme Court in *Collins* did not address any claims directed at FHFA's funding structure. The decision thus could not possibly have brought about a change in appropriations law.

Plaintiffs' assertion that their Appropriations Clause claims are a "natural follow-on" to the Supreme Court's resolution of their removal authority claim, Br. 48, only underscores the inexcusability of their failure to raise their Appropriations Clause claims in their initial complaint. If, as plaintiffs contend, their Appropriations Clause claims follow from the resolution of their removal authority claim, they must also have understood the latter claims to be available from the outset of this case. That the Supreme Court has now ruled in plaintiffs' favor on the removal authority issue is therefore not an intervening *change* in law, but simply an affirmance of what plaintiffs always believed to be true.

Plaintiffs fare no better with their second purported change in law—this Court's decision in *CFSA*, 51 F.4th 616. *See* Br. 50. That case held that the funding mechanism for the CFPB violates the Appropriations Clause because of its "unique, double-insulated" structure. *CFSA*, 51 F.4th at 623, 641. That holding does not control here because, as further explained below, FHFA's funding mechanism is distinct from that of the CFPB in several relevant ways, and this Court expressly distinguished the FHFA's funding structure from that of the CFPB. *Id.* at 641. More to the point, this Court's decision in *CFSA* does not purport to overrule any "directly opposing precedent" that would have previously rendered plaintiffs' Appropriations Clause claims "futile." *McCrimmon*, 443 F.3d at 462. Indeed, this Court stated that the Appropriations Clause claim in *CFSA* presented a "novel" question that was not controlled by direct precedent. 51 F.4th at 639. This Court's decision in *CFSA* thus provides no basis for excusing plaintiffs' failure to raise their Appropriations Clause claims from the outset.

B. FHFA's Funding Mechanism Satisfies the Appropriations Clause.

The Constitution vests the authority to "lay and collect Taxes" and to provide for expenditures of those tax dollars with Congress. U.S. Const. art. I, § 8, cl. 1. As specified in the Appropriations Clause, "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." *Id.* art. I, § 9, cl. 7. Plaintiffs' Appropriations Clause claims turn on whether Congress complied with that requirement when it directed FHFA, by statute, to fund itself through "assessments it imposes on the entities it regulates." *Collins*, 141 S. Ct. at 1772 (discussing 12 U.S.C. §§ 4502(20), 4516(a)). Because the Appropriations Clause allows Congress to create such a funding mechanism, those claims fail as a matter of law.

In the Recovery Act, Congress provided that FHFA would be funded through "annual assessments" collected from the entities it regulates. 12 U.S.C. § 4516(a). It further provided that those amounts cannot "exceed[] the amount sufficient to provide for [FHFA's] reasonable costs." *Id.* Congress also specified when and how those funds may be spent, stating that the assessments may be used "for compensation of the Director and other employees of the Agency and for all other expenses of the Director and the Agency," *id.* § 4516(f)(4), and specifying that, "if any amount from any annual assessment collected from an enterprise remains unobligated at the end of the year for which the assessment was collected, such amount shall be credited to the assessment to be collected from the enterprise for the following year," *id.* § 4516(d). In § 4516, Congress has thus prescribed the source, amount, duration, and purpose of FHFA's funding. The statute therefore more than satisfies the classic elements of an appropriation. *See* U.S. Gov't Accountability Office, GAO-16-464SP, *Principles of Federal Appropriations Law* ch. 2, at 2-22 (4th ed. 2016) ("[A]ny time the Congress specifies the manner in which a Federal entity shall be funded and makes such funds available for obligation and expenditure, that constitutes an appropriation, whether the language is found in an appropriation act or in other legislation." (quotation marks omitted)).

FHFA's funding mechanism is also consistent with historical practice. Since the Founding, Congress has frequently provided agencies with standing authority to spend funds derived from sources such as fees, assessments, and investments. In 1792, Congress established a national Post Office, to be funded through its collection of postage rates. *See* Act of Feb. 20, 1792, ch. 7, §§ 2-3, 1 Stat. 232, 233-234. The same year, it created a national mint, to be funded in part through its collection of fees. *See* Act of Apr. 2, 1792, ch. 16, §§ 1, 14, 1 Stat. 246, 246, 249.

The practice has continued over the centuries that followed. In 1836, Congress established the Patent Office, to be funded through its collection of fees paid by patent holders. Act of July 4, 1836, ch. 357, § 9, 5 Stat. 117, 121. In 1875, Congress provided for the funding of the Office of the Comptroller of the Currency through assessments levied on banks. *See* Act of Feb. 19, 1875, ch. 89, 18 Stat. 329-330; 12 U.S.C. §§ 16, 481-482. In 1913, Congress established the Federal Reserve Board, to be funded through assessments on Federal Reserve banks. See Federal Reserve Act, ch. 6, § 10, 38 Stat. 261 (1913); 12 U.S.C. §§ 243-244. And since then, Congress has chosen similar funding approaches for, among other agencies, the Federal Deposit Insurance Corporation, 12 U.S.C. §§ 1815(d), 1820(e); the National Credit Union Administration, 12 U.S.C. § 1755(a)-(b); the Farm Credit Administration, 12 U.S.C. § 2250; and U.S. Citizenship and Immigration Services, 8 U.S.C. § 1356(m)-(n). This "[l]ong settled and established practice" is entitled to "great weight," *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)), in interpreting the Appropriations Clause and underscores the validity of the mechanism through which Congress chose to fund FHFA.

In arguing that FHFA's funding mechanism violates the Appropriations Clause, plaintiffs rely almost entirely on this Court's recent decision holding unconstitutional the "unique" funding mechanism of a different agency, the CFPB. *CFSA*, 51 F.4th at 641; *see* Br. 52-53. The Supreme Court recently granted certiorari in *CFSA* to address that question along with the issue of an appropriate remedy for any such violation. *See CFPB v. CFSA,* No. 22-448, 2023 WL 2227658 (U.S. Feb. 27, 2023) (granting cert.); *see also* Petition for Writ of Certiorari at I, *CFPB v. CFSA*, No. 22-448 (U.S.

Nov.14, 2022), (showing question presented is "[w]hether the court of appeals erred in holding that the statute providing funding to the [CFPB], 12 U.S.C. § 5497, violates the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7, and in vacating a regulation promulgated at a time when the CFPB was receiving such funding").

Even assuming that the CFPB's funding mechanism crosses the line of what the Appropriations Clause allows, it does not follow that the FHFA's distinct funding mechanism does as well. This Court repeatedly emphasized that "[e]ven among self-funded agencies, the [CFPB] is unique." *CFSA*, 51 F.4th at 641; *see also id.* at 623, 624, 635. The Court stated that, while the FHFA—along with the Federal Reserve, the Federal Deposit Insurance Corporation, and others— "possess[es] a degree of budgetary autonomy," the CFPB's "perpetual self-directed, double-insulated funding structure goes a significant step further than that enjoyed by the other agencies." *Id.* at 641. The FHFA's funding mechanism thus lacks key features this Court identified as rendering the CFPB's mechanism unconstitutional.

Indeed, there is no plausible argument that FHFA's funding is "double-insulated" from Congressional control. This Court used that term to describe the mechanism by which the CFPB "receives funding directly from the Federal Reserve, which is itself funded outside the appropriations process through bank assessments." *CFSA*, 51 F.4th at 624 (quoting *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2194 (2020)). The FHFA does not draw funding from any other agency. Rather, like the Federal Reserve itself, the FHFA collects its own fees directly from the entities it regulates. 12

U.S.C. § 4516(a). Thus, even under this Court's own logic in *CFSA*, Congress did not "cede[] indirect control" over the FHFA by providing that its funding be transferred from another governmental entity. *CFSA*, 51 F.4th at 639 (emphasis omitted).

Instead, Congress provided by statute a detailed set of directions constraining the FHFA's authority to collect annual assessments from the regulated entities. *See* 12 U.S.C. § 4516. The amount of the annual assessments must "not exceed[] the amount sufficient to provide for reasonable costs (including administrative costs) and expenses of the Agency," including four specified categories of expenses. *Id.* § 4516(a)(1)-(4). That Congressional directive on the FHFA's funding is distinct from the directive that the Federal Reserve "shall transfer to the [CFPB]" the "amount determined by the Director [of the CFPB] to be reasonably necessary to carry out" the CFPB's authorities. *Id.* § 5497(a)(1); *see also CFSA*, 51 F.4th at 638. And the FHFA is required to account for any unspent funds at the end of each year by crediting that surplus toward the following year's assessment. 12 U.S.C. § 4516(d) (excepting amounts collected to maintain a working capital fund). Thus, even assuming that the Appropriations Clause requires Congress to maintain some degree of control over an agency's funding mechanism, Congress has done so with the FHFA.

Finally, even assuming that the Court were to accept plaintiffs' argument that FHFA's funding mechanism violates the Appropriations Clause, it is by no means evident that plaintiffs would be entitled to the relief they seek. Success on the merits would not automatically entitle plaintiffs to equitable relief, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008), and that question would properly be addressed by the district court in the first instance in light of this Court's opinion and the opinion, if any, of the Supreme Court.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing brief was prepared using Microsoft Word 2010 and complies with the type and volume limitations set forth in Rule 32 of the Federal Rules of Appellate Procedure. I further certify that the font used is 14-point Garamond, for text and footnotes, and that the computerized word count for the foregoing brief (excluding exempt material) is 11,884.

I further certify that 1) all required privacy redactions have been made; 2) the electronic submission will be an exact copy of the paper copy; and 3) the document is free from viruses and has been scanned by the current version of CrowdStrike Falcon Sensor.

/s/ Anna M. Stapleton
ANNA M. STAPLETON

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I also certify that I will file paper copies with the Court, via Federal Express overnight delivery, when the court requests them.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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