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 OF DEFENDANTS-APPELLEES
FEDERAL HOUSING FINANCE AGENCY AND SANDRA L. THOMPSON

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Pursuant to Fifth Circuit Rule 28.2.1, undersigned counsel of record certifies that the following persons and entities 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 FHFA Defendants-Appellees respectfully submit that oral argument would be helpful to the Court in analyzing the important constitutional issues posed by this case.

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INTRODUCTION

This case is on remand from the U.S. Supreme Court for a very limited purpose: allowing the plaintiff shareholders an opportunity to pursue claims challenging FHFA's implementation of the Third Amendment—a 2012 change to the dividends Fannie Mae and Freddie Mac paid Treasury—based solely on the existence of the unconstitutional removal provision.

The amended complaint Plaintiffs filed on remand veers far from the narrow path the Supreme Court charted. Instead, Plaintiffs seek to launch the equivalent of a whole new case, bringing two entirely new theories through six new counts.

The first new theory is that the Supreme Court's instructions call for this Court to compel FHFA and Treasury to make major financial changes to Treasury's investments in Fannie Mae and Freddie Mac that Plaintiffs hypothesize the Trump Administration might have carried out had the removal statute not existed. In Plaintiffs' words, the lower courts' job is to bring into effect "what would have happened in a world without the unconstitutional removal restriction" and "plac[e] Plaintiffs in the position they would be in absent the removal restriction." Br. 1, 2.

That grossly misreads the Supreme Court's opinion. The Court remanded in an abundance of caution to give Plaintiffs a chance to pursue possible retrospective relief for Third Amendment implementation, not to embark on a wide-ranging

inquiry into an alternate economic world that Plaintiffs speculate might have occurred absent the removal restriction.

The specific action Plaintiffs ask the Court to order—wiping out Treasury's nearly $300 billion senior preferred stock liquidation preferences in Fannie Mae and Freddie Mac—has nothing to do with Third Amendment implementation. And it is at odds with the Trump Administration's actual actions when it had plenary control of both FHFA and Treasury, including two contract amendments in 2019 and 2021 that greatly *increased* Treasury's liquidation preferences. In short, Plaintiffs' fanciful theory consists of unbridled speculation and is riddled with contradictions. It is also barred by constraints on judicially compelling agency action as well as the conservatorship statute's anti-injunction provision.

The second, and equally baseless, new theory is that the method of funding Congress enacted for FHFA—annual assessments on the entities FHFA regulates—violates the Constitution's Appropriations Clause, which provides that money can be paid out of the Treasury only through congressional authorization. Plaintiffs contend that this renders FHFA incapable of functioning, and ask the Court to unwind actions by FHFA as Conservator going all the way back to 2008. That completely new theory exceeds the Supreme Court's limited remand, as the district court recognized. In any event, the funding mechanism Congress enacted for FHFA, namely assessments on regulated entities, was based on Congress's standard model

for federal financial regulatory agencies, including the Federal Reserve. It is plainly constitutional, and Plaintiffs' contrary assertions have no support in constitutional text, doctrine, or judicial precedent.

STATEMENT OF JURISDICTION

This case arises under 28 U.S.C. § 1331. The District Court issued its opinion dismissing this action with prejudice on November 21, 2022, and entered final judgment on December 12, 2022. Plaintiffs filed a notice of appeal on December 5, 2022. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Plaintiffs are entitled to a mandatory injunction commanding FHFA and Treasury to wipe out Treasury's nearly $300 billion liquidation preferences, based on a theory that the unconstitutional removal restriction impeded a former Presidential Administration from pursuing financial reforms that Plaintiffs hypothesize might have included such a step.

2. Whether Plaintiffs' newly added claims under the Appropriations Clause are foreclosed, either because they are beyond the scope of the limited remand that governed the district court proceedings or outside the statute of limitations. If not, whether the funding mechanism Congress enacted for FHFA—consisting of financial assessments on regulated entities—comports with the Appropriations Clause, and whether any alleged violation would provide a basis to

vacate the Third Amendment when neither the money for Treasury's infusions to the Enterprises nor the money for the Enterprises' dividends to Treasury come from the funding mechanism alleged to be unconstitutional.

STATEMENT OF THE CASE

A. Statutory and Factual Background

The statutory and factual background of this matter is thoroughly covered in the Supreme Court's opinion and this Court's prior opinion, save for some new facts and allegations about events in 2017-2020 introduced as part of Plaintiffs' new theories on remand. The following summary reprises key facts relevant to the issues presented on appeal.

1. FHFA and the Recovery Act

In the midst of the 2008 economic crisis, Congress enacted the Housing and Economic Recovery Act of 2008 ("Recovery Act"). 12 U.S.C. § 4511 *et seq*. The Recovery Act created FHFA to regulate Fannie Mae and Freddie Mac (collectively, the "Enterprises"), which are financial institutions chartered by Congress to provide liquidity to the mortgage market by purchasing residential loans. *Collins v. Yellen*, 141 S. Ct. 1761, 1770-71 (2021).

FHFA is headed by a Director appointed by the President and confirmed by the Senate. 12 U.S.C. § 4512(b).[1] As is standard for federal financial regulatory agencies (*e.g.*, Federal Reserve, OCC, FDIC, National Credit Union Association, Farm Credit Administration), FHFA is funded through annual assessments on entities FHFA regulates. *Id.* § 4516. FHFA's finances are audited annually by the Government Accountability Office (an arm of Congress), which reports to Congress on "the financial operations and condition of the Agency, together with such recommendations" as deemed advisable. *Id*.

Congress authorized the FHFA Director to place the Enterprises in conservatorships or receiverships "for the purpose of reorganizing, rehabilitating, or winding up [their] affairs." *Id.* § 4617(a)(2). Consistent with other conservatorship and receivership statutes, "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver." *Id.* § 4617(f).

[1] HERA provides that the Director can be removed by the President only for cause. The Supreme Court's decision in this case found that limitation—and *only* that limitation—unconstitutional and unenforceable. 141 S. Ct. at 1783-87.

2. The Conservatorships and PSPAs

On September 6, 2008, FHFA's Director placed the Enterprises into conservatorships. ROA.1182 (¶ 23).[2] On September 7, 2008, Treasury entered into Senior Preferred Stock Purchase Agreements ("PSPAs") with the Enterprises. ROA.1182 (¶¶ 23, 24); *see* ROA.215-262 (copies of PSPAs and preferred stock certificates). Through the PSPAs, Treasury agreed to advance funds to each Enterprise for each quarter in which its liabilities exceeded its assets. In exchange, Treasury received newly issued shares of Enterprise senior preferred stock with "four key entitlements." 141 S. Ct. at 1773.

The first "key entitlement" was "a senior liquidation preference equal to $1 billion in each company, with a dollar-for-dollar increase every time the company drew on the capital commitment." *Id.*; ROA.1183 (¶ 28). If new Enterprise stock is issued to the public in the future, proceeds must be used to pay down the liquidation preferences. ROA.248, 257. A second entitlement was quarterly cash dividends at an annual rate of 10% of Treasury's outstanding liquidation preference. 141 S. Ct. at 1773; ROA.1183 (¶ 29). The third and fourth entitlements were a warrant to purchase 79.9% of the Enterprises' common stock, and a periodic commitment fee. 141 S. Ct. at 1773.

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[2] Citations herein to Plaintiffs' First Amended Complaint include both the record citation and paragraph number.

In the ensuing years, Treasury provided the Enterprises with nearly $187 billion under this arrangement to keep them afloat and the U.S. housing markets functioning. ROA.1184-85 (¶ 34). Since those draws resulted in dollar-for-dollar increases in the liquidation preferences, Treasury's liquidation preferences in the Enterprises stood at $189 billion as of the summer of 2012. *Id.*

3. Third Amendment and Arrival of Director Watt

On August 17, 2012, Treasury and the Enterprises, through FHFA as Conservator, entered into the Third Amendment to the PSPAs, which changed the Treasury dividend formula. ROA.1185-86 (¶ 37). This did not alter the liquidation preferences, which already stood at $189 billion due to funds infused by Treasury in 2008-2012. FHFA Acting Director Edward DeMarco approved the amendment on behalf of the Conservator. ROA.1188 (¶ 43).

In January 2014, Melvin L. Watt, a new FHFA Director nominated by President Obama and confirmed by the Senate, took office to serve a five-year term. ROA.1188, 1203-04 (¶¶ 43, 45, 76).

4. Relevant FHFA and Treasury Actions During the Trump Administration

Donald Trump became President in January 2017 and appointed Steven Mnuchin as his Treasury Secretary. ROA.1190, 1191 (¶¶ 49, 53). Director Watt remained in office until January 2019. Former President Trump never removed, attempted to remove, or criticized former FHFA Director Watt while in office.

At the inception of the Trump Administration, a statute passed by Congress made it illegal to "relinquish, liquidate, divest, or otherwise dispose of" Treasury's preferred stock interests in the Enterprises "until at least January 1, 2018" absent express congressional authorization. Pub. L. No. 114-113, § 702(b), 129 Stat. 2242, 3025 (2015). Even after that provision's January 1, 2018 sunset, it was the "Sense of Congress" that the preferred stock interests still should be kept intact unless and until legislation was passed "determining the future of Fannie Mae and Freddie Mac." *Id.* § 702(c).

While Treasury's preferred stock interests could not be touched, former Secretary Mnuchin, others in the Trump Administration, and then-Director Watt all expressed a shared goal of ending the conservatorships. *E.g.*, ROA.1191-94, 1200 (¶¶ 53, 67). For example, then-Director Watt stressed that conservatorship "should not be a permanent state." ROA.1189 (¶ 47); *see also* ROA.1189-90 (¶ 48) (2016 FHFA report: "FHFA continues to believe that conservatorship is not a desirable end state"). Former Director Watt viewed Congress as having an important role in the complex housing policy considerations involved in charting a path out of conservatorship. *E.g.*, ROA.1189-90, 1199-1200, 1201-02 (¶¶ 47, 48, 65, 66, 70).[3]

[3] Former Treasury Secretary Mnuchin and Director Watt's Trump-appointed successor, Dr. Mark Calabria, would come to similarly recognize Congress's role, later committing to transmit a yet-to-be-developed "proposal" for financial

Footnote continued on next page

In contrast to the goal of ending the conservatorships, from the first day of the Trump Administration through late 2019, there is no allegation that former President Trump or the Treasury Department ever entertained the possibility of raising additional capital for the Enterprises through a stock offering, let alone eliminating Treasury's liquidation preference as a facet of such a plan. There is no allegation former Director Watt ever took a position on raising capital or on any possible disposition of Treasury's liquidation preference.

In early 2019, then-President Trump directed Treasury to "develop a plan for administrative and legislative reforms" toward various goals, including "[e]nding the conservatorships of the GSEs upon the completion of specified reforms" while also "[p]roviding that the Federal Government is properly compensated for any explicit or implicit support it provides to the GSEs or the secondary housing finance market." 84 Fed. Reg. 12,479 (Mar. 27, 2019); *see* ROA.1192 (¶ 53(f)). The Presidential Memorandum listed over ten specific housing policy goals. Those goals did not include any capital-raising activities or elimination of Treasury's preferred stock investment. Rather, the Presidential Memorandum emphasized that an essential condition for ending the conservatorships would be to ensure "the Federal Government is fully compensated" for its financial support. 84 Fed. Reg. at 12,480.

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restructuring and conservatorship exit "to both Houses of Congress" at some point in the future. ROA.1210 (¶ 93).

Meanwhile, when FHFA Director Watt's term ended in January 2019, then-President Trump chose FHFA's new leadership—first, Acting Director Joseph Otting, who served from January 2019 through April 2019, and then Director Mark Calabria. ROA.1190-91, 1203-04 (¶¶ 51, 76, 77). Thus, it is undisputed that former President Trump, in addition to having plenary control of the Treasury Department at all times, controlled the leadership of FHFA for the second half of his Administration.

In September 2019, Treasury issued the report called for by the President's Memorandum. ROA.1264-1317. The report outlined a number of potential legislative and administrative housing finance policy reforms. While the report referred to "recapitaliz[ing]" the GSEs "with significant first-loss private capital," it also conveyed Treasury's expectation of "leaving the PSPA commitment in place after the conservatorships." ROA.1269; *see also* ROA.1279 ("[K]eeping each PSPA in place would have the benefit of preserving a mechanism for recouping any funding that might be extended by Treasury to a GSE in the future while ensuring taxpayers are compensated for committing to provide that support."). Treasury identified five specific PSPA amendments that would be "preconditions for ending the conservatorships," none of which included eliminating the liquidation preferences. ROA.1292-93.

A bullet point on page 27 of the report mentioned "[e]liminating all or a portion of the liquidation preference of Treasury's senior preferred shares or exchanging all or a portion of that interest for common stock or other interests in the GSE" as one of a number of "[p]otential approaches to recapitalizing a GSE." ROA.1293; *see* ROA.1197 (¶ 62). Other approaches included adjusting the "dividend[s] on Treasury's senior preferred shares so as to allow the GSE to retain [more] earnings," "[n]egotiating exchange offers for one or more classes of the GSE's existing junior preferred stock," and "[p]lacing the GSE in receivership, to the extent permitted by law, to facilitate a restructuring of the capital structure." ROA.1293. In a congressional hearing the next month, then-Director Calabria and then-Secretary Mnuchin emphasized that "[w]e have made no decision as to whether they would exit by conservatorship or receivership." *The End of Affordable Housing? A Review of the Trump Administration's Plans to Change Housing Finance in America*, 116th Cong., at 31-32 (Oct. 22, 2019) (cited in ROA.1195 (¶ 56)); *id.* at 43, 60, 61. The September 2019 report's menu of options concludes with an admonition that each option "poses a host of complex financial and legal considerations that will merit careful consideration" and any reforms must entail "appropriate compensation to Treasury." ROA.1293-94.

FHFA, as Conservator, and Treasury consummated one of the "[p]otential approaches" in the list: amending the PSPAs to adjust Treasury's dividend so the

Enterprises could retain more earnings. Specifically, in September 2019 and again in January 2021, FHFA as Conservator and Treasury entered into further letter agreements to amend the PSPAs to allow the Enterprises to build up capital. ROA.1205, 1210 (¶¶ 80, 93); ROA.1355-1390 (copies of 2019 and 2021 PSPA amendments); *see* 141 S. Ct. at 1774 n.8. These amendments built on earlier amendments providing for capital reserves in December 2017 under then-Director Watt. *Id*. They retained the liquidation preferences and established that for the foreseeable future, all dividends to Treasury would accrue as "increases in the liquidation preference." 141 S. Ct. at 1774. The amendments also retained the provision that proceeds of stock offerings must be used at least in part to pay down the liquidation preferences, *supra* at 6, and restated the importance of maximizing Treasury's interest and compensation to taxpayers for their support, ROA.1377, 1389.

Other than these PSPA amendments providing for major *increases* in the Treasury liquidation preferences, there is no allegation in the complaint that Treasury or FHFA embarked on any of the other "[p]otential approaches to recapitalizing" the Enterprises listed in the Treasury September 2019 report. In particular, there is no allegation that Treasury and FHFA ever moved toward eliminating Treasury's liquidation preferences.

In January 2021, President Biden took office. FHFA Director Calabria left office in June 2021, and then-Deputy Director Sandra Thompson was appointed by President Biden and confirmed by the Senate to serve as FHFA's new Director. ROA.1210, 1211 (¶¶ 94, 96).

B. Procedural Background

1. The Prior Complaint and Supreme Court Decision

From its inception in 2017 through remand in 2021, this litigation singularly focused on the 2012 Third Amendment involving the changed formula for Treasury's dividends. The original complaint had three counts alleging that the Third Amendment was *ultra vires* or arbitrary or capricious, and one count alleging that it was invalid because the removal for-cause provision was unconstitutional.[4]

In 2018, a panel of this Court held the removal provision unconstitutional, but rejected Plaintiffs' request for invalidation of the Third Amendment as a remedy for that issue. *Collins v. Mnuchin*, 896 F.3d 640, 676 (5th Cir. 2018). The same panel rejected Plaintiffs' *ultra vires* and arbitrary-or-capricious claims. *Id.* at 652-53. This Court sitting *en banc* later reinstated those claims, but adhered to the panel's

[4] The count alleging that the removal provision violated Article II was the only constitutional count. In the original district court proceedings, FHFA's funding mechanism and the Appropriations Clause were not mentioned. In the prior appeal to this Court, FHFA's funding mechanism was mentioned only in passing, as a tangential feature that it made it "even more important" to promote "Presidential control" under Article II by invalidating the removal restriction. Brief of Appellants, at 19, No. 17-20364.

disposition of the removal restriction claim and related relief. *Collins v. Mnuchin*, 938 F.3d 553 (5th Cir. 2019).

The Supreme Court held that HERA's bar on court action that "restrain[s] or affect[s] the exercise of powers or functions of the Agency as a conservator or a receiver," 12 U.S.C. § 4617(f), required dismissal of the *ultra vires* and arbitrary-or-capricious claims. 141 S. Ct. at 1775-78. Like this Court's *en banc* decision, the Supreme Court held the removal provision unconstitutional, but denied the requested remedy of invalidating the Third Amendment. *Id.* at 1781-87. The Third Amendment's adoption by an *Acting* Director to whom the removal provision did not apply "defeat[ed]" the request to set aside the Third Amendment. *Id.* at 1787.

The Court, however, understood Plaintiffs' claims to extend beyond just the initial *adoption* of the Third Amendment to its subsequent *implementation*, some of which occurred under Senate-confirmed Directors who were covered by the removal provision. Anticipating that the removal clause could be found inapplicable to the Acting Director and his *adoption* of the Third Amendment, Plaintiffs insisted in briefing and oral argument that irrespective of that issue, confirmed Directors who were so covered still "ordered and approved the payment of Net Worth Sweep dividends." Reply Br. 13, *Collins v. Yellen*, No. 19-422 (U.S. S. Ct.); Tr. of Oral Arg. at 67-68 (Question: "[H]ow [do] we read in continuing *implementation* of the amendment ... when you only complain of *adoption* of the amendment?" Answer:

"[W]e do complain about the adoption, but we also note throughout the complaint the *overpayments* that were being made…. [E]ach one of those *overpayments* was an *implementation* of the Net Worth Sweep.") (emphases added).[5]

These arguments led the Court, despite rejecting Plaintiffs' claims challenging *adoption* of the Third Amendment by an Acting Director, to separately "consider the shareholders' contention about remedy with respect to only the actions that confirmed Directors have taken to *implement* the third amendment during their tenures." 141 S. Ct. at 1787. The Court mostly rejected Plaintiffs' implementation arguments as well, calling them "neither logical nor supported by precedent." *Id.*; *see also id.* at 1788 & n.23 ("no basis" to conclude "any head of the FHFA lacked the authority to carry out the functions of the office"). However, because it could not "be ruled out" that the existence of the removal provision could still have specifically influenced how confirmed Directors implemented the Third Amendment in a way that "inflict[ed] compensable harm" on Plaintiffs, the Court remanded to give Plaintiffs the chance to pursue such limited claims, if they had any. *Id.* at 1789.

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[5] *See also id.* at 66-67 ("[W]e are challenging the regulatory action of the Senate-confirmed directors in *approving these dividends*."), 89 ("[W]e do complain about the *implementation*. We are complaining about each and every one of the decisions under the Net Worth Sweep by the director. Every one of these *dividend payments* gets declared quarterly, and none of them can be paid to Treasury … unless the director blesses those.") (emphases added). The transcript is available at https://bit.ly/3RhUIxW.

Five Justices openly doubted Plaintiffs' prospects on remand. *See id.* at 1795 (Thomas, J., concurring) ("I seriously doubt that the shareholders can demonstrate that any relevant action by an FHFA Director violated the Constitution. And, absent an unlawful act, the shareholders are not entitled to a remedy."); *id.* at 1799 (Gorsuch, J., concurring in part) (describing remand as "speculative enterprise" expected to "go nowhere"); *id.* at 1802 (Kagan, J., concurring in part, joined by two other Justices) ("the lower court proceedings may be brief indeed" because the President's undisputed plenary control over Treasury "seems sufficient to answer the question the Court kicks back").

2. Proceedings on Remand

On remand to this Court, after Plaintiffs previewed their new theory seeking elimination of Treasury's liquidation preferences—but were silent as to their new Appropriations Clause theory—this Court determined that "the prudent course is to remand to the district court to fulfill the Supreme Court's remand order." *Collins v. Yellen*, 27 F.4th 1068, 1069 (5th Cir. 2022) (en banc). Several Judges of this Court would have terminated the case immediately at that stage on the ground that Plaintiffs did not present a plausible case for any relief beyond invalidation of the removal provision. *Id.* at 1069-70 (Haynes, J., dissenting).

Back in the district court, Plaintiffs filed an amended complaint that replaced the four counts in the original complaint with six entirely *new* counts. Four counts

(I, III, V, and VI) sought an injunction ordering outright elimination of Treasury's preferred stock as a remedy for the unconstitutional removal statute. ROA.1211-12, 1214-15, 1217-20 (¶¶ 97-102, 117-122, 137-151). Two counts (II and IV) introduced a new constitutional claim that Congress violated the Appropriations Clause by setting up FHFA to be funded by assessments on regulated entities, and sought vacatur of the Third Amendment, or the entire PSPAs, as relief. ROA.1212-14, 1216-17 (¶¶ 103-116, 123-136).

Plaintiffs attached to their amended complaint a purported November 11, 2021 letter allegedly signed by former President Trump ten months after he left office. ROA.1225.[6] The letter states that former President Trump would have removed then-Director Watt at the start of his Administration, but does not express any disagreement with any action by him. The letter further states that former President Trump would have "ordered FHFA to release these companies from conservatorship" and "would have also sold the government's common stock in these companies at a huge profit." *Id.* There is no allegation that the former President ever gave such an order during his Administration, and Treasury did not own common stock in the Enterprises. The unauthenticated, *post hoc* letter does not

[6] The FHFA Defendants do not concede the admissibility or veracity of this document.

mention Treasury's preferred stock or any potential action with respect to the liquidation preferences.

The district court dismissed Plaintiffs' amended complaint. The court held that Plaintiffs' claims that the removal restriction entitles them to an injunction eliminating Treasury's liquidation preferences "fail[ed] to plausibly demonstrate compensable harm or the Court's ability to provide the requested relief." ROA.1518. Those claims amounted to "mere speculation" and were "contradictory," in addition to "far surpass[ing] this Court's mandate for retrospective relief" and being "incongruous with the Supreme Court's remand." ROA.1521-22.

In particular, Plaintiffs failed to plausibly allege "that the [Trump] Administration had a concrete plan in place, that this plan necessarily involved liquidating Treasury's preferred stock, or that the Administration would have completed these actions within four years." ROA.1518-19. The court observed that the Administration pronouncements Plaintiffs relied upon "emphasize[d] the importance of protecting Treasury's economic interests in the GSEs," rather than "specifically focus[ing] on reducing Treasury's priority stock holdings." ROA.1519. The court declined to place significant weight on the alleged Trump letter because it was *post hoc* and "[a]t no point during Director Watt's tenure did President Trump criticize or attempt to remove Director Watt." ROA.1520.

Further, Plaintiffs neither "effectively plead[ed] that the Administration would have been able" to accomplish the alleged objectives within four years, nor identified any "specific action by Director Watt to obstruct" the alleged goals. ROA.1520. Rather, the court noted, both former Director Watt as well as former President Trump's hand-picked choice, Director Calabria, took "similar steps" relating to Treasury's liquidation preferences. ROA.1520. In short, Plaintiffs' case was built on "mere speculation that an administration with four years to effectuate its policy preferences would have successfully taken different actions faster or otherwise reversed course to sell or eliminate these stocks." ROA.1521. Moreover, by enforcing an alleged "unachieved policy preference of a prior administration," the prospective injunction sought by Plaintiffs would "imped[e] the current administration's own ability to effectuate its policy preferences through the appointment of a new FHFA director," resulting in one branch "'impair[ing] another in the performance of its constitutional duties.'" ROA.1521 (quoting *Loving v. United States*, 517 U.S. 748, 757 (1996)).

The district court found the Appropriations Clause claims to be outside the mandate. ROA.1522-23. "The Supreme Court resolved the main issues and remanded for further proceedings on a narrow question," and "[t]he time for raising new issues has passed." ROA.1523. The court rejected Plaintiffs' argument that an

"intervening change in law" justified bringing these new and distinct claims. ROA.1522-23.

SUMMARY OF ARGUMENT

I. The Court should affirm the dismissal of Plaintiffs' claims for injunction eliminating Treasury's liquidation preferences. Those claims are outside the Supreme Court's mandate for this remand. Even taking Plaintiffs' theory on its face, that theory consists of unbridled speculation and lacks supporting facts making a plausible case that the for-cause removal provision prevented the Trump Administration from carrying out a supposed plan to eliminate Treasury's liquidation preferences. Plaintiffs' claims also would create trenchant separation-of-powers problems by using courts to force the Executive to advance what Plaintiffs assert (without support) was the policy agenda of a previous Administration, while cutting Congress out from any role. The claims are also barred because they do not challenge any agency action or cognizable failure to act, and because the Recovery Act bars injunctions that restrain or affect the Conservator's exercise of its powers or functions, which the injunction sought here would do in a profound way.

II. Plaintiffs' Appropriations Clause claims are both outside the Supreme Court's mandate and time-barred. In any event, those claims fail on the merits. While this Court recently held that the CFPB's funding mechanism violated the Appropriations Clause, the Supreme Court has granted certiorari to review that

decision, which FHFA respectfully submits is in error. Even if this Court's decision relating to the CFPB stands, that decision on its face makes clear that, under its own reasoning, FHFA is different from the CFPB in material ways and that FHFA's funding mechanism, consisting of assessments on regulated entities similar to virtually all other federal safety and soundness regulators, is constitutional. Further, any Appropriations Clause issue would provide no basis for the relief Plaintiffs seek, which is unrelated to FHFA's funding mechanism.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's grant of a motion to dismiss. *TOTAL Gas & Power N. Am., Inc. v. FERC*, 859 F.3d 325, 332 (5th Cir. 2017).

ARGUMENT

I. The District Court Correctly Dismissed Plaintiffs' Claims Seeking Elimination of Treasury's Liquidation Preferences

Plaintiffs' theory that they are entitled to a judicial order requiring FHFA and Treasury to eliminate Treasury's liquidation preferences is flawed for a host of reasons. The district court properly rejected that theory based on some of those reasons, and others would independently warrant affirmance. Indeed, another district court recently dismissed a virtually identical claim by Enterprise shareholders based on many of the same grounds discussed below. *Bhatti v. FHFA*, --- F. Supp. 3d ---, 2022 WL 17741246 (D. Minn. Dec. 16, 2022), *appeal docketed*, No. 23-1051 (8th Cir.).

A. The Claims Are Outside the Mandate

The district court held that Plaintiffs' claims "far surpass[ed]" the "mandate for retrospective relief" and were "incongruous with the Supreme Court's remand." ROA.1521-22. That holding was correct, and although the district court also found Plaintiffs' allegations implausible on the merits, this Court could affirm based on the mandate rule alone.

Lower courts on remand are limited to "only those discrete, particular issues identified by the appeals court." *United States v. McCrimmon*, 443 F.3d 454, 460 (5th Cir. 2006) (quotation marks omitted). The Supreme Court remanded this case for a limited purpose, namely, for resolution of what the Court perceived as outstanding claims already in the case for "retrospective relief" relating to "implementation of the Third Amendment." 141 S. Ct. at 1788-89. This case, as litigated to the Supreme Court, revolved around the Third Amendment. The Court understood Plaintiffs to be seeking "an order enjoining … action to implement the third amendment," *id.* at 1775, found Article III standing based on "adoption and implementation of the third amendment," *id.* at 1779, perceived "the relevant action in this case" to be "third amendment," *id.*, and held that "[o]nly harm caused by a confirmed Director's implementation of the third amendment could … provide a basis for relief," *id.* at 1781.

Thus, the Court opened the passage that contained the remand instructions with the limiting comment that it was "consider[ing] the shareholders' contention about remedy with respect to only the actions that confirmed Directors have taken to *implement* the third amendment during their tenures." *Id.* at 1787. The "actions … to *implement*" were the ones that Plaintiffs had specifically told the Court they wished to continue challenging even if their claims challenging *adoption* failed: "overpayments" of dividends to Treasury; "the regulatory action of the Senate-confirmed directors in approving these dividends"; and "implementation" consisting of "the decisions" to approve "dividend payments." *See supra* at 14-15 & n.5 (oral argument excerpts). That is what the Court authorized for remand, not a blue-sky exercise in imagining other possible ways shareholders might hypothetically be better off today had the for-cause removal provision never been in effect. *See* Br. 1 (positing remand "to explain what would have happened in a world without the unconstitutional removal restriction"), 18 ("Plaintiffs should be put in the position they would have been but for the constitutional violation").

On remand, Plaintiffs abandoned the Third Amendment dividend overpayment claims they told the Supreme Court they wished to pursue. The relevant counts (I, III, V, and VI) do not contain even a passing reference to the Third Amendment, the "Net Worth Sweep," or quarterly dividend payments. ROA.1211-20 (¶¶ 97-151) Rather, Plaintiffs seek the demise of a different

component of Treasury's consideration: liquidation preferences that began accruing at the time of the original 2008 PSPAs and were never challenged herein. *See* 141 S. Ct. at 1773 (describing liquidation preferences and dividends as separate "key entitlements"). Those liquidation preferences had grown to $189 billion *before* the Third Amendment. *Id.* The Third Amendment changed the formula for the cash dividends to Treasury, but did not change the liquidation preferences or the mechanism for future increases in the liquidation preferences.

Simply put, there is no relation whatsoever between Third Amendment implementation (*i.e.*, dividend payments) and the liquidation preferences. Because Plaintiffs' claims seeking elimination of the liquidation preferences are untethered to the "discrete, particular issues" identified by the Supreme Court, they are outside of the mandate and proper scope of remand. *McCrimmon*, 443 F.3d at 460; *see also Gen. Univ. Sys. v. HAL, Inc.*, 500 F.3d 444, 453 (5th Cir. 2007) (district court must "effect our mandate and do nothing else" (quotation marks omitted)).

Plaintiffs assert that the Supreme Court characterized the relief they are now seeking as "retrospective" and thus permissible on remand. Br. 41. Not so. The passage Plaintiffs cite used the word "retrospective" to characterize Plaintiffs' requested remedy of reversing all past dividend payments under the Third Amendment. 141 S. Ct. at 1787 & n.22. But the Court went on to decisively reject such relief, so that language cannot fairly be read as a prescription for remand.

Nothing in that or any other part of the Court's opinion suggests that a prospective injunction requiring the agencies to wipe out the liquidation preferences going forward was what the Court contemplated for this remand. A mandatory injunction commanding FHFA to fundamentally change the Enterprises' future financial relationship with Treasury is anything but retrospective.

B. The Claims Are Speculative

Even if deemed properly before the Court, Plaintiffs' liquidation-preference elimination claims were properly dismissed pursuant to Rule 12(b)(6) because they do not establish a plausible entitlement to relief. This Court has distilled from the Supreme Court's opinion in this case three exacting requirements for proving cognizable harm from an unconstitutional removal restriction: "(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 action taken by the insulated actor." *CFSA v. CFPB*, 51 F.4th 616, 632 (5th Cir. 2022), *cert. granted on other grounds*, No. 22-448, 2023 WL 2227658 (U.S. Feb. 27, 2023).[7]

[7] *Accord CFPB v. Law Offices of Crystal Moroney, P.C.*, 2023 WL 2604254, at *3 (2d Cir. Mar. 23, 2023) ("a party must show that the agency action would not have been taken *but for* the President's inability to remove the agency head"); *Calcutt v. FDIC*, 37 F.4th 293, 316-17 (6th Cir. 2022) (a "*possibility* that the [agency] would have taken different action" is not enough), *pet. for cert. filed*, No. 22-714; *Fairholme Funds, Inc. v. United States*, 26 F.4th 1274, 1305 (Fed. Cir. 2022)

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Plaintiffs satisfy none of these requirements. As to the first and second *CFSA* prongs, the complaint fails to substantiate that former President Trump either contemporaneously desired to remove former Director Watt, or, as Treasury's brief explains (at 35-36), perceived himself as unable to do so due to the removal restriction. There is no allegation that former President Trump, while in office, ever expressed displeasure with any action by FHFA's former Director Watt or suggested, let alone asserted, that he wished to remove him while in office.

Most importantly, there is no "nexus between the desire to remove and the challenged action taken by the insulated actor." *CFSA*, 51 F.4th at 632. As a threshold matter, Plaintiffs' liquidation-preference elimination theory flunks this requirement because it does not challenge any "action" by then-Director Watt at all; rather, Plaintiffs are complaining about what then-Director Watt *did not do*. *See infra* Section I.E.1 (discussing additional problems this creates for Plaintiffs' theory). Regardless, Plaintiffs do not plausibly plead any nexus between an alleged desire of the former President to remove then-Director Watt and any *inaction* by then-Director Watt either. In order for Plaintiffs to plausibly allege former Director Watt "imped[ed] the President's ability" to pursue specific policies, Br. 2, they must

(*Collins* placed "extreme limits on the possible relief"); *Bayview Loan Servicing, LLC v. 6364 Glenolden St. Tr.*, 2021 WL 4938115, *1 (9th Cir. Oct. 22, 2021) (*Collins* requires "causally linking a specific, tangible harm to the for-cause removal provision").

first plausibly establish the former President actually was pursuing those policies. He was not.

Plaintiffs amass a series of Trump Administration statements and documents that they characterize as supporting their theory that the Administration was set on eliminating Treasury's liquidation preferences. *See*, *e.g.*, Br. 22-25. In fact, however, not one of those sources plausibly suggests the Administration had adopted a plan to eliminate Treasury's liquidation preferences. What they reflect, rather, is interest in ending the conservatorships and potentially raising capital through public stock offerings.

Plaintiffs attempt a sleight of hand by equating the general goals of ending the conservatorships and public stock offerings with wiping out Treasury's liquidation preferences. Neither ending the conservatorships nor holding new stock offerings would require making the Treasury preferred stock and liquidation preferences disappear in advance. The assumption that the liquidation preferences would have to be totally eliminated in advance is not only unsupported as a matter of economic logic, it is flatly contradicted by the relevant instruments and other information in the complaint.[8]

[8] Plaintiffs' framing (Br. 28; ROA.1204-1206) of "five key steps" in the Trump Administration's alleged plans, with four steps completed and elimination of the liquidation preferences the only thing left, suffers from the same fallacy of conflation. The "completed" steps—*e.g.*, PSPA amendments and new capital

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The PSPAs themselves provide that the proceeds of stock offerings must be used to pay down the liquidation preferences, presupposing those interests' continued existence at the time of the offering. ROA.248. The Trump Administration expressly retained that paydown requirement when it amended the PSPAs in September 2019 and January 2021, *after* Plaintiffs contend the plan to wipe out the liquidation preferences in preparation for stock offerings was in place. As Treasury explained in its September 2019 report, "[p]otential approaches to recapitalizing the GSEs" included negotiated reductions in shareholders' interests and even receivership—an alternative then-Secretary Mnuchin and then-Director Calabria both repeatedly stressed was on the table. *See supra* at 11.

While the same Treasury report also floats the "[p]otential approach" of reducing "all or a portion of" the Treasury interest, that is the *only place* in dozens of materials cited in the complaint where the concept central to plaintiffs' theory is mentioned at all. *See Bhatti*, 2022 WL 17741246, at *7 (observing that identical complaint "point[ed] to only one fragment of one document that even suggested that step as an *option*"). Not a trace of that potential reduction concept appears in the

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regulations—were sensible preparations for *any* post-conservatorship regime, not just one entailing advance wiping out of Treasury's liquidation preferences. Former Director Watt, who Plaintiffs portray as the obstructionist, engaged in the same preparations. *See* 141 S. Ct. at 1774 n.8 (Watt PSPA amendment); 83 Fed. Reg. 33,312 (July 17, 2018) (capital regulations).

former President's personally signed articulation of his housing finance reform priorities—the *only* document Plaintiffs cite directly reflecting the will of the former President himself while he was in office. 84 Fed. Reg. 12,479. Rather, that document twice reiterates that *protecting* Treasury's economic interest was a Presidential prerequisite for ending the conservatorships.

Even if Plaintiffs had plausibly pleaded that the Trump Administration had a policy of eliminating the liquidation preferences (which they have not), the complaint still comes far short of plausible factual allegations that then-Director Watt actually "stymied" such efforts (Br. 35)—as would be necessary for the removal restriction to cause harm. It was Treasury's investment, and just as this Court previously observed about the Third Amendment, "the President had oversight" all along through his plenary control over Treasury. 141 S. Ct. at 1802 (Kagan, J., concurring) (citing 938 F.3d at 594 n.6). "We know that the President, acting through the Secretary of the Treasury, could have stopped [the liquidation preferences] but did not." 938 F.3d at 594.

Because Plaintiffs come up empty in trying to show that former Director Watt obstructed any Administration initiative, Plaintiffs vilify him for his general understanding of Congress's role in housing finance reform. *See* ROA.1199-1203 (¶¶ 65-75). But the Trump Administration's own 2021 PSPA amendments underscored Congress's role, stating that after Treasury and FHFA collaborated to

develop a plan over many months the next step would be to deliver that "proposal" to "both Houses of Congress." ROA.1210 (¶ 93). Regardless of how much daylight may have existed between Director Watt's and the Trump Administration's views of Congress's role, Plaintiffs offer nothing plausibly suggesting former Director Watt himself would have—or could have—blocked any initiative by Treasury to voluntarily reduce its own economic interest. Plaintiffs have failed to establish the critical "*connection* between the President's frustrated desire to remove the actor and the agency [inaction] complained of." *CFSA*, 51 F.4th at 632.

The clearest sign that Plaintiffs' theory is divorced from reality is that once former President Trump's chosen appointees headed both FHFA and Treasury, the actions they took—including what Plaintiffs call "the Trump Administration's last official word on the matter" (Br. 29) —were the *opposite* of what Plaintiffs' theory would predict. Specifically, the Trump Administration's September 2019 and January 2021 PSPA amendments not only retained the liquidation preferences as a Treasury "key entitlement," 141 S. Ct. at 1773, but also provided that future dividends to Treasury would accrue as "*increases* in the liquidation preference," *id.* at 1774 (emphasis added); *see also id.* at 1774 nn. 8, 10; ROA.1358, 1364, 1373, 1385. Both amendments also continued to require that future stock offering proceeds be used, at least in part, to pay down Treasury's liquidation preferences.

The January 2021 amendments reiterated the imperative to "compensate[] taxpayers for the support they have provided and continue to provide." ROA.1377, 1389.

Before the Supreme Court, Plaintiffs denounced those amendments for "do[ing] nothing to reverse the nationalization of Fannie and Freddie" and "only further entrench[ing] Treasury's status as the sole shareholder that can ever receive a return on its investment." Letter in Response of Patrick J. Collins, et al., *Collins v. Yellen*, No. 19-422 (U.S. S. Ct. Mar. 31, 2021). Plaintiffs insisted that the Trump amendments "ma[de] it impossible for the Companies to raise additional capital through the sale of new stock" (*id.*)—the exact opposite of their amended complaint's assertion, a year later, that former President Trump's appointees "relentlessly pursued" that objective. ROA.1177 (¶ 2).[9]

Far from being "dispositive" (Br. 17), the alleged November 2021 letter from former President Trump does not salvage Plaintiffs' case. While Plaintiffs hold the

[9] The complaint tries to reconcile the irreconcilable by suggesting that rather than making capital-raising "impossible" as Plaintiffs told the Supreme Court, these increases in the liquidation preferences instead were "part of the plan to convert Treasury's preferred stock, by enabling Treasury to receive more common stock" in exchange. ROA.1207 (¶ 85). But that is Plaintiffs' own conjecture, not a well-pleaded allegation of the parties' actual intent. As Plaintiffs admit, the same Trump Administration amendments that provided for the massive liquidation preference increases show on their face that no such plan was in place, only a preliminary "Commitment to Develop Proposal to Resolve Conservatorship" (Br. 30 (citing ROA.1377)), which, it was hoped, might ripen into a "proposal" to be submitted to Congress eight months later. ROA.1210 (¶ 93).

letter out as manifesting a situation similar to the Supreme Court's second hypothetical example of "harm," what the Supreme Court actually said was: "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." 141 S. Ct. at 1789 (emphases added). It is undisputed that the former President made no such statements or assertions while he and then-Director Watt were in office, which is the period that matters. "Requiring a contemporaneous expression of displeasure and a desire to remove makes sense" because crediting "after-the-fact assertions about what [an official] would have done if he had only known he had the authority" would "throw[] the government into chaos by undermining years' worth of agency action." *Bhatti*, 2022 WL 17741246, at *7 (citing *CFSA*, 51 F.4th at 632).

Moreover, this purported letter neither "outline[s] a plan for ending the conservatorship" (ROA.1520) nor even mentions the liquidation preferences, and inferring that such a plan to eliminate those interests was underway in 2017-2018 cannot be squared with the Trump Administration's real-world actions and statements as discussed above. Even Plaintiffs have to strain excessively to read between the lines to make the content of this document fit their theory, basing their argument on what they say the letter "necessarily implies" rather than what it actually says. Br. 31.

In finding the complaint's allegations untenable on their face, the district court did not weigh evidence or make credibility determinations as Plaintiffs insist. Br. 35-42. It simply performed its proper function of disregarding "conclusory allegations, unwarranted factual inferences, or legal conclusions." *In re Great Lake Dredge & Dock Co.*, 624 F.3d 201, 210 (5th Cir. 2010) (quotation marks omitted); *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("[f]actual allegations must be enough to raise a right to relief above the speculative level"). After all, the court is charged with "draw[ing] on its judicial experience and common sense" to determine whether enough "factual content" has been alleged for "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). Plaintiffs chastise the district court for noting contradictions in Plaintiffs' theory and for observing that key documents relied on in the complaint do not bear out Plaintiffs' characterizations of them. But in *Twombly* itself, inconsistent and self-defeating material in the complaint, and the "full contents" of selectively cited documents, formed a major part of what the Court relied on in finding those claims not plausibly pleaded. 550 U.S. at 568 & n.13. The district court here likewise properly discharged its functions under *Twombly* and *Iqbal*.

Plaintiffs accuse the district court of improperly imposing a "new, heightened evidentiary standard" by observing that they had not alleged any "concrete plan"—

an observation that Plaintiffs do not substantively contest. Br. 39. This is an odd argument to make in the same brief that uses the words "plan," "planned," or "planning" over ten times to describe the key premise of their theory. *See*, *e.g.*, Br. 27 ("Having alleged ample facts establishing the Trump Administration's *plan* … as well as the steps necessary to complete that *plan*, … the Trump Administration was unable to complete its *plan*") (emphasis added); *see also id.* at 8, 9, 25, 26, 28, 30. Plaintiffs strain to attribute significance to the absence of words "concrete plan" from the Supreme Court's hypothetical about potential harm from a removal restriction. But that hypothetical envisioned a challenge to "actions *taken* by a Director," which are completed and inherently concrete. 141 S. Ct. at 1789 (emphasis added). Here, where Plaintiffs challenge *in*action and their theory integrally depends on a specific type of plan, which they seek to have the current Administration ordered to fulfill, it was eminently reasonable to require Plaintiffs to plausibly allege such a plan actually existed.

C. The Burden Does Not Shift

Lacking a case that can stand on its own, Plaintiffs insist that "uncertainty" should be resolved in their favor and that Defendants should bear a burden of "making a clear showing that the removal restriction did *not*, in fact, harm Plaintiffs." Br. 31. In addition to burdens to "prove a negative" being generally improper, *see, e.g.*, *Kinder Morgan, Inc. v. Crout*, 814 F. App'x 811, 819 (5th Cir.

2020), that position is directly foreclosed by *CFSA*, which emphasized that it is "*the Plaintiffs*" who "must show" the requisite connection between desire to remove and the challenged agency action. *CFSA*, 51 F.4th at 632 (emphasis added).

Moreover, the bedrock rule reflected in Plaintiffs' own authorities is that "the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims." Mueller & Kilpatrick, 1 Federal Evidence § 3:3 (4th ed. 2021); *see* 2 McCormick on Evidence § 337 (8th ed. 2020) (burden "assigned to the plaintiff who generally seeks to change the present state of affairs"). Plaintiffs halfheartedly suggest that "facts relevant to this issue are in the exclusive possession of Defendants," but admit in the same breath that their own theory revolves around inchoate thoughts in the heads of "*former* officers and employees," most notably the former President himself. Br. 32 (emphasis added).

Plaintiffs' analogy to burden-shifting for discrimination claims (*id.*) fails because this is not a Title VII case, nothing comparable to a "prima facie case" has been established here, and even in that context, "[t]he ultimate burden of persuading the trier of fact ... remains at all times with the plaintiff." *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981). And the presumption of regularity applies to "the official acts of public officers," *United States v. Chem. Found.*, 272 U.S. 1, 14 (1926), not to reminiscences by former officials, even ex-Presidents.

The analogy to the standard for "harmless error" in APA rulemaking cases (Br. 34-35) fares no better. The issue here is not harmless error; it is that Plaintiffs have not come forward with a remotely plausible theory connecting the unenforceable removal provision with any injury to them. If anything, the APA analogy cuts against Plaintiffs. If a failure to provide notice and comment rights is not "harmless," the remedy is to remand to the agency for application of the proper procedures, not for the court to rewrite the rule itself or otherwise direct a particular substantive outcome. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Here, Plaintiffs seek to lock in a particular, desired substantive outcome and to remove the relevant decisions from the agency's jurisdiction—the opposite of a remand to the agency.

D. An Order Requiring Elimination of the Liquidation Preferences Would Violate the Separation of Powers

The district court was also correct in finding that Plaintiffs' claims run afoul of core separation-of-powers principles. At an earlier stage of this litigation, this Court stressed that "invalidating the Net Worth Sweep would actually erode executive authority rather than reaffirm it." 938 F.3d at 594. That is doubly true of the much more sweeping relief Plaintiffs now seek. As the district court observed, injunctive relief eliminating the liquidation preferences would have the courts enforcing an alleged "unachieved policy preference of a prior administration, impeding the current administration's own ability to effectuate its policy preferences

through the appointment of a new FHFA director." ROA.1521. Plaintiffs make no effort to hide that their goal is to force the current Administration to undertake transformative new action specifically to "vindicat[e]" what Plaintiffs purport were "the prior administration's policy goals." Br. 35. That is far different than simply requiring the Government to maintain the status quo unless and until a modification of policy meets APA requirements. *Cf. Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (requiring the Government to follow APA requirements when rescinding the prior Administration's DACA program), *cited in* Br. 40.

The intrusive remedy Plaintiffs seek would create a far more acute separation-of-powers problem than the supposed harm it would be designed to redress. Article II of the Constitution vests "[t]he executive Power" in the current President, and it is he, not any former President or the courts, who is accountable to the electorate and obliged to "take Care that the Laws be faithfully executed." U.S. Const. art. II, §§ 1, 3. It makes no sense to *diminish* the current President's power "under the guise of respecting the presidency." 938 F.3d at 594.

Making matters even worse, Plaintiffs' proposed injunction would also divest Congress of its legislative role with respect to Treasury's preferred stock interests and shaping the Enterprises' future—a role it has closely guarded. *See supra* at 8

(discussing legislation and "Sense of Congress"); ROA.1210 (¶ 93) (emphasizing Trump Administration's commitment to transmit "proposal" to Congress).

E. The Claims Are Barred for Other Reasons

While the above reasons more than suffice on their own, this Court could also affirm on two other grounds the district court had no need to reach. *See*, *e.g.*, *Taylor v. HD & Assocs., L.L.C.*, 45 F.4th 833, 837 (5th Cir. 2022) (court may affirm "on any ground supported by the record and presented to the district court").

1. The Claims Neither Challenge Final Agency Action Nor Meet Requirements For Challenging Agency Inaction

Plaintiffs' claims do not challenge any final agency action by FHFA, which is generally a prerequisite for judicial review under the APA. 5 U.S.C. § 704; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990). To be susceptible to judicial review, an agency action must "mark the 'consummation' of the agency's decisionmaking process." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quotation marks omitted). A narrow exception allows suits to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), but "only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004); *see also Louisiana v. United States*, 948 F.3d 317, 323-24 (5th Cir. 2020) (holding that *Norton* required dismissal of claim seeking to enjoin Army Corps to maintain

and repair waterway because the statute merely *authorized* and did "*not direct* the Corps to take such measures").

Four counts of the complaint seek elimination of the liquidation preferences as relief for the removal restriction: Counts I, III, V, and VI. Counts III and V are APA claims supposedly challenging agency action, but fail to identify any agency action. *See Bhatti*, 2022 WL 17741246, at *8-9 (holding that an APA plaintiff "must identify the agency action at issue" and that identical counts failed because they "do not arise out of any particular agency action"). That flaw alone required dismissal.

Count VI is styled as a § 706(1) failure-to-act claim, but does not meet the preconditions for such a claim under *Norton* and *Louisiana*. Plaintiffs do not accuse FHFA and Treasury of failing to take a "*discrete*" action, but rather of not undertaking a complex multi-step process to overhaul a quarter-trillion dollar Treasury investment with major implications for the national economy and housing markets. And no constitutional or statutory provision or other source of law "*required*" FHFA to take such actions. Rather, the liquidation preference relinquishment sought by Plaintiffs was unlawful for the first year of the Trump Presidency, and explicitly discouraged by Congress thereafter. *See supra* at 8. This is an independent ground for affirming the dismissal of Count VI. *See Bhatti*, 2022 WL 17741246, at *10 (holding that identical count failed under *Norton*).

Count I, which purports to be directly under the Constitution in the mold of *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), suffers from the same fatal flaws. The limitations enunciated in *Norton* are not endemic to the APA, but rather derive from pre-APA equity practice dating back to *Marbury v. Madison*.[10] *PCAOB*, moreover, refutes rather than supports the idea of a free-floating cause of action for an extraordinary mandatory injunction, because the Court there categorically rejected injunctive relief sought against PCAOB actions. 561 U.S. at 508-10, 513. Rather, "*PCAOB* indicates" that "the cure … is narrower": "Stripping away the FHFA Director's unconstitutional insulation is the 'minimalist remedy' that 'maintain[s] presidential control while leaving in place the regulatory functions of an agency.'" *Collins*, 938 F.3d at 596 (Duncan, J., concurring) (quoting Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1261 (2014)). *Free Enterprise Fund* thus offers no support for any remedy beyond that which this Court and the Supreme Court already granted—striking the removal

[10] *See Norton*, 542 U.S. at 63; *Marbury v. Madison*, 5 U.S. 137, 170-71 (1803) ("how the executive, or executive officers, perform duties in which they have a discretion" is outside the province of the courts, and writs commanding executive performance are appropriate only where an agency "is directed by law to do a certain act"); Attorney General's Manual on the Administrative Procedure Act 108 (1947) (emphasizing that a court cannot "substitute its discretion for that of an administrative agency and thus exercise administrative duties," which would transgress the separation of powers).

restriction so as to recognize the full extent of the President's removal authority going forward.

2. The Anti-Injunction Statute Bars These Claims

These claims also are barred by an FHFA-specific statutory provision: "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); *see Bhatti*, 2022 WL 17741246, at *10 (holding that § 4617(f) bars the same claims as brought here). This provision, which the first part of the Supreme Court's opinion in this case centered on, "sharply circumscribe[s] judicial review of any action that the FHFA takes as a conservator or receiver." 141 S. Ct. at 1775. Injunctive relief is prohibited for any FHFA action "within the scope of the Agency's authority as a conservator," and allowed only if "the FHFA does not exercise but instead exceeds those powers or functions." *Id.* at 1776.

The terms of the preferred stock investments governing Treasury's ongoing support of the Enterprises are plainly within FHFA's authority as Conservator. The Supreme Court directly held as much for the Third Amendment, which pertained to one aspect of the preferred stock. *Id.* at 1775-78. It necessarily follows that determining whether to adopt a much more consequential amendment ending the entire preferred stock arrangement is also part of the Conservator's powers and functions.

Plaintiffs assert that § 4617(f) does not apply because Director Watt's "activities cease[d] to be authorized" at some point, unbeknownst to anyone at the time and unspecified even now, when they allege former "President Trump would have removed him from office." Br. 43. That position is impossible to square with the Supreme Court's holding, repeated and unequivocal, that "there is no basis for concluding that any head of the FHFA lacked the authority to carry out the functions of the office." 141 S. Ct. at 1788; *see also id.* at 1787, 1788 n.23, 1793 (Thomas, J., concurring). To retroactively declare government agencies' actions *ultra vires* because a former President purportedly expresses certain theretofore unexpressed and unacted-on thoughts would be profoundly destabilizing.

In any event, Plaintiffs' retroactive stripping-of-authority argument fails on its own terms. While courts can enjoin an "FHFA action" that "exceeded" FHFA's "authority as a conservator," *id.* at 1776, Plaintiffs do not challenge any action by Director Watt, so there would be no unauthorized action outside § 4617(f)'s protection to enjoin.

Plaintiffs secondarily argue that § 4617(f) "lacks the clear statement required to bar all remedies for a *constitutional* claim." Br. 44. However, Plaintiffs bring their claims primarily under the APA. *See supra* Section I.E.1. This comports with Justice Thomas's observations that an unconstitutional removal restriction does not mean actions taken by the agency are unconstitutional, and that claims seeking relief

from agency action on account of the removal restriction would have to be APA claims. 141 S. Ct. at 1794 & n.7 (Thomas, J., concurring). Justice Thomas explained that such APA claims would necessarily run up against "the Act's anti-injunction provision," *i.e.*, § 4617(f). *Id.* at 1794 n.7; *accord Bhatti*, 2022 WL 17741246, at *5-6, *10 (adopting Justice Thomas's view as a way to "harmonize" *Collins* and rejecting plaintiffs' attempts to avoid § 4617(f) by inaccurately labeling their claims "constitutional").

Furthermore, "§ 4617(f) does not bar judicial review of constitutional claims; it simply bars certain types of relief." *Id.* at *10. Plaintiffs have already received a significant portion of the relief they sought for their constitutional claim, to wit, a declaration that the removal restriction "violates the separation of powers." ROA.96 (¶ 190) (prayer for relief in original complaint). And, to the extent a "clear statement" is required, it is hard to imagine a clearer language than "no court may take any action to restrain or affect the exercise of [the] powers or functions of the Agency as a conservator." *Cf. Webster v. Doe*, 486 U.S. 592 (1988) (refusing to hold constitutional claims barred *by implication* of statute authorizing CIA Director to terminate employees in his discretion but that was silent about judicial review).

The Supreme Court did not "implicitly" reject § 4617(f)'s applicability to future injunction remedies by ruling on the removal provision's constitutionality. Br. 44. That ruling did not restrain or affect the Conservator's exercise of its powers

or functions in any way, and no one argued that § 4617(f) somehow prevented the Court from determining the constitutionality of the statute. The relief being sought at the time was vacatur of the Third Amendment, and the Court did not need to reach whether that relief was barred because it was unavailable regardless—just as "reject[ing] the Shareholders' request to unwind the Net Worth Sweep" for other reasons previously made it unnecessary for this Court to "address whether § 4617(f) would bar such relief if it were otherwise necessary." 938 F.3d at 595 n.8.

II. The District Court Correctly Dismissed Plaintiffs' Appropriations Clause Claims

A. The Claims Are Outside the Mandate

The district court correctly found that Plaintiffs' new Appropriations Clause claims were outside the appellate mandate. As discussed above in the context of the removal restriction claims, lower courts on remand are limited to "only those discrete, particular issues identified by the appeals court." *McCrimmon*, 443 F.3d at 460 (quotation marks omitted).

For example, a criminal defendant on remand for resentencing cannot inject new challenges to the indictment and jury charge, *United States v. Teel*, 691 F.3d 578, 582-83 (5th Cir. 2012), or even raise sentencing-related issues beyond those for which remand was ordered, *United States v. Hamilton*, 440 F.3d 693, 698-99 (5th Cir. 2006). Likewise, in a civil case remanded to resolve a "sole remaining claim"

for trade secrets misappropriation, the plaintiff could not revive related claims against other defendants that it previously abandoned. *Gen. Univ. Sys.*, 500 F.3d at 453-54. "The mandate rule requires a district court on remand to effect our mandate and to do nothing else." *Id*. at 453 (quotation marks omitted).

Here, this Court's prior mandate was narrowly limited, directing the district court to "fulfill the Supreme Court's remand order"—nothing more. 27 F.4th at 1069. The Supreme Court's remand order, in turn, directed "the lower courts" to resolve "in the first instance" any residual claims "that the unconstitutional removal restriction caused any such harm," 141 S. Ct. at 1789, by influencing "actions that confirmed Directors have taken to *implement* the third amendment during their tenures," *id.* at 1787.

The district court correctly concluded that neither the Supreme Court's nor this Court's remand orders authorized introducing new and distinct claims challenging the original adoption of the Third Amendment under a different constitutional theory, one rooted in *Congress's* power under Article I as opposed to the *President's* power under Article II. ROA.1522-23.

Plaintiffs contend that their Appropriations Clause claims "fulfill" the "letter and the spirit" of the Supreme Court's mandate because the factual background section of its opinion included a short description of FHFA's funding mechanism for contextual purposes. Br. 47-48 (citing 141 S. Ct. at 1772). However, when the

Court addressed what was to be done on remand, it directed the lower courts to "resolve[] in the first instance" the "parties' arguments" about whether the unconstitutional removal restriction might have affected "actions that confirmed Directors have taken to *implement* the third amendment" in a way that harmed Plaintiffs. 141 S. Ct. at 1787, 1789. Nothing in those crystal clear instructions leaves any opening for new claims based on different alleged constitutional issues.

Nor does the exception to the mandate rule for intervening changes in law apply here. That exception is triggered where "controlling authority has *since* made a *contrary decision* of the law applicable to such issues." *N. Miss. Commc'ns., Inc. v. Jones*, 951 F.2d 652, 656 (5th Cir. 1992). For example, in *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002), an earlier decision of this Court had ordered a limited remand for resentencing on particular grounds, while affirming a particular sentencing enhancement. After the first appeal and remand, the Supreme Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which undermined the previously affirmed enhancement. Although the mandate rule normally would have precluded any going beyond the remand instructions, *Apprendi*, as a "contrary" decision "since" the first appeal, justified the district court taking a fresh look at the now-defective enhancement. *Matthews*, 312 F.3d at 657-58; *see also McCrimmon*, 443 F.3d at 459-62 (considering whether issuance of Supreme Court's *Blakely*

decision *after* this Court's decision remanding for resentencing allowed defendant to introduce *Blakely* argument that would otherwise be outside mandate).

Here, Plaintiffs primarily point to the Supreme Court's holding in this case that the removal restriction was unconstitutional as the supposed "intervening change in controlling law." Br. 49. As the district court observed, however, that position ignores the word "intervening." ROA.1522-23. An "intervening" decision is a new one that "comes *between* an appellate decision and the proceedings on remand." *Amado v. Microsoft Corp.*, 517 F.3d 1353, 1359 (Fed. Cir. 2008) (emphasis added). The same Supreme Court decision that *provided for the limited remand* cannot have created a change in law justifying deviation from that mandate. Contrary to Plaintiffs' criticism, the district court did not create a new "exception-to-the-exception" (Br. 49-50) by applying the settled understanding of "intervening change of law" as one coming from "outside the confines of the particular case." Wright & Miller, 18B Fed. Prac. & Proc. Juris. § 4478 (3d ed.).

Moreover, the Supreme Court's invalidation of the removal restriction did not change the law on any issue previously decided against Plaintiffs, let alone in a way material to the Appropriations Clause issue. While Plaintiffs theorize plenary presidential control of FHFA makes FHFA's appropriations scheme "more suspect" (ROA.1522), Plaintiffs have never suggested that their appropriations theory *depends* on the removal restriction being held unconstitutional. To the extent

Plaintiffs now contend that the presidential at-will removal authority ruling *they* procured somehow *exacerbates* the alleged appropriations issue, that flatly contradicts what they told this Court previously: that FHFA's not being "subject to the congressional appropriations process" made "Presidential control" an "even more important safeguard"—not more problematic. Brief of Appellants, at 19, No. 17-20364. In all events, Plaintiffs could and should have raised this issue in their original pleadings and appeals from 2016 onward, rather than saving it to spring on the lower courts as a sequel on remand in 2023. *See Hamilton*, 440 F.3d at 698 (refusing to apply change-in-law exception where appellant did not "anticipate [the] error" by originally arguing the position later vindicated by the change in law).

Plaintiffs' change-in-law argument also ignores that the removal restriction has been unconstitutional in this Circuit since 2018. 896 F.3d at 646. Therefore, not only was the Supreme Court's decision in this case not "intervening"; it did not actually even change the law in this Circuit. *See United States v. Bell*, 988 F.2d 247, 251 n.3 (1st Cir. 1993) (rejecting change-in-law exception because intervening decision "was no bolt from the blue").

Plaintiffs alternately point to this Court's recent Appropriations Clause holding in *CFSA* regarding the Consumer Financial Protection Bureau ("CFPB") as a "separate intervening change in law outside the context of this case." Br. 50. But *CFSA* did not change controlling law on any issue previously resolved against

Plaintiffs by this Court or the Supreme Court. *See Jones*, 951 F.2d at 656 (exception applies where "controlling authority has since made a contrary decision of the law applicable" to pre-existing issues in the case). The purpose of the change-in-law exception is to provide relief from mandates that no longer conform to controlling law, not an open-ended invitation to add wholly new claims or theories inspired by new decisions. Therefore, Plaintiffs' reliance on the "intervening change in law" exception is unavailing.

B. The Claims Are Time-Barred

The Appropriations Clause claims are also time-barred. FHFA raised the statute of limitations below, ROA.1349, and this Court can affirm on any ground supported in the record, even if not relied upon by the district court. *Taylor*, 45 F.4th at 837. These counts challenge the 2012 Third Amendment, or alternately, the 2008 PSPAs in their entirety. The statute of limitations for non-tort claims challenging agency action is six years. 28 U.S.C. § 2401(a). That limitations period expired in 2014 for vacatur of the PSPAs and in 2018 for vacatur of the Third Amendment, long before the June 2022 amended complaint.

Relation back does not apply because the Appropriations Clause claims did not "ar[ise] out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B); *see*, *e.g.*, *United States v. Alaniz*, 5 F.4th 632, 636 (5th Cir. 2021) (quotation marks omitted)

("common core of operative facts" needed). The mere fact that both old and new claims share a goal of invalidating the Third Amendment does not mean the new claims arise out of a common core of operative facts. *See Mayle v. Felix*, 545 U.S. 644, 661-63 (2005) (amendment to habeas petition to add self-incrimination claim did not relate back to confrontation claim, despite both theories seeking to vacate same conviction). The core operative facts relevant to the removal restriction claims were that the for-cause provision purported to limit the President's power to remove FHFA Directors; the core operative facts relevant to the Appropriations Clause claims are that FHFA is funded through assessments on regulated entities.

C. FHFA's Funding Mechanism Does Not Violate the Appropriations Clause

If the Court reaches the merits of the Appropriations Clause issue, it should affirm the dismissal of Counts II and IV on the ground that FHFA's funding mechanism does not violate the Appropriations Clause. Plaintiffs' arguments are based entirely on this Court's recent decision in *CFSA*. However, the Supreme Court has granted the Government's petition for certiorari for review of that decision. *CFPB v. CFSA*, No. 22-448, 2023 WL 2227658 (U.S. Feb. 27, 2023). In any event, Plaintiffs' arguments would lack merit even under this Court's *CFSA* decision, as that opinion makes clear that FHFA is materially different from the CFPB under the

Court's reasoning and that the constitutional issues *CFSA* perceived with the CFPB's funding mechanism do not apply to FHFA. *See CFSA*, 51 F.4th at 641-42.

1. The Appropriations Clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law." Art. I, § 9, Cl. 7. The meaning of the text is "straightforward and explicit": "'It means simply that no money can be paid out of the Treasury unless it has been appropriated by an Act of Congress.'" *OPM v. Richmond*, 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap v. United States*, 301 U.S. 308, 321 (1937)). The Clause thus serves "as a restriction upon the disbursing authority of the Executive department." *Cincinnati Soap*, 301 U.S. at 321. It does not, however, limit the manner in which Congress may exercise its authority to make "Appropriations" "by law." Language elsewhere in the Constitution, providing that appropriations for armies may not be "for a longer Term than two Years," Art. I, § 8, cl. 12, reflects that the Founders knew how to impose such a limit when they wished to do so. Yet the Founders did not impose any such temporal, or other, limitations on Congress's appropriations authority generally.

History and practice dating to the Founding confirm that Congress has wide latitude in this area. *See Clinton v. City of New York*, 524 U.S. 417, 466-67 (1998) (Scalia, J., concurring in part and dissenting in part) (collecting examples). Congress has often enacted standing or permanent appropriations, which remain "always available for specified purposes and do[] not require repeated action by Congress to

authorize [their] use." Government Accountability Office, *Principles of Federal Appropriations Law*, 2-10 (4th ed. 2016). For many years, a large portion of the federal budget has consisted of mandatory spending that "does not require annual appropriations." Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* 62 (2017).

As relevant here, Congress has frequently provided for funding of federal agencies and entities through "fees" or "assessments" on regulated entities, rather than allocations in annual appropriations bills. *PHH Corp. v. CFPB*, 881 F.3d 75, 95 (D.C. Cir. 2018) (en banc), *overruled on other grounds by Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020). That has been the model for federal financial regulators for over a century. *See generally* Cong. Research Serv., R43391, *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues* at 25-27 (2017). In establishing the Federal Reserve in 1913, Congress provided that the Board would be funded through the "power to levy semiannually upon the Federal reserve banks ... an assessment sufficient to pay its estimated expenses." Federal Reserve Act, Pub. L. No. 63-43, § 10, 38 Stat. 251, 261 (1913) (codified as amended at 12 U.S.C. § 243). Other examples include the OCC, 12 U.S.C. § 16; FDIC, 12 U.S.C. § 1817; NCUA, 12 U.S.C. § 1755; Farm Credit Administration, 12 U.S.C. § 2250; and the Public Company Accounting Oversight Board, 15 U.S.C. § 7219.

The *CFSA* panel opinion mentioned several features of the CFPB's funding mechanism and structure that it considered problematic, but did not clearly identify which ones were decisive to its holding. To the extent *CFSA* can be understood as forbidding Congress from providing for funding of entities other than through "annual or other time limited" statutes, 51 F.4th at 638-39, such a rule would lack any basis in text, history, or precedent. Moreover, rather than being some kind of admission of unconstitutionality as *CFSA* suggests, the clause stating that CFPB funds "shall not be construed to be Government funds or appropriated monies," 12 U.S.C. § 5497(c)(2), also appears in various other agencies' statutes, *see*, *e.g.*, *id.* §§ 16 (OCC), 2250 (FCA); 15 U.S.C. § 7219 (PCAOB), and serves merely to exempt those funds from certain statutes. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995) (explaining that similar provisions provide exemptions from other statutes, rather than determining constitutional status).

For these reasons and others, *CFSA* did not correctly interpret the Appropriations Clause and gave Congress far too little legislative berth, and the Supreme Court is not likely to adopt *CFSA*'s analysis. *See also Law Offices of Crystal Moroney*, 2023 WL 2604254, at *4-6 (declining to follow *CFSA* and upholding CFPB's funding mechanism).

2. Even viewing *CFSA* as the final word on the subject, that opinion makes unmistakably clear that it applies only to the CFPB and cannot be extended to any

other agency—especially not FHFA. To compare CFPB's funding mechanism with that of safety-and-soundness regulators like FHFA, this Court stressed, "mixes apples with oranges," or "more accurately, with a grapefruit." *CFSA*, 51 F.4th at 641.

Under *CFSA*, FHFA's funding mechanism is materially different from CFPB's: whereas *CFSA* characterized CFPB as having the power to "simply requisition[]" money from another federal agency, *id.* at 638, FHFA charges assessments to the entities it regulates, just like the Federal Reserve Board, OCC, FDIC, NCUA, FCA, and PCAOB. FHFA's funding mechanism is therefore much more analogous to the Federal Reserve Board, whose constitutionality the *CFSA* panel did not call into question.

Indeed, CFSA's position before the Supreme Court is that agencies funded by assessments on regulated entities are "in an entirely unrelated family" from the CFPB, have "historical pedigree," and are fully compatible with the Appropriations Clause. Br. in Opp. at 22, *CFPB v. CFSA*, No. 22-448, 2023 WL 317680. The "practice" of funding agencies "by assessments they charge to entities they regulate" "took root in the early 1900s" and is by now "'long settled and established.'" *Id.* at 23 (quotation marks omitted). "The Federal Reserve fits comfortably within this tradition, as it is funded by assessments, fees, and other transactions with member institutions" or "regulated entities." *Id.* So too for FHFA.

Moreover, the *CFSA* panel perceived the CFPB as having a uniquely "staggering amalgam of legislative, judicial, and executive power." *CFSA*, 51 F.4th at 638 (quote marks omitted); *see also id.* at 640 (CFPB "acts as a mini legislature, prosecutor, and court, responsible for creating substantive rules for a wide swath of industries, prosecuting violations, and levying knee-buckling penalties against private citizens") (quotation marks omitted). The panel found FHFA and other safety-and-soundness regulators do not "wield[] enforcement or regulatory authority remotely comparable to the authority the [Bureau] may exercise throughout the economy." *Id.* (quotation marks omitted). While the CFPB may regulate and initiate enforcement proceedings against "any person that engages in offering or providing a consumer financial product or service," 12 U.S.C. § 5481(6)(A), FHFA's purview is limited to a very small number of regulated entities including the two Enterprises, the eleven regional Federal Home Loan Banks, and the Office of Finance. 12 U.S.C. §§ 4511, 4502(20).

Furthermore, *CFSA* found the CFPB's funding mechanism problematic at least partly because of a statutory provision stating that its funding "'shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate.'" *CFSA*, 51 F.4th at 639 (citing 12 U.S.C. § 5497(a)(2)(C)). That provision is missing from FHFA's enabling statute. And contrary to Plaintiffs' speculation that FHFA could try to collect "*unlimited* funds,"

Br. 52-53, making its funding mechanism "*more* constitutionally problematic," the statute limits FHFA's assessments to the amount necessary to cover its reasonable operating costs and expenses. 12 U.S.C. § 4516(a), (d); 141 S. Ct. at 1772 (noting FHFA 2020 budget of about $300 million).

D. Any Appropriations Clause Issue Would Not Warrant Invalidating the Third Amendment

Finally, any conceivable issue with FHFA's funding mechanism under *CFSA* would have no connection with, and would provide no basis for invalidating, the PSPAs or Third Amendment. *CFSA* rejects "*per se* invalidation" and calls for examination of whether the challenged funding mechanism actually "enable[s] the exercise of [the relevant] power," *i.e.*, a "linear nexus between the infirm provision … and the challenged action[.]" *CFSA*, 51 F.4th at 643. There is no nexus, linear or otherwise, between FHFA's funding mechanism and the Third Amendment. The funds FHFA collects through assessments on regulated entities are not the source for the complained-of dividends to Treasury, and FHFA does not provide the funding for the Enterprises' or Treasury's performance of their respective PSPA obligations. The money for draws to avoid Enterprise insolvency comes from Treasury, and the money for dividends to Treasury comes from the Enterprises.

Finally, Plaintiffs' requested relief based on the Appropriations Clause issue is barred by laches. *See Envt'l Def. Fund, Inc. v. Alexander*, 614 F.2d 474, 477-81 (5th Cir. 1980) (laches bars relief that would be "inequitable" because of "plaintiff's

long delay"). Unlike *CFSA*, where the Appropriations Clause issue was raised at the first opportunity in an APA challenge to a newly issued regulation before compliance was even required, 51 F.4th at 624-25, here Plaintiffs delayed for many years, during which Treasury's commitment served as the foundation for ensuring a stable, functioning housing finance market, which the entirety of that market relied upon. For all of these reasons, any Appropriations Clause issue would not entitle Plaintiffs to the extraordinary relief they seek.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment dismissing the Complaint with prejudice.

Dated: April 3, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because the brief contains 12,995 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

Dated: April 3, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2023, I electronically filed the foregoing with the Court via the appellate CM/ECF system, and that copies were served on the following counsel of record by operation of the CM/ECF system on the same date:

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