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

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CERTIFICATE OF INTERESTED PERSONS

Collins v. Treasury, 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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Dated: May 8, 2023

s/ David H. Thompson
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INTRODUCTION

Based on Defendants' briefing and the district court's opinion, a reader might assume that this case comes to this Court after a full-fledged, complex trial on the merits. It does not. The primary question here is a narrow one specified by the Supreme Court: have Plaintiffs plausibly alleged harm for the proven constitutional violation sufficient to survive a motion to dismiss? The Supreme Court made that already-narrow inquiry even more straightforward by specifying specific types of allegations that would "clearly" demonstrate harm. One example was a public statement from the President explaining that he disapproved of the actions of FHFA's director and that he would have removed him from office.

Plaintiffs' allegations conform *precisely* to the Supreme Court's specifications, and they include a letter from the former President himself explaining what he would have done in the absence of the constitutional violation. That alone ends the motion to dismiss inquiry. And apart from the President's letter, Plaintiffs' other allegations independently establish that the FHFA Director's unconstitutional removal protection harmed them. Plaintiffs have also plausibly alleged that FHFA's self-funding structure—which grants the Director full control over FHFA's funding with no oversight from Congress—violates the Appropriations Clause.

That Plaintiffs' claims must survive follows directly from the Supreme Court's decision in this case. Defendants attempt to undermine this conclusion by

raising a host of alleged procedural issues, from the mandate rule that typically applies in criminal resentencing cases, to a statute of limitations argument not addressed by the district court. On the substance, Defendants splice the verb tenses of the Supreme Court's opinion to impose a contemporaneity requirement on Plaintiffs' evidence and appear to assume that Plaintiffs must prove their claims to a certainty. Defendants ask this Court to read limitations into *Collins* that the Supreme Court did not impose while at the same time ignoring the clear language the Supreme Court did use. None of Defendants' attempts to impose new procedural limitations on Plaintiffs' claims find purchase.

The Supreme Court provided instructions. Plaintiffs followed them. There is nothing left for this Court to do than to apply the Supreme Court's instructions. That means that at a minimum this Court must permit this case to move forward to summary judgment, if not hold outright that Plaintiffs are entitled to relief. Under the right standards and a fair reading of the Supreme Court's decision, Plaintiffs have not only met, but exceeded, their burden. The district court's dismissal should be reversed.

ARGUMENT

I. The Mandate Rule Does Not Bar Plaintiffs' Claims.

A. Nothing in the Supreme Court's Mandate Prohibits Plaintiffs From Pressing Previously Unaddressed Theories in an Amended Complaint.

When an appellate court remands a civil case "for further proceedings consistent [with its opinion]," it does not "tie the lower court's hands in its task to a bedpost forcing it to stare only at the issues specifically decided." *Chapman v. NASA*, 736 F.2d 238, 242 (5th Cir. 1984) (cleaned up). Instead, such a mandate leaves the parties free on remand "to present by amendment new issues, if not inconsistent with what the appellate court ha[s] adjudged." *Jones v. St. Paul Fire & Marine Ins. Co.*, 108 F.2d 123, 125 (5th Cir. 1939). That is precisely what happened here. On remand, the district court entered an order permitting Plaintiffs to amend the complaint, ROA.1169, Plaintiffs amended the complaint to raise new issues in light of the Supreme Court's decision, and the parties proceeded to litigate over whether the newly operative complaint stated legally cognizable claims. Defendants did not object to the district court's order permitting amendment of the complaint or move to strike the amended complaint as improper under Federal Rule of Civil Procedure 15(a)(2).

Once the complaint was amended to press new claims and seek new remedies, nothing in the Supreme Court's mandate stood in the way of the district court considering the new issues on the merits. Defendants' principal objection to the

issues raised in the amended complaint is not that these issues were actually decided at an earlier phase of the case but that Plaintiffs could have raised them sooner. But "unlike claim preclusion," "[t]he law of the case doctrine" and the closely related mandate rule apply "only to issues that were decided, and do[ ] not include determination of all questions which were within the issues of the case and which, therefore, might have been decided." *Doran v. Petroleum Mgmt. Corp.*, 576 F.2d 91, 93 (5th Cir. 1978).

To support their arguments under the mandate rule, Defendants rely almost exclusively on criminal resentencing cases. Parting ways with several of its sister circuits, "this court has adopted a restrictive rule for interpreting the scope of the mandate in the criminal [ ]sentencing context." *United States v. Matthews*, 312 F.3d 652, 658 (5th Cir. 2002) (citing *United States v. Marmolejo*, 139 F.3d 528, 530 (5th Cir. 1998)). The rationale for that restrictive approach is grounded in considerations that are specific to criminal law: the need to preserve the integrity of the plain error standard of review for mistakes that a criminal defendant does not identify for the district court and the utility of resolving sentencing matters promptly after conviction "when the record is fresh." *See United States v. Whren*, 111 F.3d 956, 960 (D.C. Cir. 1997). This Court takes a far less restrictive view of what the mandate permits on remand in civil cases, where the district court can serve a gatekeeping function by exercising its discretion to reject untimely amendments to pleadings

under Rule 15(a)(2). *See Chapman*, 736 F.2d at 242.

Defendants cite only a single civil case about the mandate rule—*General Universal Systems v. HAL, Inc.*, 500 F.3d 444, 453 (5th Cir. 2007). In that case, the district court dismissed all the plaintiff's claims, this Court reversed as to some of the claims, and in a subsequent appeal the parties disagreed about which of the original complaint's claims this Court had revived. Nothing in *General Universal Systems* addresses a district court's authority to hear new claims on remand in an amended complaint or to otherwise address previously unconsidered issues.

Procrustean application of the mandate rule would be particularly anomalous in a case on remand from the Supreme Court. For one thing, the Supreme Court has not adopted this Court's restrictive approach to the mandate rule in criminal resentencing cases, much less extended that approach to civil cases. *See Perkins v. Standard Oil Co.*, 399 U.S. 222, 223 (1970) (summarily reversing lower court's narrow reading of mandate and explaining that "[o]ur failure to make explicit mention in the mandate of attorneys' fees simply left the matter open for consideration by the District Court, to which the mandate was directed"). For another, it makes no sense to forbid the parties from adjusting their positions and arguments to account for intervening Supreme Court authority that changes the law in significant ways. *Cf. United States v. Bell Petroleum Servs., Inc.*, 64 F.3d 202, 204 (5th Cir. 1995) ("On a second appeal following a remand, this Court must

interpret its earlier mandate reasonably and not in a manner to do injustice.").

B. Plaintiffs' Removal Remedy Claims Fall Within the Supreme Court's Mandate.

Even under the narrowest possible reading of the Supreme Court's mandate, Plaintiffs' removal remedy claims would fall within the scope of the remand. The Supreme Court "remanded for further proceedings consistent with [its] opinion." *Collins v. Yellen*, 141 S. Ct. 1761, 1789 (2021). The Court identified the issue for the lower courts to decide: whether the unconstitutional restriction "inflict[ed] compensable harm" on the Companies' shareholders. *Id.* at 1789. This Court in turn "remand[ed] to the district court to fulfill the Supreme Court's remand order." 27 F.4th 1068, 1069 (5th Cir. 2022).

The Supreme Court explained that Plaintiffs may seek a retrospective remedy for "actions that confirmed Directors have taken to *implement* the third amendment." *Collins*, 141 S. Ct. at 1787. Plaintiffs followed the Court's instructions, challenging the precise actions that the Supreme Court held could be challenged for retrospective relief. *See* ROA.1177 ("Plaintiffs are therefore entitled to retrospective relief to put them in the position they would have been in were it not for the unconstitutional removal restriction."); *see also* ROA.1221 (requesting "an injunction that restores Plaintiffs to the position they would have been in were it not for the unconstitutional removal restriction"); *see also* 141 S. Ct. at 1787 ("[T]he only remaining remedial question concerns retrospective relief.").

There is no question that Plaintiffs' requested relief is retrospective. *See Rop v. FHFA*, 50 F.4th 562, 576 (6th Cir. 2022) ("But, on appeal, like in *Collins*, shareholders ask only for relief effecting a zeroing out of Treasury's liquidation preference or converting of Treasury's senior preferred stock to common stock. The Court identified this as retrospective relief, *Collins*, 141 S. Ct. at 1787 & n.22, and this request for retrospective relief is tethered to shareholders' argument that the Recovery Act's removal restriction is unconstitutional."). Indeed, Justice Kagan recognized that "plaintiffs alleging a removal violation are entitled to injunctive relief—a rewinding of agency action … when the President's inability to fire an agency head affected the complained-of decision," because "relief [is then] needed to restore the plaintiffs to the position they 'would have occupied in the absence of the removal problem.'" *Collins*, 141 S. Ct. at 1801 (Kagan, J., concurring in part and dissenting in part) (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)). Plaintiffs ask to be put in the position they would be in but for the constitutional violation that harmed them. That relief is, by definition, retrospective.

FHFA complains that the precise details of Plaintiffs' requested *remedy* has changed since the Supreme Court held the removal restriction unconstitutional. But this does not preclude Plaintiffs from requesting the remedy they seek. The Supreme Court did not purport to limit Plaintiffs in that way, and neither does the mandate rule. Indeed, the Supreme Court remanded to the lower courts to determine whether

Plaintiffs could even allege harm "*in the first instance*." *Id.* at 1789 (emphasis added). Plaintiffs' claims—and to the extent they even fall under the mandate rule, their requested remedies—fall well within the "letter and the spirit" of that broad mandate. *Matthews*, 312 F.3d at 657.

C. Plaintiffs' Appropriations Clause Claims Fall Within the Supreme Court's Mandate.

Plaintiffs' Appropriations Clause arguments likewise fulfill "both the letter and the spirit of the [Supreme Court's] mandate." *Matthews*, 312 F.3d at 657. First, the Supreme Court explicitly discussed FHFA's unusual appropriations structure. *See* 141 S. Ct. at 1772 ("FHFA is not funded through the ordinary appropriations process."). Second, the separation-of-powers implications of the agency's non-appropriated funding structure arises directly from the Supreme Court's decision, which recognized a fundamental shift in the separation of powers as to FHFA. As a result of the Supreme Court's decision, it is clear that Congress's attempt to insulate the FHFA Director from Presidential control is a nullity. The natural follow-on question is whether Congress must now exercise appropriations control over FHFA. *See CFSA v. CFPB*, 51 F.4th 616, 640 (5th Cir. 2022) (explaining that "the Director's newfound presidential subservience exacerbates the constitutional problem arising from the Bureau's budgetary independence" (cleaned up)). After all, the removal restriction and the agency's non-appropriated funding structure are of a piece—the 2008 Congress employed these twin tactics in its singular effort to insulate FHFA

from political accountability as an independent agency. That the Supreme Court held one of these tactics unconstitutional raises the specter of unconstitutionality for the other.

Even if Plaintiffs' Appropriations Clause claims do not fit within the mandate, they fall within the exception to the mandate rule given the multiple intervening changes in law.[1] *See Matthews*, 312 F.3d at 657. Defendants argue that the Supreme Court's separation-of-powers holding cannot constitute an intervening change in law because the Supreme Court agreed with Plaintiffs about the unconstitutionality of the removal restriction. *See* Br. for the Treasury Dep't, Doc. 48, at 43 (Apr. 3, 2023) ("Treasury Br."); *see also* FHFA Br. at 48. In so doing, Defendants severely

[1] Both sets of Defendants quote cases out of context to assert that Plaintiffs must point to a *contrary* decision to satisfy the intervening law exception. FHFA cites *N. Miss. Commc'ns., Inc. v. Jones*, 951 F.2d 652, 656 (5th Cir. 1992), for the proposition that an intervening change in law only applies where "controlling authority has *since* made *a contrary decision* of the law applicable to such issues." Br. of Defs.-Appellees FHFA and Sandra L. Thompson, Doc. 49, at 46 (Apr. 3, 2023) ("FHFA Br.") (emphasis in original). But that case focused on contrary intervening authority because the district court had *departed* on remand from the determinations of the court of appeals. Here, the Appropriations Clause claim is in no way *contrary* to the Supreme Court's or this Court's prior decisions. Treasury likewise quotes out of context, *see* Treasury Br. at 43, citing *United States v. McCrimmon* for the proposition that "directly opposing precedent" needed to render Plaintiffs arguments "futile." But that language in *McCrimmon* was simply stating that the criminal defendant in that case could not point to an earlier case to excuse his failure to raise an issue in an earlier proceeding when that case had not been decided at the time of that earlier proceeding. When describing the doctrine, however, *McCrimmon* states that what is needed is "an intervening change [in] law by a controlling authority," 443 F.3d 454, 460 (5th Cir. 2006)—which, as we explain, exists here.

overstate the scope of the mandate rule. The question is not whether Plaintiffs *could* have ever possibly raised their claims earlier. The question is whether Plaintiffs' claims fulfill the letter and the spirit of the mandate on remand, and, if not, whether a change in law counsels permitting the claims to go forward regardless.

Defendants' argument that Plaintiffs should have raised their Appropriations Clause claims before the Supreme Court's decision belies the decision's impact on remedies for separation of powers claims generally. For the first time, the Supreme Court distinguished violations concerning *removal* of officers from violations concerning *appointment* of officers. And the Court required a showing of harm for any meaningful remedy for the former, while leaving the automatic vacatur generally granted for the latter intact. *See CFSA*, 51 F.4th at 642; *Cochran v. Sec. and Exch. Comm'n*, 20 F.4th 194, 232–33 (5th Cir. 2021) (Oldham, J., concurring). Had the Supreme Court not made this change, Plaintiffs would not have to make any showing of harm. Plaintiffs' claims for retrospective relief as to the Appropriations Clause only arose *because* the Supreme Court made this change. After all, under the original rule of remedies for appointments violations, past actions of FHFA Directors would have simply been void. Instead, a remedy for such violations now requires a showing of harm under the hypothetical scenario in which the unconstitutional removal restriction never existed. And that inquiry in turn raises the question whether the agency's self-funding structure—in the world without the unconstitutional removal

protection that Plaintiffs have been instructed to address—would independently violate the Constitution.

Further, this Court's decision in *CFSA* provides a separate and undeniable intervening change. *See* 51 F.4th at 623 ("Congress's decision to abdicate its appropriations power under the Constitution, i.e., to cede its power of the purse to the [CFPB], violates the Constitution's structural separation of powers."). That Appropriations Clause holding is directly relevant to Plaintiffs' analogous Appropriations Clause claims here and gives this Court further reason not to apply the mandate rule to bar Plaintiffs' claims.

Treasury argues that *CFSA* cannot qualify as an intervening change because "FHFA's funding mechanism is distinct from that of the CFPB in several relevant ways[.]" Treasury Br. at 43. That begs the question. Plaintiffs have argued, *see* Br. of Pls.-Appellants, Doc. 42, at 52–53 (Feb. 1, 2023) ("Opening Br."), and will argue, *see infra* at IV.B, that FHFA cannot be meaningfully distinguished from the CFPB for the purposes of the Appropriations Clause except that FHFA raises a *more* severe Appropriations Clause violation because FHFA faces no cap on its self-funding power. *Id.* Disagreement on the ultimate merits of that constitutional question provides no basis for early dismissal of Plaintiffs' claims under the mandate rule.

II. Defendants' Arguments Against Plaintiffs' Removal Remedy Fail.

FHFA argues that Plaintiffs have not alleged agency action and are barred by HERA's anti-injunction clause. Both Defendants argue that Plaintiffs' allegations are implausible or speculative, and that the Supreme Court required a contemporaneous presidential statement. These arguments are foreclosed by a fair reading of Plaintiffs' allegations and the Supreme Court's decision.

A. Defendants' Agency Action Argument Fails.

FHFA reprises an argument that Plaintiffs have not alleged any final agency action by FHFA. *See* FHFA Br. at 38. To be clear, Defendants' agency action arguments do not apply to Plaintiffs' claims under Counts I and II. Separate from their APA claims, Plaintiffs raise those claims under the cause of action for equitable relief to redress constitutional violations by federal officials. ROA.1211–14 (citing *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 491 n.2 (2010)). In any event, even with respect to the claims to which it does apply, FHFA's argument did not move the District Court and misconceives of Plaintiffs' claims.

Plaintiffs have pointed to agency "conduct" and "action" that repeatedly harmed them—the transfer of value from the Companies' shareholders to Treasury through both quarterly dividends and increases in the liquidation preference. *See Collins*, 141 S. Ct. at 1779. Those actions easily fall within the APA's definition of agency "action," "which is meant to cover comprehensively every manner in which

an agency may exercise its power." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001). Likewise, Defendants' failure to return that ill-gotten value to the shareholders is not only "unlawful conduct" that harmed Plaintiffs under Article III, but also agency action under the APA, which defines the term "agency action" to include an agency's "failure to act," 5 U.S.C. § 551(13).

More broadly, Defendants confuse claims with remedies and misconceive of Plaintiffs' claims. Plaintiffs challenge agency action: the implementation of the PSPA provisions that swept the Companies' dividends to Treasury and increased Treasury's liquidation preference while the Trump administration was in office. The only reason Plaintiffs argue that the government is required to eliminate the liquidation preference is that it is the appropriate *remedy* for the constitutional violation Plaintiffs have alleged.

B. Defendants' Section 4617(f) Argument Fails.

FHFA argues that relief for Plaintiffs' proven constitutional violation is barred by 12 U.S.C. § 4617(f). That provision states: "no court may take any action to restrain or affect the exercise of [the] powers or functions of the Agency as a conservator." *Id.* The provision *permits* relief, however, "if the FHFA exceeded [its] authority." *Collins*, 141 S. Ct. at 1776. Plaintiffs allege that FHFA exceeded its authority in maintaining the Net Worth Sweep and the liquidation preference since

President Trump was unconstitutionally barred from firing FHFA Director Watt.[2]

FHFA retorts that this view is impossible to square with the Supreme Court's holding that "there is no basis for concluding that any head of the FHFA lacked the authority to carry out the functions of [its] office." *Collins*, 141 S. Ct. at 1788. But this passage is beside the point. The Court was discussing whether the Third Amendment was void *ab initio*, entitling Plaintiffs to an automatic remedy. And the question is not whether any FHFA Director lacked authority to "carry out the *functions* of [its] office," *id.* (emphasis added), that is, whether any Director was not properly appointed. *Id.* The question is whether any FHFA Director—even if properly appointed—exceeded the *authority* of his office by standing in the way of reform initiatives that the President supported but could not implement due to an unconstitutional removal restriction.

The Supreme Court's decision provides that when HERA's unconstitutional removal provision "inflict[s] compensable harm," it does so because the Director's activities cease to be authorized. *See Collins*, 141 S. Ct. at 1789. Justice Thomas explains this idea in concurrence, positing that "[i]f the President tries to remove an official but a court blocks this action, then that official is not lawfully occupying his office and would likely be acting without authority." *Id*. at 1793 n.6 (Thomas, J.,

[2] FHFA's arguments that the anti-injunction clause bars APA claims, *see* FHFA Br. at 42–43, cannot justify dismissal because Plaintiffs bring freestanding constitutional claims under Counts I and II.

concurring). The majority opinion, meanwhile, places both the example of a removal blocked by a court and a statement by a President on the same footing. *Id.* at 1789. In both circumstances, the insulated official acts beyond his authority.

Even if Plaintiffs did not allege that FHFA exceeded its authority, Section 4617(f) does not provide the kind of "clear statement" required to deprive Plaintiffs of any remedy for a constitutional violation. *Webster v. Doe*, 486 U.S. 592, 603 (1988). FHFA responds that "§ 4617(f) does not bar judicial review of constitutional claims; it simply bars certain types of relief." FHFA Br. at 43. At this point, though, as the Supreme Court made clear, this case is *only* about remedy. Thus, under the circumstances of this case, barring remedies in effect bars review of Plaintiffs' claims. Indeed, if FHFA were right, Section 4617(f) would bar all forms of relief potentially available to Plaintiffs. That is because, if the agency were acting within its authority, Section 4617(f) would bar all forms of equitable relief, not just injunctions. *See Perry Cap. LLC v. Mnuchin*, 864 F.3d 591, 606 (D.C. Cir. 2017).

Nor is it accurate that "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.'" FHFA Br. at 43. Neither the Supreme Court nor this Court ordered the district court to award the declaratory relief Plaintiffs have sought. And the district court acknowledged and rejected Plaintiffs' request for declaratory relief based on its judgment about the current

Administration's policy preferences. ROA.1521. In sum, FHFA's Section 4617(f) arguments fail to preclude all relief for the proven constitutional violation at issue here.

In any case, as indicated above, Defendants' reading of Section 4617(f) and FHFA's exercise of authority would bar the declaratory relief Defendants claim Plaintiffs already received. *See Perry Cap.*, 864 F.3d at 606 ("The plain statutory text draws a sharp line in the sand against litigative interference—through judicial injunctions, declaratory judgments, or other equitable relief—with FHFA's statutorily permitted actions as conservator or receiver.").

C. The Supreme Court Did Not Implicitly Create a Contemporaneity Requirement for Presidential Statements.

Defendants attempt to nullify Plaintiffs' dispositive evidence of presidential intent to fire the FHFA Director but for the unconstitutional removal restriction by reading the Supreme Court's decision to require that such a statement be made at the time the President first held the view, rather than later in time. In other words, Defendants (and the district court) seek to impose a contemporaneity requirement akin to that required of administrative agencies explaining their actions, on plaintiffs seeking to prove *Collins* claims. This effort at creative reading fails.

Defendants argue that the verb tenses the Supreme Court used in its hypothetical require contemporaneity. The Court stated: "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. In "th[at] situation[], the statutory provision would clearly cause harm." *Id.* Defendants posit that "[t]he 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." Treasury Br. at 34; *see also* FHFA Br. at 32.

This grammatical splicing is illogical. First, this is no way to read a Supreme Court opinion. "Judicial opinions must not be confused with statutes, and general expressions must be read in light of the subject under consideration." *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010). The Court remanded for a broad determination of whether Plaintiffs could demonstrate compensable harm. If the Court wanted to import an administrative law contemporaneity requirement to limit Plaintiffs' potential recovery for a proven constitutional violation, it would have said so. Second, Defendants' argument ignores the rules of grammar. The Supreme Court was giving a hypothetical, urging the reader to "*suppose* that the President *had* made" a statement of intent. 141 S. Ct. at 1789 (emphasis added). So, the use of the word "had" throughout the hypothetical does not imply a requirement to look only into a certain period of time before the Court's writing—it indicates a discussion of events that, at the time of the Court's writing, were hypothetical.

Nor does importing the analogy to administrative agencies through the

contemporaneity requirement "make[] sense." FHFA Br. at 32. Here, the former President explains what he *would have done* in a counterfactual situation made relevant for the first time by a Supreme Court decision that issued after he left office. It makes no sense to require a sitting President to make a public, contemporaneous statement for every action he does *not* take because the action is barred under current law—especially in this case, where the President had no notice of such a requirement while in office. And it makes no sense to bar a President's reflection on what he would have done, with the benefit of hindsight, after his term has ended. If anything, such a reflection is likely to produce a broader and more considered view based on additional information.

III. Plaintiffs' Appropriations Clause Claims Are Not Time-Barred.

Finally, Plaintiffs' Appropriations Clause claims are not time-barred, as FHFA asserts. Plaintiffs filed their original complaint within the six-year statute of limitations. *See* 28 U.S.C. § 2401(a). A claim asserted in an amended complaint relates back to the date of the original pleading if the amended claims "arose 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).

Plaintiffs' Appropriations Clause claims arose out of FHFA's adoption and continued implementation of the Third Amendment—the same conduct and occurrences that were the focus of the original complaint. That Plaintiffs have

refined their legal theories to account for the Supreme Court's decision has no effect on whether the claim relates back. "The fact that an amendment changes the legal theory on which the action initially was brought is of no consequence if the factual situation upon which the action depends remains the same and has been brought to defendant's attention by the original pleading." *FDIC v. Bennett*, 898 F.2d 477, 480 (5th Cir. 1990). Defendants are entitled to notice of *facts* within the prescribed statute of limitations; they are not entitled to advance notice of *all legal theories* that may arise from that set of facts. Especially so where, as here, the underlying law has since changed.

IV. Plaintiffs Have Plausibly Alleged Their Claims.

A. Plaintiffs Have Plausibly Alleged Their Removal Remedy Allegations—Including through a Dispositive Statement from the Former President.

The Supreme Court's decision makes this appeal straightforward. The Supreme Court stated: "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 1783, 1789. In "th[at] situation[], the statutory provision would clearly cause harm." *Id.* Plaintiffs have alleged, and in fact produced, the exact evidence the Supreme Court reasoned would clearly demonstrate harm. That concludes the motion to dismiss inquiry.

Defendants criticize the former President's letter, arguing that the letter does not "outline[] a plan" or "even mention[] the liquidation preferences." FHFA Br. at 32. But this assumes a far higher burden than Plaintiffs face. Even if it were proper to weigh evidence at the motion-to-dismiss stage, former President Trump's letter leaves no doubt that Plaintiffs were harmed. The letter explains:

> From the start, I would have fired former Democrat Congressman and political hack Mel Watt from his position as Director and would have ordered FHFA to release these companies from conservatorship. My Administration would have also sold the government's common stock in these companies at a huge profit and fully privatized the companies. . . . My Administration was denied the time it needed to fix this problem because of the unconstitutional restriction on firing Mel Watt.

ROA.1225.

Further, Plaintiffs provide even further support in the form of *fourteen* different statements from President Trump and Trump Administration officials expressing goals that would have benefited Plaintiffs. *See* ROA.1191–94, 1196–97. When President Trump took office, Director Watt still had two years left to serve and could not be fired without cause under HERA's removal restriction. ROA.1190; *see also* ROA.1199–1203. Thus, Plaintiffs support their claim for a remedy with both direct and circumstantial evidence of presidential intent absent the unconstitutional removal restriction.[3]

[3] If the Court decides that former President Trump's statement—the precise evidence *Collins* said would "clearly" show harm—is not dispositive, the Court

Defendants attempt to undermine the extensive allegations and evidence detailed above by pointing to certain actions the Trump Administration did not take, or actions that it did take that purportedly did not further its goals of ending the conservatorships and selling Treasury's stake in the Companies. *See, e.g.*, Treasury Br. at 31 (the 2019 Treasury report recognized various options "pose[] a host of complex financial and legal considerations" and would require "careful consideration"). That the Administration acknowledged the availability of other options and urged careful consideration is not the knockout blow Defendants think it is. It is a commonplace part of policymaking. But this argument highlights the absurd standard Defendants would have this Court set—one in which *every* action taken by a presidential administration must make forward progress toward the ultimate policy goal. This finds no basis in the Supreme Court's opinion or in common sense. Plaintiffs are not burdened to prove that *every* intermediate step taken by the Administration was consistent with the Administration's goals. It is enough that the Administration stated its goals and took steps to achieve them, but

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should hold that Defendants may avoid Plaintiffs' requested remedy only by making a clear showing that the removal restriction did *not*, in fact, harm Plaintiffs. *See* Opening Br. at 31. Contrary to FHFA's argument, FHFA Br. at 34–35, *CFSA* does not preclude this Court from adopting a burden shifting framework. Although the Court noted that "a party challenging agency action must show . . . harm," 51 F.4th at 632, that language could just as naturally apply to a Plaintiff's initial showing of harm under a burden-shifting framework.

was hindered in achieving those goals by the unconstitutional removal restriction. Plaintiffs are not required to prove harm to an unprovable certainty. Here again, the circumstantial evidence Plaintiffs have alleged satisfies the required showing, but President Trump's letter alone closes the case. And in any event, Plaintiffs are simply required to demonstrate what most likely *would have happened* absent the unconstitutional removal restriction; they do not have to show that the plan was precisely formulated in advance.

Instead of engaging with Plaintiffs' well-pleaded factual allegations, Defendants attack strawmen. They assert that Plaintiffs' theory would have required a "cost-free write-off of Treasury's interest in the enterprises." Treasury Br. at 25; *id.* at 35 (Plaintiffs content "that the former President wanted simply to write-off Treasury's valuable liquidation preference or forgo its more valuable preferred shares."). Not so. The write-down of Treasury's liquidation preference would not have been a giveaway. Rather, it was one critical step in the overall effort to recapitalize Fannie and Freddie, so that Treasury could sell its stake to other investors at a profit. Indeed, former President Trump's letter specifically refutes Defendants' point. ROA.1225 (stating that, absent the unconstitutional removal restriction, his Administration would have "sold the government's common stock in these companies at a huge profit").

Further, Defendants dispute the disagreement between Director Watt and the

Trump Administration. Plaintiffs plausibly allege that President Trump's policy disagreement with Director Watt prevented the Trump Administration from achieving its goals.[4] ROA.1199; *see also* ROA.1199–1203 (outlining the policy disagreements between Director Watt and the Trump Administration). It makes no difference if "plaintiffs have identified no instance in which Director Watt took any specific action to obstruct the policy goals of the Trump Administration, let alone evidence indicating that he would have opposed a cost-free write-off of Treasury's interest in the enterprises." Treasury Br. at 25 (internal citation omitted). Plaintiffs must show policy disagreement with Director Watt, not that Director Watt took "specific action" to "obstruct" the Administration. *Id.* The Supreme Court's opinion evinces no such requirement. It is enough that Director Watt held a different view of the relevant policy issues—including the Executive's authority to even act without Congress, ROA.1199–1200—and that the Trump Administration understood that it needed to wait for its own Director before taking on the multi-step effort of achieving its goals, ROA.1202.

Finally, Defendants' policy argument, *see* FHFA Br. at 32 (predicting that

[4] Defendants accuse Plaintiffs of "vilify[ing]" Director Watt. FHFA Br. at 29. Plaintiffs do no such thing. The policy disagreements between Director Watt and the Trump Administration were a natural consequence of the unconstitutional removal restriction. It is only natural for a new President to want his own appointee in this important office, which is presumably why President Biden fired President Trump's chosen Director and nominated his own within hours of the Supreme Court's decision. ROA.1210.

granting Plaintiffs relief would "throw[] the government into chaos"), does nothing to undermine the fact that Plaintiffs have plausibly alleged their claims sufficient to survive a motion to dismiss. And in any case, the argument is belied by law and fact. Remedies for violations of the Constitution's separation of powers will often serve to limit the policy options of a current Administration. As a matter of fact, however, that would likely not be the case here. The principal practical effect of Plaintiffs' requested remedy would be to put the Companies in a stronger financial position, which would ultimately expand the policy options of the current Administration.

B. Plaintiffs Plausibly Allege that the FHFA's Self-Funding Structure Violates the Appropriations Clause.

Plaintiffs plausibly allege a violation of the Appropriations Clause. Plaintiffs allege that "FHFA's structure violates the Constitution's separation of powers by empowering it to act without oversight from Congress through the appropriations process." ROA.1177; *see also* ROA.1181. This violation arises from FHFA's unusual self-funding structure.

In *CFSA v. CFPB*, this Court held that the CFPB's self-funding structure violates the Appropriations Clause. The Court explained: "The Appropriations Clause's 'straightforward and explicit command' ensures Congress's *exclusive* power over the federal purse." 51 F.4th at 637 (quoting *OPM v. Richmond*, 496 U.S. 414, 424 (1990)) (emphasis in original). The Court's reasoning applies with equal force to FHFA, given its unusual status outside of the constitutionally prescribed

appropriations process. The Supreme Court has granted certiorari to consider whether CFPB's self-funding structure violates the Appropriations Clause. *See CFPB v. CFSA*, No. 22-448 (pet. granted Feb. 27, 2023).

FHFA cannot be meaningfully distinguished from CFPB, except to demonstrate how FHFA's funding structure is more clearly unconstitutional. Both agencies are non-independent federal agencies headed by a single Director. 51 F.4th at 640 (explaining that "the Director's newfound presidential subservience exacerbates the constitutional problem arising from the Bureau's budgetary independence" (cleaned up)). Both agencies do not receive appropriations, thus preventing Congress from exercising direct control over their funding. *Compare* 12 U.S.C. § 4516(f)(2) (providing that FHFA assessments are not appropriations), *with* 51 F.4th at 638 (discussing analogous statutory provision as to CFPB). And both agencies exercise extensive power over the American economy. ROA.1177.

Yet FHFA—unlike CFPB—can collect *unlimited* funds with no oversight from Congress. While CFPB's assessments are limited to no more than 12% of the operating expenses of the independent Federal Reserve, 51 F.4th at 624, the sole limitation on FHFA's funding power is the Director's unbounded judgment of what is "reasonable." *See* 12 U.S.C. § 4516(a). In practical terms, that amounts to an unlimited power to collect and spend money, as FHFA regulates entities that have *over $8 trillion* of assets from which it may freely draw. *See* Statement of Sandra L.

Thompson, FHFA Dir., Before the House Comm. On Fin. Servs. (July 20, 2022) https://bit.ly/3AnDFVq (last visited May 5, 2023). This structure renders FHFA "no longer dependent and, as a result, no longer accountable to Congress and, ultimately, to the people." *CFSA*, 51 F.4th at 639 (cleaned up).

This key difference between CFPB and FHFA, that CFPB faces a cap on its self-funding while FHFA does not, underscores the magnitude of the constitutional problem Plaintiffs allege. The Appropriations Clause not only limits how public funds are spent—it also limits how large and powerful federal agencies can become by requiring that Congress approve of any funding expansions. *See* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1356 (1988). And FHFA, unlike the CFPB, is *entirely* unbound from any statutory limit on its efforts to expand its own size and power through increased funding.

Even if, as Treasury argues, *see* Treasury Br. at 47, the CFPB is more constitutionally infirm than FHFA, that does not make FHFA constitutionally sound. As this Court put in *CFSA*, "[w]herever the line between a constitutionally and unconstitutionally funded agency may be, [CFPB's] unprecedented arrangement crosses it." *CFSA*, 51 F.4th at 639.

As to remedy, "FHFA adopted the Third Amendment at a time when it lacked constitutionally authorized funding to operate," ROA.1214, and so "the Third Amendment must be vacated and set aside," *id.*; *see also* ROA.1216–17. And

because FHFA lacked constitutional authority to act due to the Appropriations Clause violation, Section 4617(f) does not bar relief. Plaintiffs have stated a claim that the FHFA's self-funding structure violates the Appropriations Clause and that the appropriate remedy is to vacate and set aside the Third Amendment.

***

The district court erred in discounting Plaintiffs' critical factual allegations—including the letter from the former President—openly weighing the evidence, making unsupported credibility determinations, and generally exceeding the limits of review on a motion to dismiss. *See, e.g.*, ROA.1518–20 (analyzing statements by Director Calabria and Secretary Mnuchin to conclude that the evidence "do[es] not specifically outline a plan for ending the conservatorship"); ROA.1520 (remarking that the evidence of President Trump's letter "should not be given significant weight"); ROA.1520 (weighing contrary evidence). These errors require reversal.

Plaintiffs have proven a constitutional violation and are entitled to make their case for retrospective relief. The Supreme Court provided instructions on how to do so, and Plaintiffs have followed those instructions. Plaintiffs should be put in the position they would have been in but for the constitutional violation.

CONCLUSION

The district court's judgment should be reversed.

Dated: May 8, 2023 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit on May 8, 2023 by using the appellate CM/ECF system and that service was accomplished on all counsel of record by the appellate CM/ECF system and via US Mail on the below:

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Dated: May 8, 2023

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CERTIFICATE OF COMPLIANCE

I certify that this Reply Brief of Plaintiffs-Appellants complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 6,486 words, excluding the parts exempted by FED. R. APP. P. 32(f).

This brief also complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 (Version 2304) in Times New Roman 14-point font.

Dated: May 8, 2023

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