No. 23-1051

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court for the District of Minnesota, No. 17-cv-2185

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

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SUMMARY OF THE CASE

In this case, now before this Court for a second time, shareholders of Fannie Mae and Freddie Mac argue that as a remedy for an unconstitutional statutory restriction on the President's power to remove the Federal Housing Finance Agency's ("FHFA") Director, the district court should have ordered FHFA and the Treasury Department to wipe out multi-billion dollar preferred stock interests Treasury holds in Fannie Mae and Freddie Mac, thereby shifting that value to Plaintiffs. The district court properly rejected this novel and untenable claim for a host of reasons. FHFA agrees with Plaintiffs that oral argument, with each side allotted 20 minutes, is appropriate in light of the constitutional dimensions and amount in controversy.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s):**

Constitution

Statutes, Rules & Regulations

Other Authorities

STATEMENT OF THE ISSUES

I. Whether Plaintiffs' claims seeking a mandatory injunction requiring the Federal Housing Finance Agency ("FHFA"), as Conservator for Fannie Mae and Freddie Mac, and the Department of the Treasury to wipe out Treasury's nearly $300-billion liquidation preferences in Fannie Mae and Freddie Mac were properly dismissed as implausible and speculative. *Collins v. Yellen*, 141 S. Ct. 1761 (2021).

II(a). Whether Plaintiffs' request for such a mandatory injunction is also barred by a statutory prohibition on any court action that would "restrain or affect the exercise of [the] powers or functions of [FHFA] as a conservator." 12 U.S.C. § 4617(f); *Collins*, 141 S. Ct. 1761.

II(b). Whether Plaintiffs' claim against FHFA for alleged constitutional violations also fails because the unconstitutional removal restriction did not render FHFA's actions themselves unconstitutional. *Collins*, 141 S. Ct. 1761.

II(c). Whether Plaintiffs' APA claims purportedly challenging "agency action" also fail for lack of any identified cognizable final agency action. 5 U.S.C. § 704; *Bennett v. Spear*, 520 U.S. 154 (1997); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990).

II(d). Whether Plaintiffs' claims fail to the extent they challenge lack of action by Defendants because Plaintiffs do not meet the prerequisites for that type of claim, namely that the challenged failure-to-act must involve a *discrete* action that Defendants were legally *required* to take. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55 (2004); *Org. for Competitive Mkts. v. USDA*, 912 F.3d 455 (8th Cir. 2018).

STATEMENT OF THE CASE

In this case, private shareholders of Fannie Mae and Freddie Mac seek to eliminate all value that has accrued to the U.S. Treasury Department's senior preferred stock interests in those companies, which are also known as the Enterprises. Those interests arise from contracts between Treasury and the FHFA as Conservator of the Enterprises. They constitute consideration for Treasury's infusions of hundreds of billions of dollars into the Enterprises during and after the 2008 financial crisis, and they are the vehicle through which Treasury maintains an ongoing commitment to infuse hundreds of billions more as needed.

Plaintiffs purport to base this request on the Supreme Court's decision in *Collins v. Yellen*, 141 S. Ct. 1761 (2021), another Enterprise shareholder lawsuit. In *Collins*, the Supreme Court held that a statutory limitation on the President's power to remove FHFA Directors was unconstitutional. The Court further held that the unconstitutionality of the removal provision never deprived FHFA of authority or made any of its actions *ultra vires*. In an abundance of caution, however, the Court remanded to give the *Collins* plaintiffs an opportunity to pursue very limited claims alleging that the unconstitutional removal provision caused FHFA's implementation of an amendment changing the dividend formula for Treasury's preferred stock to be worse for junior shareholders than it would have been absent the removal provision.

In the *Collins* remand, the shareholder plaintiffs attempted to pivot away from the narrow dividend issue to launch the same much broader claim as now brought in this case: that absent the removal restriction, Treasury's preferred stock liquidation preferences would have been eliminated entirely.

The district court in *Collins* rejected that claim as "incongruous with the Supreme Court's remand" and based on "speculation" and "contradictory and largely non-cognizable" allegations. *Collins v. Lew*, 2022 WL 17170955, at *5, *6 (S.D. Tex. Nov. 21, 2022), *appeal docketed*, No. 22-20632 (5th Cir.).

This case is essentially a facsimile of that *Collins* remand, in a second forum. The district court here rejected Plaintiffs' theory on the same implausibility and speculativeness grounds as did the *Collins* district court. The district court also held that Plaintiffs' claims failed to satisfy Administrative Procedure Act ("APA") prerequisites and were precluded by a statute barring judicial interference with FHFA's powers and functions as Conservator. All of those rulings were sound and correct, and this Court should affirm.

A. Statutory and Factual Background

The statutory and factual background of this matter is thoroughly covered in the Supreme Court's opinion in *Collins* and this Court's prior opinion in *Bhatti v. FHFA*, 15 F.4th 848 (2021) (*Bhatti I*), save for some new facts and allegations about events in 2017-2020 introduced as part of Plaintiffs' new theory 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*, 141 S. Ct. at 1770-71. FHFA is headed by a Director appointed by the President and confirmed by the Senate for a term of five years. 12 U.S.C. § 4512(b).[1]

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

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).

2. The Conservatorships and PSPAs

On September 6, 2008, FHFA's Director placed the Enterprises into conservatorships. App. 86, R.Doc. 87, at 6. On September 7, 2008, Treasury entered into Senior Preferred Stock Purchase Agreements ("PSPAs") with the Enterprises. App. 86-87, R.Doc. 87, at 6-7; *see* App. 17-63, R.Docs. 37-1, 37-2 (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.*; App. 88, R.Doc. 87, at 8. If new Enterprise stock is issued to the public in the future, proceeds must be used to pay down the liquidation preferences. App. 49, 58-59, R.Doc. 37-2, at 5, 14-15. A second entitlement was quarterly cash dividends at an annual rate of 10% of Treasury's outstanding liquidation preference. 141 S. Ct. at 1773; App. 88, R.Doc. 87, at 8. 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.

In the ensuing years, Treasury provided the Enterprises with $187 billion under this arrangement to keep them afloat and the U.S. housing markets and economy at large functioning. App. 90, R.Doc. 87, at 10. 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. The Third Amendment and the 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 formula for Treasury's dividends on its senior preferred stock. App. 91, R.Doc. 87, at 11. The Third Amendment did not alter the liquidation preferences, which already stood at $189 billion on account of funds Treasury had infused into the Enterprises in 2008-2012. FHFA Acting Director Edward DeMarco approved the Third Amendment on behalf of the Conservator. App. 93, R.Doc. 87, at 13.

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. App. 93, 94, R.Doc. 87, at 13, 14.

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. App. 95-96, R.Doc. 87, at 15-16. Director Watt remained in office until January 2019. There is no allegation that former President Trump ever removed, attempted to remove, or criticized former FHFA Director Watt while in office.

At the inception of the Trump Administration, it was 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.*, App. 97-100, 106-07, R.Doc. 87, at 17-20, 26-27. For example, then-Director Watt stressed that conservatorship "should not be a permanent state." App. 94-95, R.Doc. 87, at 14-15; *see also* App. 95, R.Doc. 87, at 15 (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.*, App. 94-95, 105-06, 108, R.Doc. 87, at 14-15, 25-26, 28.

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.

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. App. 96-97, 111, R.Doc. 87, at 16-17, 31. Thus, it is undisputed that former President Trump, in addition to having plenary control of the Treasury Department at all times, also controlled the leadership of FHFA for the second half of his Administration.

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, 12,479 (Apr. 1, 2019); *see* App. 98, R.Doc. 87, at 18. This Presidential Memorandum listed more than 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 "[t]he Federal Government is fully compensated" for its financial support. 84 Fed. Reg. at 12,480.

In September 2019, Treasury issued the report called for by the Presidential Memorandum. App. 99, R.Doc. 87, at 19; *see also* App. 131-183, R.Doc. 94-1 (copy of report). 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." App. 135, R.Doc. 94-1, at 6; *see also* App. 145, R.Doc. 94-1, at 16 ("[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. App. 158, R.Doc. 94-1, at 29.

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." App. 159, R.Doc. 94-1, at 30; *see* App. 104, R.Doc. 87, at 24. 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." App. 159, R.Doc. 94-1, at 30. 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: Hearing Before the H. Comm. on Fin. Servs.*, 116th Cong. 31-32 (Oct. 22, 2019) (*cited in*

App. 101, R.Doc. 87, at 21); *accord 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." App. 159-60, R.Doc. 94-1, at 30-31.

FHFA, acting 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 and Treasury entered into further letter agreements to amend the PSPAs to allow the Enterprises to build up capital. App. 112, R.Doc. 87, at 32; App. 184-219, R.Doc. 100-2 (copies of 2019 and 2021 PSPA amendments); *see* 141 S. Ct. at 1774 nn.8, 10. These amendments built on earlier amendments providing for capital reserves in December 2017 under then-Director Watt. *Id.* at 1774 n.8. They retained the liquidation preferences and established that for the foreseeable future, all dividends to Treasury would accrue as "increases in the liquidation preference." *Id.* at 1774; *see* Br. 3 n.1 (acknowledging the 2021 amendments "permitted Treasury's liquidation preference to increase in an amount equal to the Companies' retained earnings"). The amendments also retained the provision requiring that proceeds of stock offerings must be used at least in part to pay down the liquidation preferences, App. 202, 214, R.Doc. 100-2, at 19, 31, and restated the importance of maximizing Treasury's interest and compensation to taxpayers for their support, App. 187, 193, 206, 218, R.Doc. 100-2, at 4, 10, 23, 35.

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 Treasury's 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. App. 118, R.Doc. 87, at 38.

B. Procedural Background

1. Original District Court Proceedings

Plaintiffs originally filed this suit in June 2017. Plaintiffs' original and First Amended Complaints targeted solely the 2012 Third Amendment, which changed the formula for dividends on Treasury's senior preferred stock. Plaintiffs sought vacatur of the Third Amendment on the grounds that the Recovery Act's restriction on the President's removal authority violated the separation of powers, that Acting

Director DeMarco's duration of service allegedly violated the Appointments Clause, and that FHFA's powers as Conservator allegedly violated the nondelegation doctrine. Plaintiffs also sought a judicial declaration that the removal restriction was unconstitutional. The district court dismissed all of those claims in 2018. R.Doc. 70, at 47. Plaintiffs then filed their first appeal to this Court. *Bhatti v. FHFA*, No. 18-2506.

2. The Supreme Court's Decision in *Collins*

While that first appeal was pending, the Supreme Court decided *Collins*. In *Collins*, other shareholders, represented by the same counsel representing Plaintiffs here, challenged the Third Amendment's revision of Treasury's dividend formula on two grounds: (1) that it exceeded the Conservator's statutory powers, and (2) that the removal provision was unconstitutional. The Supreme Court held that neither argument warranted invalidation of the Third Amendment. The first argument was foreclosed by the Recovery Act'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." 141 S. Ct. at 1770; 12 U.S.C. § 4617(f). As to the removal restriction, the Court held the provision unconstitutional but denied the requested remedy of invalidating the Third Amendment. *Collins*, 141 S. Ct. at 1783-87. 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 the *Collins* 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 provision might be found inapplicable to the Acting Director and his *adoption* of the Third Amendment, the *Collins* plaintiffs argued to the Supreme Court that, irrespective of that issue, confirmed Directors to whom the removal provision *was* applicable still "ordered and approved the payment of Net Worth Sweep dividends." Reply Br. at 13, No. 19-422, 2020 WL 6889215, at *13; Oral Arg. Tr. at 67-68 (Question: "[H]ow [do] we read in continuing *implementation* of the amendment … when you only complain of the *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)).[2]

[2] *See also* Oral Arg. Tr. 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 the

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These arguments led the Court, despite its rejection of the 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 those 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").

The Court also explained that the unconstitutional removal provision was never "part of the body of governing law" because "the Constitution automatically displaces any conflicting statutory provision from the moment of the provision's enactment." *Id.* at 1788-89; *see also id.* at 1793 (Thomas, J., concurring) ("[W]hile the provision *does* conflict with the Constitution, the Constitution has always displaced it and the President has always had the power to fire the Director for any reason.").

However, because it could not "be ruled out" that the existence of the removal provision still could have specifically influenced how confirmed Directors implemented the Third Amendment in a way that "inflict[ed] compensable harm,"

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Treasury … unless the director blesses those.") (emphases added). The transcript is available at https://bit.ly/3RhUIxW.

the Court remanded to give the *Collins* plaintiffs the chance to pursue such limited claims, if they had any. *Id.* at 1789. Justice Thomas explained in concurrence that because the removal provision was never actually valid or enforceable, the premise for such claims would have to be that the President and/or Director had a "misunderstanding about the scope of the President's removal authority," which would never render FHFA's actions unconstitutional, and at most could form a basis for an APA claim. *Id.* at 1794 & n.7 (Thomas, J., concurring).

Five Justices openly doubted the *Collins* 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 Breyer and Sotomayor, JJ.) ("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").

3. This Court's Decision in the First Appeal

After the Supreme Court decided *Collins*, this Court received supplemental briefing and then issued its *Bhatti I* decision. 15 F.4th 848. This Court affirmed dismissal of the Appointments Clause and nondelegation claims, neither of which is any longer at issue. *Id.* at 852-53, 854-55. The Court found the removal restriction claim controlled entirely by *Collins*. *Id.* at 853-54. Specifically, while "the removal restriction in the Recovery Act violates the separation of powers," that issue did not cause the Third Amendment to be invalid, and "[t]he only question" remaining "is about remedy 'with respect to only the actions that confirmed Directors have taken to *implement* the third amendment during their tenures.'" *Id.* at 853 (quoting *Collins*, 141 S. Ct. at 1787). Accordingly, this Court reversed the dismissal of the removal-restriction claim and, tracking the Supreme Court's remand of *Collins*, remanded solely for inquiry into whether Plaintiffs were entitled to any "retrospective relief" for actions confirmed Directors took to implement the Third Amendment. *Id.* at 854.

4. Remand to District Court and Second Amended Complaint

Back in the district court, Plaintiffs filed a Second Amended Complaint abandoning challenges to the 2012 Third Amendment or its implementation. App. 81-129, R.Doc. 87. Instead, Plaintiffs launched the new and novel theory currently before the Court: that in 2017 and 2018, former FHFA Director Watt, who was covered by the unconstitutional for-cause removal provision, thwarted an alleged presidential objective of "elimination of the 'liquidation preference' on the

Treasury Department's senior preferred stock in the Companies." App. 82, R.Doc. 87, at 2.

The Second Amended Complaint contained three counts under the APA and one purportedly under the Constitution, claiming entitlement to an injunction requiring Defendants to "restore" them "to the position they would have been in were it not for the unconstitutional removal restriction." App. 126, R.Doc. 87, at 46. Such relief included, "[a]t a minimum," an injunction ordering Defendants to "reduce the liquidation preference … to zero" or to "convert Treasury's senior preferred stock to common stock." *Id.*[3]

Plaintiffs attached to their Second Amended Complaint a purported November 11, 2021, letter allegedly signed by former President Trump ten months after he left office. App. 129, R.Doc. 87-1.[4] The letter states that former President Trump would have removed then-Director Watt at the start of his Administration, but it 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

[3] As Plaintiffs acknowledge, *see, e.g.*, Br. 6, either form of injunction would necessarily include eliminating the liquidation preferences, since common stock does not have a liquidation preference.

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

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

5. The Decision Below

The district court granted Defendants' motions to dismiss Plaintiffs' claims with prejudice. App. 345-73, R.Doc. 119. "Plaintiffs' legal theory reads far too much into *Collins*," the court explained. App. 359, R.Doc. 119, at 15. As a threshold matter, because "*Collins* makes clear that every FHFA director had the authority to carry out the functions of his office," Plaintiffs' claims could be viewed only as "challenges to agency action that has (allegedly) been tainted by an improper consideration, which is a statutory challenge, not a constitutional one." App. 359-60, R.Doc. 119, at 15-16.

Moreover, Plaintiffs' claims were nothing like the hypothetical example the Supreme Court gave of harm from an unconstitutional removal restriction, involving a President who "*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." App. 361, R.Doc. 119, at 17 (quoting *Collins*, 141 S. Ct. at 1789) (emphasis added by district court). The hypothetical example involves a "contemporaneous expression of displeasure and a desire to remove" that are "*publicly* expressed." App. 361-62, R.Doc. 119, at 17-18. "As plaintiffs have not alleged that Trump, while in office, ever *publicly* criticized Watt or *publicly* expressed a desire to remove him, they have failed to state the type of claim contemplated in *Collins*." App. 362, R.Doc. 119, at 18.

Further, "the nature of [Plaintiffs'] claim [was] far too speculative to survive a motion to dismiss." App. 363, R.Doc. 119, at 19. Plaintiffs' "alternate history"—resting as it did on "only one fragment of one document that even suggested" eliminating Treasury's liquidation preferences "as an *option*"—was an "exercise in rank speculation." App. 363-64, R.Doc. 119, at 19-20. The court observed that the full version of a former Trump Administration official's interview selectively cited by Plaintiffs "actually *undermines* plaintiffs' allegations" by identifying numerous reasons unrelated to then-Director Watt that the Trump Administration delayed exploring housing finance reform and emphasizing that then-Director Watt "would have actually done almost anything we wanted to do." App. 364-65, R.Doc. 119, at 20-21. In sum, the court concluded, nothing in Plaintiffs' allegations supported either the notion that "Watt's presence" impeded ending the conservatorships, or the prospect that "ending the conservatorships would necessarily have meant eliminating the entire liquidation preference." App. 365, R.Doc. 119, at 21. "Writing alternate histories of this sort is the work of fiction authors, not federal judges." *Id.*

Plaintiffs' APA claims also failed because "to state a claim under the APA for unlawful agency action, a plaintiff must identify the agency action at issue," App. 366, R.Doc. 119, at 22, yet it was "clear that plaintiffs' claims do not arise out of any particular agency action," App. 370, R.Doc. 119, at 26. Nor did Plaintiffs meet the requirements for a suit challenging an agency's failure to act and seeking to compel the desired act, namely that the act be a *discrete* one that the agency was *required by law* to take. App. 370-71, R.Doc. 119, at 26-27 (citing *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004)). Finally, and independently, the court concluded that Plaintiffs' claims—all of which sought a sweeping injunction against FHFA in its capacity as Conservator—were barred by 12 U.S.C. § 4617(f), which provides that "no court may take any action to restrain or affect the exercise of powers or functions of the [FHFA] as a conservator." App. 371-73, R.Doc. 119, at 27-29.

SUMMARY OF THE ARGUMENT

The Court should affirm the dismissal of Plaintiffs' claims. Plaintiffs' theory consists of unbridled speculation. Plaintiffs' allegations do not make out 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 current Executive Branch to advance what Plaintiffs assert (without support) was the policy agenda of a previous Administration, while cutting Congress out from any role.

Plaintiffs' claims also fail on additional grounds, which are independently sufficient to affirm. The Recovery Act forbids injunctions that restrain or affect FHFA's exercise of its powers or functions as Conservator. The sole relief Plaintiffs seek here, an injunction that would overhaul the foundational financial contracts for the conservatorships, is plainly barred under that provision. Plaintiffs' purported constitutional claim is also invalid because Plaintiffs do not plead any viable theory that FHFA violated the Constitution—which the Supreme Court stressed is a distinct issue from the unconstitutionality of the removal provision. Finally, Plaintiffs' claims are barred because they do not challenge any agency action and fall outside the narrow circumstances in which agency *in*action may be cognizable, namely, failure to take a discrete action that was legally mandated.

ARGUMENT

I. Standard of Review

This Court reviews the district court's grant of a motion to dismiss *de novo*. *Vadnais v. Fed. Nat'l Mortg. Ass'n*, 754 F.3d 524, 526 (8th Cir. 2014).

II. Plaintiffs' Theory Was Properly Dismissed As Speculative and Implausible

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. Contrary to Plaintiffs' attempt to cast their claims as following a template established by the Supreme Court when it remanded *Collins*, the claims are far afield from the direction the Court provided. Plaintiffs' theory piles layer upon layer of speculation and would create new separation-of-powers issues far worse than those it purports to remedy. That is why the district court in *Collins* already rejected the exact same theory brought by other plaintiff shareholders on remand. *See Collins*, 2022 WL 17170955, at *5, *6.

A. Plaintiffs' New Claims Are Far Afield from What the Supreme Court Prescribed for the *Collins* Remand

As the court below and the *Collins* district court both held, the newfound liquidation-preferences elimination theory in Plaintiffs' Second Amended Complaint bears no resemblance to the remand proceedings the Supreme Court contemplated in *Collins*.

Plaintiffs imagine *Collins* as fashioning a bold new cause of action, under which Plaintiffs get to posit alternate economic and policy scenarios that might have developed if the for-cause removal provision had never existed, and the court then prospectively orders that counterfactual world into existence. According to

Plaintiffs, "[t]he Supreme Court instructed plaintiffs to present a counterfactual theory of what President Trump would have done absent the unconstitutional removal restriction." Br. 16. And "apply[ing] the Supreme Court's decision" supposedly requires the lower courts to "enter an injunction placing Plaintiffs in the position they would be in absent the unconstitutional removal restriction." Br. i.

That characterization "reads far too much into *Collins*." App. 359, R.Doc. 119, at 15. The Court remanded *Collins* for a limited purpose, namely, resolution of a narrow cohort of residual claims for "retrospective relief" relating to "implementation of the third amendment." 141 S. Ct. at 1788-89; *see also id.* at 1787 ("We therefore 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."). Implementation of the Third Amendment meant, in the *Collins* plaintiffs' own words, "decisions" to approve dividend "overpayments" to Treasury, "the regulatory action of [the] directors in approving these dividends," and the "overpayments" themselves. *See supra* at 14-15 & n.2 (oral argument excerpts). The Court doubted the *Collins* plaintiffs' chances on even those claims, but remanded because the possibility of compensable harm could not be "ruled out." 141 S. Ct. at 1789.

Nothing the Court wrote in *Collins* endorses the much broader entitlement Plaintiffs claim—to an injunction placing them more generally in the "position" they claim "they would be in absent the unconstitutional removal restriction." Br. i. The Court simply prescribed a remand for further litigation of claims, if any, that certain discrete agency actions (dividend payments) were different than they would have been had the removal provision not existed, resulting in "compensable harm." 141 S. Ct. at 1789. All of the circuits that have addressed *Collins* agree that it allows only an exceedingly narrow type of claim, in which a concrete causal link exists between a specific agency action and the President's perceived inability to control the agency through his removal power. *See, e.g.*, *CFPB v. Law Offices of Crystal Moroney, P.C.*, 63 F.4th 174, 180 (2d Cir. 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."); *CFSA v. CFPB*, 51 F.4th 616, 632 (5th Cir. 2022) (requiring, *inter alia*, "a nexus between the desire to remove and the challenged actions taken by the insulated actor"), *cert. granted on other grounds*, 143 S. Ct. 978 (2023); *Calcutt v. FDIC*, 37 F.4th 293, 316-17 (6th Cir. 2022) ("*possibility* that the [agency] would have taken different actions" is not enough), *pet. for cert. filed*, No. 22-714; *Fairholme Funds, Inc. v. United States*, 26 F.4th 1274, 1305 (Fed. Cir. 2022) (*Collins* placed "extreme limits on the possible relief"), *cert. denied*, 143 S. Ct. 562-63 (2023); *Bayview Loan Servicing, LLC v. 6364 Glenolden*

St. Tr., 2021 WL 4938115, at *2 (9th Cir. Oct. 22, 2021) (*Collins* requires "causally linking a specific, tangible harm to the for-cause removal provision"). As discussed below, Plaintiffs' allegations fall far short of any of these standards.

B. Plaintiffs' Factual Narrative Is Wildly Implausible

Under a proper understanding of *Collins*, it is clear that Plaintiffs fall far short of stating a plausible, cognizable claim. Plaintiffs have not plausibly pleaded that any action FHFA took "would not have been taken *but for* the President's inability to remove the agency head." *Law Offs. of Crystal Moroney*, 63 F.4th at 180. Put differently, there is no "nexus between [a] desire to remove" and any "challenged actions taken by the insulated actor." *CFSA*, 51 F.4th at 632.

Indeed, Plaintiffs do not challenge any "action" by then-Director Watt at all. Rather, Plaintiffs complain about what then-Director Watt *did not do*. *See infra* Section III.D (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. Plaintiffs' theory falters at every turn. There are no allegations that former President Trump specifically aimed to eliminate Treasury's liquidation preferences—as opposed to pursuing broader, widely shared goals, such as finding a path out of conservatorship, that did not need to entail wiping out those interests. There are no allegations that former Director Watt did anything to impede any such (non-existent) efforts, and Plaintiffs' own sources contradict their portrayal of former Director Watt as an obstructionist. Most tellingly, the Trump Administration's real-world actions, reflecting a singular focus on protecting and maximizing Treasury's investment, actually resulted in large *increases* in the same Treasury liquidation preferences that Plaintiffs pretend the Administration was already determined to relinquish.

1. Plaintiffs Fail to Plausibly Plead that Former President Trump Sought to Eliminate Treasury's Liquidation Preferences

As in *Collins*, "Plaintiffs fail plausibly to allege that the administration had a concrete plan to end the conservatorship, or that that plan necessarily involved liquidating Treasury's preferred stocks." *Collins*, 2022 WL 17170955, at *4. 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. 17-19. However, not one of those sources plausibly suggests the Trump Administration had adopted a plan to eliminate Treasury's liquidation preferences. What they reflect, rather, is an 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 unilaterally abolishing the entire Treasury liquidation preferences in advance. Plaintiffs' contrary assumption is not only unsupported as a matter of economic logic, it is flatly contradicted by the relevant instruments and other information in the Second Amended Complaint.[5]

In particular, 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. App. 49, 58-59, R.Doc. 37-2, at 5, 14-15. The Trump Administration expressly retained that paydown requirement when it amended the PSPAs in September 2019 and January 2021, *after* the time that, under Plaintiffs' theory, the supposed plan to wipe out the liquidation preferences in preparation for stock offerings would already have had to be in place. As Treasury explained in its September 2019 report, "[p]otential

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[5] Plaintiffs' framing (Br. 23; App. 111-15, R.Doc. 87, at 31-35) of "five key steps" in the Trump Administration's alleged plan, 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 regulations—were sensible preparations for *any* post-conservatorship regime, not just one predicated on advance elimination of Treasury's liquidation preferences. Former Director Watt, whom Plaintiffs portray as the obstructionist, engaged in the same preparations. *See Collins*, 2022 WL 17170955, at *5 ("Under both Directors Watt and Calabria, FHFA took similar steps to enable the GSEs to retain capital while simultaneously amending the PSPAs to *increase* Treasury's liquidation preferences."); 141 S. Ct. at 1774 n.8 (Watt PSPA amendment); Enterprise Capital Requirements, 83 Fed. Reg. 33,312 (July 17, 2018).

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 10-11.

While the same Treasury report also floats the "[p]otential approach" of reducing "all or a portion of" the Treasury interest, the district court correctly observed that that was the *only place* in dozens of materials cited in the Second Amended Complaint where the concept central to Plaintiffs' theory is mentioned at all. App. 363, R.Doc. 119, at 19 (observing that Plaintiffs "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 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 (Apr. 1, 2019). Rather, that document twice reiterates that *protecting* Treasury's economic interest was a presidential prerequisite for ending the conservatorships. *Id.* at 12,480.

2. Plaintiffs Fail to Plausibly Plead that Former Director Watt Stymied Any Trump Administration Plans Regarding Treasury's Liquidation Preferences

Even if Plaintiffs had plausibly pleaded that the Trump Administration had a policy of eliminating the liquidation preferences (which they have not), the Second

Amended Complaint still comes far short of plausibly alleging that then-Director Watt actually "stymied" such efforts (Br. 30)—as would be necessary for the removal restriction to have caused harm. "Plaintiffs point to no specific action by Director Watt to obstruct the policy goals of the Trump Administration." *Collins*, 2022 WL 17170955, at *5. Indeed, the preferred stock was *Treasury*'s investment, and "the President had oversight" all along through his plenary control over Treasury. 141 S. Ct. at 1802 (Kagan, J., concurring) (citation omitted). "We know that the President, acting through the Secretary of the Treasury, could have stopped [the liquidation preferences] but did not." *Id.* (citation omitted).

The district court perceptively observed that Plaintiffs' own sources in the Second Amended Complaint belie the notion that then-Director Watt somehow blocked reform initiatives of the former President. Plaintiffs quote an interview of a former mid-level Treasury employee that refers to the Trump Administration "wait[ing] … for Director Watt's term to end" before undertaking new policies. App. 109, R.Doc. 87, at 29. However, "the full interview actually *undermines* plaintiffs' allegations" because the former official said the Trump Administration paused reform efforts for other reasons as well, including deficit concerns and "other priorities (including tax and bank-regulatory reform) that took precedence over dealing with the conservatorships." App. 364, R.Doc. 119, at 20. According to the former official quoted by Plaintiffs, then-Director Watt "would have actually done almost anything we wanted to do"—his views were "not terribly different than Director Calabria's," and he "felt very strongly" the conservatorships and Third Amendment both should end. App. 364-65, R.Doc. 119, at 20-21 (quoting Interview by Tim Rood with Craig Phillips, SitusAMC, 7:10-10:10).

Tellingly, Plaintiffs' brief on appeal persists (at 23) in offering the misleadingly truncated quotation from the interview, as if the district court's analysis and conclusion that the full interview hurt their position far more than it helped did not exist. Refusing to engage with what the district court said is no way to show that the court below erred.

Because Plaintiffs come up empty in trying to show that former Director Watt obstructed any Trump Administration initiative, Plaintiffs fall back on vilifying him for his general understanding of Congress's role in housing finance reform. Br. 6; App. 105-07, R.Doc. 87, at 25-27. 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." App. 206, 218, R.Doc. 100-2, at 23, 35. Regardless of how much daylight may have existed between then-Director Watt's and the Trump Administration's views of Congress's role, Plaintiffs offer nothing plausibly suggesting that former Director Watt himself would have—or could have—blocked any initiative by Treasury to voluntarily reduce its own economic interest. Thus, even assuming *arguendo* former President Trump contemporaneously had a "frustrated desire to remove" then-Director Watt, Plaintiffs have failed to establish the critical "*connection*" between such a desire and "the agency [inaction] complained of." *CFSA*, 51 F.4th at 632.

3. The Trump Administration's Real-World Actions Relating to Treasury's Preferred Stock Belie Plaintiffs' Revisionist History

The clearest sign that Plaintiffs' theory is divorced from reality is the "inconvenient fact" (App. 368, R.Doc. 119, at 24) that once former President Trump's chosen appointees headed both FHFA and Treasury, the actions they took 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, they also provided that future dividends to Treasury would accrue as "increases in the liquidation preference." 141 S. Ct. at 1774; *see also id.* at 1774 nn.8, 10; App. 187, 193, 202, 214, R.Doc. 100-2, at 4, 10, 19, 31 (relevant amendment provisions); *see* Br. 3 n.1 (conceding the 2021 amendments "permitted Treasury's liquidation preference to increase in an amount equal to the Companies' retained earnings"). 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." App. 206, 218, R.Doc. 100-2, at 23, 35.

The *Collins* plaintiffs did not mince words in explaining to the Supreme Court how these Trump amendments adversely affected their interests. According to the *Collins* plaintiffs (represented by the same counsel as Plaintiffs here), the Trump amendments made it "impossible for the Companies to raise additional capital through the sale of new stock," did "nothing to reverse the nationalization of Fannie and Freddie" and "only further entrenched 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. at 1, *Collins*, No. 19-422 (S. Ct.). These amendments—credited by Plaintiffs here as "the Trump Administration's last official word on the matter" (Br. 24)—shred the notion that the Administration was set on wiping out the liquidation preferences in order to facilitate raising additional capital through stock sales.[6]

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[6] The Second Amended Complaint tries to reconcile the irreconcilable by suggesting that, rather than making capital-raising "impossible," as the *Collins* plaintiffs told the Supreme Court, these increases in the liquidation preferences instead were "permitted" as part of the supposed plan to convert Treasury's preferred stock by enabling Treasury to "receive more common stock" in exchange. App. 115, R.Doc. 87, at 35. But that is pure conjecture on Plaintiffs' part, not a well-pleaded allegation of FHFA's and Treasury's actual intent. 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,"

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4. The Alleged Former President Trump Letter Does Not Help Plaintiffs

Far from being "[d]ispositive" (Br. 13), the November 2021 letter allegedly from former President Trump does not salvage Plaintiffs' case. While Plaintiffs hold the letter out as manifesting a situation similar to a hypothetical example of "harm" the Supreme Court gave in *Collins*, the scenario hypothesized in the relevant *Collins* passage is one in which "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 (emphasis added). It is undisputed that the former President made no such statements or assertions while he and then-Director Watt were in office, the only period that matters. *See Collins*, 2022 WL 17170955, at *5 ("At no point *during Director Watt's tenure* did President Trump criticize or attempt to remove Director Watt." (emphasis added)). As the district court observed, "[r]equiring 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

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which, it was hoped, might ripen into a "proposal" to be submitted to Congress eight months later. App. 206, 218, R.Doc. 100-2, at 23, 35.

into chaos by undermining years' worth of agency action." App. 361-62, R.Doc. 119, at 17.

Plaintiffs call contemporaneity a "novel requirement" and an "exercise in absurdity," criticize the district court for supposedly "creating" it out of thin air, and even question the validity of the requirement that the statement have been "public[]." Br. 31-32. But, as shown, these requirements track the Supreme Court's own words in *Collins*. Contrary to Plaintiffs' suggestion (Br. 32), an unknown source's posting of unauthenticated private correspondence on an internet site called "Real Clear Politics" years after the fact is not remotely comparable to the President himself having made a public statement during the relevant time period.

The purported letter, moreover, does not even mention the liquidation preferences. 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 "implies" (Br. 25-26) rather than what it actually says. At bottom, inferring that a plan to eliminate Treasury's liquidation preferences was underway in 2017-2018 cannot be squared with the Trump Administration's real-world statements and actions greatly expanding those interests.

C. The District Court Applied the Proper Standards to Plaintiffs' Far-Fetched Allegations

In finding the Second Amended Complaint's allegations untenable on their face, the district court did not "improperly discount[]" Plaintiffs' allegations (Br. 31), make "credibility judgment[s]" (Br. 33), or impose "new, heightened evidentiary requirements" (Br. 35). Rather, it correctly declined to draw "unreasonable inferences from documents the plaintiff makes a part of the complaint" or to credit "wholly unrealistic assertions." *Brown v. Medtronic, Inc.*, 628 F.3d 451, 461 (8th Cir. 2010); *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' argument that the district court unfairly applied a "very strong showing" standard to their claims (Br. 35) is particularly misguided. Plaintiffs' far-fetched theory constituted "rank speculation" that would not pass muster under *any* standard. App. 364, R.Doc. 119, at 20. The passage of the district court decision that Plaintiffs complain about simply expounds on why it "ma[de] sense" for the Supreme Court to require, as it did, "a contemporaneous expression of displeasure and a desire to remove." App. 361, R.Doc. 119, at 17. Nothing in that discussion was remotely improper.

D. The Burden Does Not Shift to Defendants

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. 26. "[T]he law generally frowns on requiring a party to prove a negative," *United States v. Marin*, 31 F.4th 1049, 1054 (8th Cir. 2022), and all of the circuits that have addressed *Collins* remedy issues, in particular, place the burden where it plainly belongs: on plaintiffs. *E.g.*, *CFSA*, 51 F.4th at 632 (emphasizing that it is "the Plaintiffs" who "must show" the requisite connection between desire to remove and a challenged agency action); *see supra* at 25-26 (collecting cases).

Indeed, 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. 2022) (cited in Br. 29); *see* 2 McCormick on Evidence § 337 (8th ed. 2022) (burden "assigned to the plaintiff who generally seeks to change the present state of affairs") (cited in Br. 26-27). And this is not a situation where "facts relevant to this issue are in the exclusive possession of

Defendants"; rather, as Plaintiffs admit in the same breath, their theory revolves around inchoate thoughts in the heads of "*former* officers and employees," most notably the former President himself. Br. 27 (emphasis added).

Plaintiffs' analogy to burden-shifting for discrimination claims (Br. 27) fails because this is not a Title VII or equal protection 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 (Br. 27-28) 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 "harmless error" standard in APA rulemaking cases (Br. 29-30) 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 alleged injury to them. If anything, the APA analogy cuts against Plaintiffs. If a failure to afford 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 substantive outcome and to remove the relevant decisions from the agency's jurisdiction—the opposite of a remand to the agency.

E. Plaintiffs' Requested Relief Would Clash with, Rather than Vindicate, Separation-of-Powers Principles

The district court was also correct that Plaintiffs' requested relief would "interfer[e] with the policies of a duly elected succeeding administration." App. 361, R.Doc. 119, at 17. This would create a separation-of-powers problem far more acute than the supposed harm it would ostensibly 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. 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. 30. Such mandatory injunctive relief would hamper the current President's ability to pursue what *he* considers the right approach in this important area of national economic policy. *See Collins*, 2022 WL 17170955, at *6 (rejecting the same claims in part because they seek to enforce "unachieved policy preference[s] of a prior administration, impeding the current administration's own ability to effectuate its policy preferences through the appointment of a new FHFA director").

Moreover, the intrusion is not limited to the President's Article II responsibilities. Plaintiffs' requested relief would apparently also divest *Congress* of its legislative role under *Article I* with respect to Treasury's preferred stock interests and shaping the Enterprises' future—matters in which it has consistently expressed keen interest. *See supra* at 7 (discussing legislation and "Sense of Congress"); App. 206, 218, R.Doc. 100-2, at 23, 35 (2021 PSPA amendments reflecting Trump Administration's commitment to transmit "proposal" to Congress).

Plaintiffs see no problem because, in their view, this is analogous to "requiring the Trump Administration to adhere to the Obama Administration's DACA program." Br. 36 (citing *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1901 (2020)). Not so. In cases like *Regents*, the government was required to maintain the status quo (even if that status quo was established in a prior administration) unless and until it conformed to APA requirements for modifying certain kinds of policies. Here, in contrast, Plaintiffs seek not to maintain the status quo, but rather to commandeer the current Administration to effectuate a radical transformation of it.

As the Fifth Circuit put it in their decision in *Collins* when it found the removal restriction unconstitutional but rejected invalidation of the Third Amendment, it makes no sense to *diminish* the current President's power "under the guise of respecting the presidency." *Collins v. Mnuchin*, 938 F.3d 553, 594 (5th Cir. 2019), *aff'd in relevant part*, 141 S. Ct. 1761. This is yet another reason counseling dismissal of Plaintiffs' novel claims.

III. The District Court's Further Reasons for Dismissing Plaintiffs' Claims Were Equally Sound

While the implausible and speculative nature of Plaintiffs' claims was alone a sufficient basis for dismissal, the district court also identified other defects. Those defects independently warranted dismissal, and this Court can and should affirm on those grounds as well.

A. Plaintiffs' Claims Are Barred by the Recovery Act's Anti-Injunction Provision

The district court was also correct in finding Plaintiffs' claims barred by the Recovery Act's provision that "no court may take any action to restrain or affect the exercise of [the] powers or functions of the Agency as a conservator." 12 U.S.C. § 4617(f); *see* App. 371-73, R.Doc. 119, at 27-29. Plaintiffs acknowledge (Br. 46) that "[t]his provision 'prohibits relief where the FHFA action at issue fell within the scope of the Agency's authority as a conservator'" and permits relief only "if the FHFA *exceeded* that authority." Br. 46 (quoting *Collins*, 141 S. Ct. at 1776).

Thus, the parties agree that § 4617(f)'s applicability turns on whether Plaintiffs' claims challenge an FHFA action that exceeded FHFA's authority.

Plaintiffs' claims do not. In fact, as discussed further in Section III.C below, Plaintiffs do not challenge any FHFA *action* at all, so there is no unauthorized action outside § 4617(f)'s protection to enjoin. By challenging, rather, a *lack of action*, Plaintiffs have pleaded themselves out of the unauthorized-actions exception to § 4617(f).

Plaintiffs try to theorize their way out of this conundrum by suggesting that former Director Watt could be deemed to have "exceeded his authority by continuing to exercise the powers of FHFA Director" *at all* at some indeterminate point "when … President Trump would have removed him from office." Br. 46-47. Again, however, Plaintiffs do not challenge any "exercise" by former Director Watt of "the powers of FHFA Director"; as noted, their complaint revolves around what he did *not* do. More importantly, the Supreme Court was crystal clear that "there is no basis for concluding that any head of the FHFA lacked the authority to carry out the functions of the office" on account of the unconstitutional removal restriction. 141 S. Ct. at 1788; *see also id.* at 1787, 1788 n.23; *id.* at 1793 (Thomas, J., concurring). Plaintiffs' strained theory would make *every* action by former Director Watt after a postulated removal date *per se* void—the antithesis of the approach the Supreme Court took in *Collins*. It would be profoundly destabilizing to retroactively declare a government agency's actions *ultra vires* based on a former President purportedly revealing thoughts, in private correspondence long after his Presidency, that he neither expressed nor acted upon while in office.

Plaintiffs secondarily argue that § 4617(f) "lacks the clear statement required to bar all remedies for a *constitutional* claim." Br. 48. However, Plaintiffs bring three of their four counts under the APA, so this argument could apply, at most, only to Count I, which the district court rejected on other independently sufficient grounds. App. 358-65, R.Doc. 119, at 14-21; *see supra* Section II, *infra* Section III.B. Justice Thomas specifically foreshadowed in his *Collins* concurring opinion that *APA claims* challenging FHFA actions based on the unconstitutional removal restriction would have to contend with "the Act's anti-injunction provision." *Collins*, 141 S. Ct. at 1794 n.7.

Moreover, Plaintiffs admit the clear-statement requirement applies only to statutes that purport to "deprive [p]laintiffs of *any* remedy for a constitutional violation." Br. 12. As the district court held, "§ 4617(f) does not bar judicial review of constitutional claims" like the statutes at issue in cases cited by Plaintiffs purported to do. App. 372-73, R.Doc. 119, at 28-29 (methodically distinguishing Plaintiffs' cases). Rather, it "simply bars certain types of relief." App. 372, R.Doc. 119, at 28. On appeal, Plaintiffs merely repeat the same cases and rhetoric about barring "*all* remedies" and "deny[ing] *any* judicial forum" while ignoring the distinction the district court drew. Br. 48-49 (emphases added). That is no way to show error.

Of course, Plaintiffs here have not been denied any judicial forum or had all remedies barred. Notably, a significant portion of the relief they seek for their constitutional claim has already been awarded, to wit, a declaration that the removal restriction "violates the separation of powers and [is] void." App. 126, R.Doc. 87, at 46. In *Bhatti I*, Plaintiffs insisted that "even if the Court declines to vacate the Net Worth Sweep," merely "subjecting FHFA to oversight by the President" prospectively would "partially redress [Plaintiffs'] injuries." Plaintiffs-Appellants' Reply Br., No. 18-2506, at 10-11. Consistent with *Collins*, Plaintiffs were successful in that request. *See Bhatti I*, 15 F.4th at 853.

To the extent a "clear statement" is nevertheless required to give effect to § 4617(f), it is hard to imagine clearer language than forbidding "any [court] action to restrain or affect the exercise of [the] powers or functions of the Agency as a conservator." That is nothing like *Webster v. Doe*, 486 U.S. 592 (1988), cited by Plaintiffs (Br. 48), which merely declined to construe a statute about CIA employment that said nothing about court action or judicial review as precluding employees' constitutional claims by implication.

Lastly, *Collins* did not "implicitly" reject § 4617(f)'s applicability to future injunction requests by reaching the merits of the removal provision's constitutionality, as Plaintiffs contend (Br. 48). 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. *See Bartlett v. Bowen*, 816 F.2d 695, 703 (D.C. Cir. 1987) (Congress may not "preclude the judiciary from hearing challenges to the constitutionality of [its] legislation"). The Court had no occasion to address whether § 4617(f) barred the *relief* being sought at the time—vacatur of the Third Amendment—because it found such relief unavailable for other reasons. *Collins*, 141 S. Ct. at 1779-80; *see also Collins*, 938 F.3d at 595 n.8 (Fifth Circuit declining to reach § 4617(f) because it rejected invalidation of Third Amendment on other grounds).

Even in remanding for further litigation for a narrow category of potential retrospective relief claims for Third Amendment implementation, the Supreme Court emphasized that any and all remedial limitations would be fair game for further litigation. 141 S. Ct. at 1788-89 & n.26. It would make little sense to construe *Collins* as nevertheless taking § 4617(f) off the table as a defense to novel requests for mandatory prospective injunctions that could not possibly have been foreseen.

B. Plaintiffs Do Not State a Claim that FHFA Committed Constitutional Violations (Count I)

Count I purports to invoke "a cause of action for equitable relief to redress constitutional violations by [FHFA]." App. 119, R.Doc. 87, at 39. The district court correctly held that this count failed because Plaintiffs do not plausibly allege any constitutional violations by FHFA. App. 358-60, R.Doc. 119, at 14-16.

As the district court explained, "the core of the Court's analysis [in *Collins*] is that, while the *removal restriction* is unconstitutional, that fact does not render the *agency's actions* unconstitutional." App. 357, R.Doc. 119, at 13. Thus, crediting an observation by Justice Thomas in his concurrence in *Collins*, the district court explained that a claim that an unconstitutional removal restriction resulted in harmful agency action would have to be brought, if at all, under the APA. *Id.* (citing *Collins*, 141 S. Ct. at 1794 n.7 (Thomas, J., concurring)). Because an unconstitutional removal provision is "automatically displace[d]" by the Constitution and therefore is "never really part of the body of governing law," *Collins*, 141 S. Ct. at 1788-89, the only way an unconstitutional removal restriction could cause harm is by creating "a misunderstanding about the correct state of the law." *Id.* at 1794 (Thomas, J., concurring). But such a misunderstanding could not "make[] an otherwise constitutional action unconstitutional"; "nothing in the Constitution, history, or our case law supports [that] expansive view of unlawfulness." *Id.* The path for a litigant to argue that such a misunderstanding impacted agency action would be, rather, through the APA. *Id.* at 1794 n.7.

Justice Thomas's and the district court's approach "recognizes that every FHFA director had the authority to carry out the functions of his office," while "leav[ing] a path open for a litigant with standing to show that a particular agency action was arbitrary and capricious for purposes of the APA because the action was attributable to the agency's incorrect belief that the director was removable only for cause." App. 358, R.Doc. 119, at 14. Such claims "would not be *constitutional* claims." *Id.* Rather, Plaintiffs' claims must be treated as "challenges to agency action that has (allegedly) been tainted by an improper consideration, which is a statutory challenge, not a constitutional one." *Id.* at 16.

Plaintiffs largely acquiesced in this analysis by making the APA the basis for three of the Second Amended Complaint's four counts and by specifically invoking the same concurring opinion footnote in which Justice Thomas explained that the *only* conceivable vehicle for these claims would be the APA. App. 123-24, R.Doc. 87, at 43-44. Plaintiffs now contend on appeal that the APA is non-exclusive and that Justice Thomas's and the district court's focus on the APA "finds no support in the Supreme Court's decision." Br. 31. But Plaintiffs do not actually engage with Justice Thomas's and the district court's reasoning, and they do not confront the Supreme Court's multiple statements emphasizing that no

FHFA action was rendered unconstitutional by the invalid removal restriction.[7] As the district court properly held, the lack of any plausibly alleged constitutional violation by FHFA was an independently sufficient basis to dismiss Count I.

C. Plaintiffs Fail to Challenge Final Agency Action Under the APA (Counts II and III)

Counts II and III respectively allege agency action "contrary to constitutional right, power, privilege, or immunity" under 5 U.S.C. § 706(2)(B) and agency action "without observance of procedure required by law" under § 706(2)(D). App. 120-24, R.Doc. 87, at 40-44. As the district court found, each of these counts fails because such claims require "final agency action" as a prerequisite, yet Plaintiffs allege no "final agency action." App. 366-70, R.Doc. 119, at 22-26.

"Final agency action" 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). A "final agency action" is one that (1) "mark[s] the consummation of the agency's decisionmaking process" and (2) constitutes an event "by which rights or

[7] *See* 141 S. Ct. at 1787 ("[T]here is no reason to regard any of the actions taken by the FHFA in relation to the third amendment as void."), 1788 ("[T]here is no basis for concluding that any head of the FHFA lacked the authority to carry out the functions of the office."), 1788 n.23 ("[T]he unlawfulness of the removal provision does not strip the Director of the power to undertake the other responsibilities of his office…."), 1788 n.24 ("unconstitutional removal restriction" does "not mean that actions taken by such an officer are void *ab initio*").

obligations have been determined, or from which legal consequences will flow." *Sierra Club v. U.S. Army Corps of Eng'rs.*, 446 F.3d 808, 813 (8th Cir. 2006) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).

The gravamen of all of Plaintiffs' claims—Counts II and III no less than the others—is that FHFA, as Conservator, and Treasury should have, but did not, amend the PSPAs to eliminate Treasury's liquidation preferences. Counts II and III contain identical operative language as the other counts about desired actions Plaintiffs contend "would have occurred" under different leadership. App. 120, 121-22, 123, 125, R.Doc. 87, at 40, 42, 43, 45. That leaves no doubt that what Plaintiffs are complaining about is an *absence of action*, not "final agency action."[8]

The only time the words "agency action" appear in Counts II and III (aside from quoting 5 U.S.C. § 706) is in cryptic phrasing in the last sentence of each count, requesting "an order setting aside the agency action maintaining Treasury's liquidation preference." App. 122, 124, R.Doc. 87, at 42, 44. With no antecedent

[8] Plaintiffs state that "[t]he phrasing of Plaintiffs' requested *remedy*" in the affirmative—a mandatory injunction directing elimination of Treasury's liquidation preferences—should not count against them in evaluating whether they challenge final agency action. Br. 42-43. This argument is non-responsive because the district court's holdings regarding Counts II and III did not rely on the phrasing of the remedy. App. 366-70, R.Doc. 119, at 22-26. Rather, the court relied on what the Second Amended Complaint alleges about FHFA's conduct, finding that "plaintiffs' entire theory is premised on a *failure* to act—specifically, the agency's failure to eliminate the liquidation preference." App. 367-68, R.Doc. 119, at 23-24.

for "the agency action," however, reciting those three words does not carry Plaintiffs' "burden of identifying specific federal conduct and explaining how it is 'final agency action.'" *Colo. Farm Bureau Fed'n v. U.S. Forest Serv.*, 220 F.3d 1171, 1173 (10th Cir. 2000). The mere continued existence of Treasury's liquidation preferences, which arose by operation of the 2008 PSPAs and Treasury's infusions of funds to the Enterprises over many years, did not require or involve any agency action in 2017 or 2018.

Plaintiffs' counter-arguments on this score are misdirection and fail to show any error. Plaintiffs first assert that the district court was barred from finding they did not challenge any final agency action because the Supreme Court in *Collins*, and this Court in *Bhatti I*, left claims challenging "actions" taken to "implement" the Third Amendment open for litigation. Br. 39-40 (citing *Collins*, 141 S. Ct. at 1781, 1787, and *Bhatti I*, 15 F.4th at 853, 854). As already discussed, however, Plaintiffs are no longer challenging any "actions" to "implement" the Third Amendment's modification of Treasury's dividends. Rather, they challenge the failure in 2017-2020 to eliminate liquidation preferences that accrued mostly before the Third Amendment. Thus, Plaintiffs' argument only serves to highlight how far their new theory strays from the framework the Supreme Court articulated in *Collins*; it does not relieve them of the obligation to identify a final agency action they are challenging.

Plaintiffs also try to shoehorn Counts II and III into "final agency action" by characterizing them as challenging the fact that FHFA "continued to implement the PSPA provisions … [1] entitling Treasury to senior preferred stock, [2] implementing the third amendment's Net Worth Sweep, and [3] providing for Treasury's liquidation preference." Br. 41. But the counts themselves do not bear out this characterization: they identify no "implementing" action by FHFA during the Trump Administration and do not mention the Third Amendment, "Net Worth Sweep," payment of dividends to Treasury, overpayments of such dividends, or action providing for Treasury's liquidation preference (which occurred back in 2008 when the original PSPAs were entered). App. 120-24, R.Doc. 87, at 40-44.[9] Presented with similar arguments, the district court correctly remarked that "a plaintiff cannot amend his complaint in his briefing." App. 367, R.Doc. 119, at 23 (citing *Fischer v. Minneapolis Pub. Schs.*, 792 F.3d 985, 990 n.4 (8th Cir. 2015)). It is equally axiomatic that Plaintiffs "cannot amend [their] complaint on appeal." *DuBois v. Dooley*, 277 F. App'x 651, 652 (8th Cir. 2008).

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[9] The district court held that any challenge to the provisions creating Treasury's senior preferred stock or liquidation preferences, in addition to not being in the Second Amended Complaint, would be barred by the six-year statute of limitations. App. 366 n.8, R.Doc. 119, at 22 n.8 (citing *Izaak Walton League of Am., Inc. v. Kimbell*, 558 F.3d 751, 758-59 (8th Cir. 2009)). Plaintiffs have not challenged that holding on appeal and thus have waived any contention that the court's analysis was error. *See, e.g.*, *Marksmeier v. Davie*, 622 F.3d 896, 902 n.4 (8th Cir. 2010).

Plaintiffs' brief characterizes Counts II and III as challenging "transfer of value from the Companies' shareholders to Treasury through both quarterly dividends and increases in the liquidation preference." Br. 41. However, the only citation offered in support is to *Collins*, not any record reference to their pleading. Again, at the time the Supreme Court decided *Collins*, the Second Amended Complaint in this case did not exist, so *Collins* cannot possibly be used as a guide to what that Complaint does or does not allege. Plaintiffs evidently made a tactical decision in this remand not to pursue claims targeting quarterly Third Amendment dividends or liquidation preference increases during the period former Director Watt served during the Trump Administration. They may have decided to forgo such challenges because the dividends paid to Treasury under the Third Amendment formula in that period were *less than* those that would have been payable under the pre-Third Amendment formula, and only a minuscule fraction (about 3.5%) of the current total liquidation preferences accrued in that period.[10]

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[10] Specifically, from the first quarter of 2017 through the fourth quarter of 2018, the Enterprises paid Treasury a total of $36.48 billion in dividends under the Third Amendment formula. The amount payable under the pre-Third Amendment formula (10% of total liquidation preferences per annum) would have been $38.90 billion. The liquidation preferences increased by about $10 billion in 2017-2018; the current total liquidation preferences are approximately $290 billion. Data underlying these calculations can be found at a source cited in the Second Amended Complaint, FHFA, Table 2: Dividends on Enterprise Draws from Treasury (2019), https://bit.ly/3tmDbKa (cited in App. 113, R.Doc. 87, at 33), and a companion table, FHFA, Table 1: Quarterly Draws on Treasury Commitments to

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Whatever Plaintiffs' reasons, they are bound by the four corners of the pleading on which they proceeded in district court. *DuBois*, 277 F. App'x at 652.

D. Plaintiffs Fail to Meet the Requirements for Challenging Agency Inaction

A narrow exception to the final agency action requirement allows suits in limited circumstances to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Given that Plaintiffs' counts all revolve around FHFA and Treasury's *inaction*—their failure to eliminate the liquidation preferences—this type of claim would be the closest fit for Plaintiffs' theory. However, Plaintiffs do not and cannot meet either of two prerequisites for this type of claim: that the "agency [1] failed to take a *discrete* agency action [2] that it is *required to take*." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004); *Org. for Competitive Mkts. v. USDA*, 912 F.3d 455, 462 (8th Cir. 2018); *see* Br. 43-44 (acknowledging these requirements).

As Plaintiffs concede, the limitation to "discrete agency action" precludes using the APA to launch "the kind of broad programmatic attack" better left to "the offices of the [agency] or the halls of Congress, where programmatic improvements are normally made." Br. 44 (quoting *Norton*, 542 U.S. at 64). The

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Fannie Mae and Freddie Mac per the Senior Preferred Stock Purchase Agreements (2019), https://bit.ly/3LbI6qw.

limitation to action the agency is "required to take," in tandem, "rules out judicial direction of even discrete agency action that is not demanded by law." *Norton*, 542 U.S. at 65. The Second Amended Complaint here meets neither requirement.

No Discrete Action. Plaintiffs accuse FHFA and Treasury not 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. Plaintiffs' facile assertion that the relief is "straightforward: [t]he liquidation preference is either zero or it is not" (Br. 45) rings hollow in light of their own position that reducing the liquidation preferences would never make sense in isolation, only as one component of a multifaceted housing finance reform plan with many moving parts. *See*, *e.g.*, Br. 20-23.

No Legal Requirement to Take the Action. Even more importantly, no constitutional or statutory provision or other source of law "demanded" that FHFA or Treasury take such actions. As the district court observed, "Plaintiffs point to no statute or rule that would *require* FHFA and Treasury to eliminate the liquidation preference." App. 370-71, R.Doc. 119, at 26-27.[11] That remains true

[11] In fact, the opposite is true: throughout the first year of the Trump Administration it was *unlawful* to "sell, transfer, relinquish, liquidate, divest, or otherwise dispose" of any part of Treasury's preferred stock interests absent authorizing legislation. Pub. L. No. 114-113, § 702(b), 129 Stat. 2242, 3025

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on appeal: Plaintiffs still neglect to identify any such authority. All they muster is the same circular argument they offered to the district court that if they prevail in this case, Defendants will be "legally required" to eliminate the liquidation preferences. Br. 45. The district court correctly rejected this as a "spurious" attempt to "bootstrap" a § 706(1) claim that, if accepted, would render the "legally required" prong meaningless. App. 371, R.Doc. 119, at 27 (observing that any plaintiff who "alleg[es] harm from an agency's failure to act" could extrapolate that "if he wins the lawsuit, the agency will be required to remedy that harm"). Plaintiffs offer no response, failing to engage with the district court's analysis.

These deficiencies apply most squarely to Count IV, which is explicitly styled as a § 706(1) failure-to-act claim. But they also apply to the other counts, which, as the district court noted, all functionally "rest on the agency's failure to act." App. 370, R.Doc. 119, at 26; *see* App. 120, 121-22, 123, 125, R.Doc. 87, at 40, 41-42, 43, 45 (all four counts containing the same central verbiage about actions Plaintiffs contend "would have occurred" under different leadership). The *Norton* requirements would be nugatory if they could be evaded simply by labeling

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(2015); *see also id.* § 702(c) (expressing "Sense of Congress" that agencies should refrain from such actions even after 2018 sunset). An agency cannot be held liable under § 706(1) when legislation stood in the way of the applicable action. *Org. for Competitive Mkts.*, 912 F.3d at 463 (rejecting failure-to-act claim where "appropriations riders … preclud[ed] USDA from finalizing its proposed regulation").

a failure-to-act claim as something else. Courts have not hesitated to apply *Norton* to dismiss claims that amounted to failure-to-act claims in essence despite not being formally pleaded as such. *See Louisiana v. United States*, 948 F.3d 317, 323-24 (5th Cir. 2020); *Nat'l Wildlife Fed'n v. E.P.A.*, 945 F. Supp. 2d 39, 46 (D.D.C. 2013).

Although the district court did not address whether this analysis applies to Count I (the purported constitutional claim), it does so apply, and this Court could independently affirm the dismissal of Count I on that basis. *See Cross v. Fox*, 23 F.4th 797, 802 (8th Cir. 2022) (this Court "may affirm on any ground supported by the record") While Count I is not styled as an APA count, the limitations reflected in *Norton* transcend the APA, which "carried forward the traditional practice prior to its passage, when judicial review was achieved through use of the so-called prerogative writs—principally writs of mandamus under the All Writs Act." *Norton*, 542 U.S. at 63; *Attorney General's Manual on the Administrative Procedure Act* 108 (1947) (explaining the longstanding pre-APA principle that a court cannot "substitute its discretion for that of an administrative agency and thus exercise administrative duties" and that doing so would transgress the separation of powers). "The mandamus remedy was normally limited to enforcement of a specific, unequivocal command," that is, "the ordering of a precise, definite act about which an official had no discretion whatever." *Norton*, 542 U.S. at 63 (cleaned up).[12] Plaintiffs' failure to satisfy these deeply rooted prerequisites for challenging agency inaction is fatal to all of their claims.

CONCLUSION

This Court should affirm the judgment below.

Dated: May 3, 2023

Respectfully submitted,

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[12] *See also Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 614 (1838) (mandamus to compel federal action allowed only where "[t]here is no room for the exercise of any discretion, official or otherwise: all that is shut out by the direct and positive command of the law," and "the act required to be done is, in every just sense, a mere ministerial act"); *Marbury v. Madison*, 5 U.S. (1 Cranch) 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").

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 12,854 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

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As required by Eighth Circuit Rule 28A(h), this brief has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May, 2023, I filed the foregoing Brief of Defendants-Appellees Federal Housing Finance Agency and Sandra L. Thompson with the Clerk of the Court using the CM/ECF System. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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