No. 23-1051

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Minnesota

BRIEF FOR TREASURY APPELLEES

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SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

The Treasury Department respectfully requests oral argument in this case, with 20 minutes allocated to each side. This case concerns whether the district court correctly resolved a remedial issue remanded to it from this Court following the Supreme Court's decision in *Collins v. Yellen*, 141 S. Ct. 1761 (2021). The Court's resolution of that issue has implications for the government's multi-billion-dollar rescue of the mortgage giants Fannie Mae and Freddie Mac. The government believes oral argument could provide substantial assistance to this Court in understanding the issues in the case.

Appellate Case: 23-1051 Page: 2 Date Filed: 05/04/2023 Entry ID: 5273348

TABLE OF CONTENTS

Page

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUE 1

STATEMENT OF THE CASE 3

A. Fannie Mae and Freddie Mac 3

B. The 2008 Housing Crisis and the Recovery Act 3

C. Conservatorship and the Purchase Agreements 5

D. The Third Amendment 6

E. Additional Amendments 7

F. The Supreme Court's Decision in Collins v. Yellen 9

G. Prior Proceedings 11

SUMMARY OF ARGUMENT 15

ARGUMENT 17

I. Standard of Review 17

II. Plaintiffs Have Not Plausibly Alleged That They Were Harmed By The Unconstitutional Removal Restriction 17

A. Treasury's Status as a Counterparty to the Purchase Agreements Makes Clear that the Statutory Removal Restriction Did Not Preclude the President from Directing the Implementation of the Third Amendment as He Deemed Appropriate. 18

Appellate Case: 23-1051 Page: 3 Date Filed: 05/04/2023 Entry ID: 5273348

B. The Actions Taken by the FHFA Directors President Trump Selected Confirm that Plaintiffs' Conjectures Are Without Basis. 23

C. The Absence of Any Support for Plaintiffs' Theory Is Further Illustrated by the Documents on Which They Rely 25

D. Former President Trump's Post-Presidency Letter Does Not Advance Plaintiffs' Theory of Harm and Proposed Remedy 28

E. Plaintiffs Bear the Burden of Establishing that the President Would Have Eliminated Treasury's Liquidation Preferences But For the FHFA Director's Removal Restrictions 31

CONCLUSION 33

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

Appellate Case: 23-1051 Page: 4 Date Filed: 05/04/2023 Entry ID: 5273348

TABLE OF AUTHORITIES

Cases: **Page(s)**

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 27

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 27

Beverly v. United States,
468 F.2d 732 (5th Cir. 1972) 30

Bhatti v. FHFA,
15 F.4th 848 (8th Cir. 2021) 11

Collins v. Mnuchin,
938 F.3d 553 (5th Cir. 2019), *rev'd on other grounds*,
141 S. Ct. 1761 (2021) 16, 18, 19, 23

Collins v. Yellen:
27 F.4th 1068 (5th Cir. 2022) 16, 23
141 S. Ct. 1761 (2021) 2, 3, 4, 5, 6, 7, 8, 9, 10, 15, 18, 20, 24, 27, 28, 29, 30, 31

Dunbar v. Wells Fargo Bank,
709 F.3d 1254 (8th Cir. 2013) 17

Perry Capital LLC v. Lew,
70 F. Supp. 3d 208 (D.D.C. 2014) 5

Perry Capital LLC v. Mnuchin,
864 F.3d 591 (D.C. Cir. 2017) 4, 5

Saxton v. FHFA,
901 F.3d 954 (8th Cir. 2018) 9

Seila Law LLC v. CFPB,
140 S. Ct. 2183 (2020) 10

United States v. Chemical Found.,
272 U.S. 1 (1926) 30

Appellate Case: 23-1051 Page: 5 Date Filed: 05/04/2023 Entry ID: 5273348

Statutes:

Administrative Procedure Act (APA):
5 U.S.C. § 706(1) 14
5 U.S.C. § 706(2) 14

Housing and Economic Recovery Act of 2008,
Pub. L. No. 110-289, 122 Stat. 2654 4
12 U.S.C. § 4511 .... 1, 4
12 U.S.C. § 4512(a) 4
12 U.S.C. § 4512(b)(1) 4
12 U.S.C. § 4512(b)(2) 4, 9
12 U.S.C. § 4512(f) 4

12 U.S.C. § 1455(*l*)(1)(A) 1, 5

12 U.S.C. § 1455(*l*)(2)(A) 5

12 U.S.C. § 1719(g)(1)(A) 1, 5

12 U.S.C. § 1719(g)(2)(A) 5

12 U.S.C. § 4617(a) 1, 4

12 U.S.C. § 4617(f) 9, 14

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

28 U.S.C. § 2201 1

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85 Fed. Reg. 82,150 (Dec. 17, 2020) 23

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Letter from Steven T. Mnuchin, Secretary of the Treasury, U.S. Dep't of the Treasury, to Melvin L. Watt, Director, FHFA (Dec. 21, 2017), https://perma.cc/8EUJ-V5DE. 7

Office of Inspector Gen., FHFA, WPR-2013-002, *Analysis of the 2012 Amendments to the Senior Preferred Stock Purchase Agreements* (2013) 3-4

On the Hill Episode 10: Craig Phillips, Former Counselor to U.S. Secretary of the Treasury, SitusAMC (May 2021), https://www.situsamc.com/resources-insights/podcasts/hill-episode-10-craig-phillips-former-counselor-us-secretary-treasury 21

U.S. Dep't of the Treasury, *Housing Reform Plan* (Sept. 2019), https://perma.cc/VPS6-6974 .... 25, 26

U.S. Dep't of the Treasury, *Treasury Department and FHFA Modify Terms Of Preferred Stock Purchase Agreements for Fannie Mae and Freddie Mac* (Sept. 30, 2019), https://go.usa.gov/xF6NS 8

Appellate Case: 23-1051 Page: 7 Date Filed: 05/04/2023 Entry ID: 5273348

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 2201. On December 16, 2022, the district court granted defendants' motion to dismiss the suit. App. 373; R. Doc. 119. Plaintiffs timely filed a notice of appeal on January 9, 2023. App. 375; R. Doc. 121. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

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

After the Director of FHFA placed the enterprises into conservatorship, Treasury immediately purchased senior preferred stock in each entity and committed to provide up to $100 billion in taxpayer funds to each enterprise to avoid insolvency. Between 2008 and 2012, the preferred stock purchase agreements (Purchase

Agreements) were amended three times. The first two amendments substantially increased Treasury's capital commitment to the enterprises. The Third Amendment replaced a fixed dividend obligation with a variable dividend equal to the amount, if any, by which the enterprises' net worth exceeds a capital buffer.

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

The issue presented in this appeal is whether the district court correctly concluded that plaintiffs had failed to plausibly allege that the removal restriction

harmed them by preventing President Trump from writing off the Treasury Department's financial interests in the enterprises.

STATEMENT OF THE CASE

A. Fannie Mae and Freddie Mac

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

B. The 2008 Housing Crisis and the Recovery Act

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

The enterprises lost more in 2008 ($108 billion) than they had earned in the past 37 years combined ($95 billion). *See Collins*, 141 S. Ct. at 1771 (citing Office of Inspector Gen., FHFA, WPR-2013-002, *Analysis of the 2012 Amendments to the Senior*

Preferred Stock Purchase Agreements 5 (2013)). As a result, the enterprises faced capital shortfalls, and private investors were unwilling to provide Fannie Mae and Freddie Mac with the capital they needed to weather their losses and avoid receivership and liquidation. *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 601 (D.C. Cir. 2017).

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

Recognizing that an enormous commitment of taxpayer funds could be required, Congress also amended the enterprises' statutory charters to authorize Treasury to "purchase any obligations and other securities issued by" the enterprises upon "Treasury's specific determination that the terms of the purchase would 'protect

Appellate Case: 23-1051 Page: 11 Date Filed: 05/04/2023 Entry ID: 5273348

the taxpayer,'" *Perry Capital*, 864 F.3d at 600 (quoting 12 U.S.C. §§ 1455(*l*)(1)(A), 1719(g)(1)(A)), and to "exercise any rights received in connection with such purchases." 12 U.S.C. §§ 1455(*l*)(1)(A), (2)(A), 1719(g)(1)(A), (2)(A).

C. Conservatorship and the Purchase Agreements

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

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

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

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

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

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

D. The Third Amendment

In August 2012, Treasury and FHFA (headed by Acting Director Edward DeMarco) agreed to modify the Purchase Agreements for a third time. *Collins*, 141 S. Ct. at 1773. This "Third Amendment" broke the draws-to-pay-dividends cycle by replacing the previous fixed dividend obligation with a variable dividend equal to the

Appellate Case: 23-1051 Page: 13 Date Filed: 05/04/2023 Entry ID: 5273348

amount, if any, by which the enterprises' net worth for the quarter exceeded a capital buffer. *Id.* at 1774. The Third Amendment thus ensured that the enterprises would not deplete Treasury's vital capital commitment prematurely and that the enterprises would play their central role in the housing market for the foreseeable future. *See id.* at 1777 (stating that the Third Amendment assured "a stable secondary mortgage market"). The Third Amendment did not amend or alter Treasury's liquidation preference rights.

E. Additional Amendments

In May 2013, President Obama nominated Melvin Watt to serve as FHFA Director; he was confirmed by the Senate and sworn into office on January 6, 2014. *See* App. 93; R. Doc. 87, at 13. In 2017, Director Watt and the Secretary of the Treasury negotiated an amendment to the Purchase Agreements under which Treasury agreed to permit the enterprises to retain up to $3 billion each in internal capital, rather than paying those funds to Treasury as cash dividends. *See* App. 186; R. Doc. 100-2, at 2.[2] In exchange for the forgone cash dividends, Treasury received a $3 billion increase in its liquidation preference for each enterprise. *See* App. 187; R. Doc. 100-2, at 3.

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

Appellate Case: 23-1051 Page: 14 Date Filed: 05/04/2023 Entry ID: 5273348

Director Watt served until his term expired in January 2019. App. 349; R. Doc. 119, at 5. At the end of Director Watt's term, President Trump designated Joseph Otting to serve as Acting Director. *Id.* That same month, President Trump nominated Mark Calabria to serve as Director. *Id.* The Senate confirmed Calabria as Director in April 2019. *Id.*

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

In January 2021, Treasury and FHFA agreed to another amendment to the Purchase Agreements. Pursuant to that amendment, Treasury and FHFA agreed to suspend all quarterly cash dividend payments until the enterprises build sufficient capital to meet specified thresholds. *Collins*, 141 S. Ct. at 1774. Once those thresholds are met, cash dividend payments to Treasury will resume. *Id.* at 1774-75.

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

Appellate Case: 23-1051 Page: 15 Date Filed: 05/04/2023 Entry ID: 5273348

In the meantime, the dividends that the enterprises would have paid to Treasury in cash under the Third Amendment are added to Treasury's liquidation preference. *Id.*

F. The Supreme Court's Decision in *Collins v. Yellen*

In *Collins v. Yellen*, 141 S. Ct. 1761 (2021), enterprise shareholders challenged the Third Amendment on the grounds that (1) FHFA had exceeded its statutory authority in agreeing to the amendment, and (2) Acting Director DeMarco was unconstitutionally insulated from Presidential control when he agreed to the amendment. The Supreme Court rejected both claims and declined to set the Third Amendment aside.

The Supreme Court first held that FHFA lawfully exercised its statutory conservatorship authority when it agreed to the Third Amendment and that, as a result, the shareholders' statutory challenge to the Third Amendment was barred by the Recovery Act's "anti-injunction" provision. *Collins*, 141 S. Ct. at 1775-78; 12 U.S.C. § 4617(f). This Court had previously reached the identical conclusion in a lawsuit filed by other enterprise shareholders. *See Saxton v. FHFA*, 901 F.3d 954 (8th Cir. 2018).

The Supreme Court then addressed the constitutionality of the statutory restriction on the President's authority to remove FHFA's Senate-confirmed Director. *Collins*, 141 S. Ct. at 1783-87. That provision states that "[t]he Director shall be appointed for a term of 5 years, unless removed before the end of such term for cause by the President." 12 U.S.C. § 4512(b)(2). The Supreme Court held that, under its

prior decision in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), Congress could not, consistent with the separation of powers, limit the President's authority to remove FHFA's Director, and the restriction was therefore invalid. *Collins*, 141 S. Ct. at 1783-87.

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

The Supreme Court also held that, with respect to the later implementation of the Third Amendment by confirmed Directors, there was "no reason to regard any of the actions taken by the FHFA in relation to the third amendment as void." *Collins*, 141 S. Ct. at 1787. However, because it remained "possible" that actions taken by Senate-confirmed Directors while implementing the Third Amendment could have resulted in harm to shareholders, the Supreme Court remanded the case for the district court and this Court to decide whether the shareholders were entitled to retrospective relief. *Id.* at 1789.

G. Prior Proceedings

1. Plaintiffs, who are three enterprise shareholders, filed this suit challenging the Third Amendment in June 2017. In their first amended complaint, they asserted that the Third Amendment should be set aside because (1) the President lacked the authority to remove FHFA's Acting Director at will at the time the Third Amendment was signed; (2) Acting Director DeMarco was serving in violation of the Appointments Clause when he signed the Third Amendment; and (3) Congress's delegation of authority to FHFA as conservator of the enterprises violated the non-delegation doctrine. *See* R. Doc. 1 (initial complaint); R. Doc. 27 (first amended complaint). The district court dismissed plaintiffs' complaint in its entirety. R. Doc. 70.

On appeal, this Court affirmed the district court's dismissal of plaintiffs' Appointments Clause and nondelegation claims. *Bhatti v. FHFA*, 15 F.4th 848, 852-53, 854-55 (8th Cir. 2021). In keeping with the Supreme Court's instructions in *Collins*, this Court remanded plaintiffs' removal authority claim to the district court for it to determine whether plaintiffs could establish that the removal restriction caused them compensable harm during the implementation of the Third Amendment by Senate-confirmed FHFA Directors. *Id.* at 854.

2. Following remand to the district court, plaintiffs filed a second amended complaint. *See* App. 81-127; R. Doc. 87. In their second amended complaint, plaintiffs assert a constitutional claim and three Administrative Procedure Act (APA)

claims, all premised on the same theory that the unconstitutional removal restriction harmed them because it allegedly prevented President Trump from "eliminat[ing] . . . the 'liquidation preference' on the Treasury Department's senior preferred stock." App. 82, 119-126; R. Doc. 87, at 2, 39-46. To remedy that purported harm, they seek an injunction "placing plaintiffs in the position they would be in but for the constitutional violation" including by "direct[ing] Defendants to either (a) reduce the liquidation preference on Treasury's senior preferred stock to zero and end further increases to the liquidation preference except as necessary to offset any further draws on Treasury's funding commitment; or (b) convert Treasury's senior preferred stock to common stock." App. 126; R. Doc. 87, at 46.

The district court granted FHFA's and Treasury's motions to dismiss the second amended complaint. App. 347; R. Doc. 119, at 3. The court rejected plaintiffs' assertion that the removal restriction prevented President Trump from eliminating Treasury's liquidation preference. App. 363; R. Doc. 119, at 19. The court dismissed as "far too speculative" plaintiffs' allegation that President Trump wished to write-off Treasury's liquidation preference as part of a plan to end the conservatorships. The court emphasized that none of the materials plaintiffs cited suggested that the former President "had ever *contemplated*" ending the conservatorships by writing-off Treasury's liquidation preference in the enterprises, "much less [that he] regarded that step as necessary or important." *Id.* The court also noted that, under President Trump's chosen FHFA Director (Mark Calabria), "FHFA

twice agreed to *increase* the liquidation preference," an "inconvenient fact" that could not be squared with plaintiffs' assertion that President Trump wished to eliminate the liquidation preference. App. 368; R. Doc. 119, at 24.

The court further concluded that, even assuming President Trump wished to eliminate Treasury's liquidation preference (an assumption unsupported by the materials cited in plaintiffs' amended complaint), plaintiffs' "own allegations" made clear that the removal restriction did not prevent him from doing so. App. 364; R. Doc. 119, at 20. The court noted, for example, that plaintiffs cited an interview with a former Trump Administration Treasury official who opined that the Trump Administration decided to wait for a Trump-appointed FHFA Director to pursue ending the conservatorships. *Id.* The court emphasized that, in that same interview, the official stated that "the views of Watt (the holdover Obama director) 'w[ere] not terribly different than Director Calabria's,' that Watt thought the conservatorships should end, 'felt very strongly' that the Net Worth Sweep should end, and 'would have actually done almost anything [the Trump Administration] wanted to do.'" App. 364-65, R. Doc. 119, at 20-21 (alteration in original). In other words, plaintiffs' materials themselves did not support the conclusion that the removal restriction and Director Watt's tenure prevented Trump from eliminating Treasury's liquidation rights in the enterprises, had President Trump been interested in doing so. *Id.*

In short, the court dismissed as "rank speculation" plaintiffs' contention that President Trump had decided to write-off Treasury's liquidation preference as part of

Appellate Case: 23-1051 Page: 20 Date Filed: 05/04/2023 Entry ID: 5273348

a settled plan to end the conservatorships, and the court likewise found implausible plaintiffs' assertion that the removal restriction had prevented the President from doing so. App. 364; R. Doc. 119, at 20.

The district court also found that plaintiffs' three APA claims failed for additional, independent reasons. App. 365-73; R. Doc. 119, at 21-29. The court found that two of the claims, brought pursuant to 5 U.S.C. § 706(2), failed because plaintiffs had not identified any final agency action to which § 706(2) might apply. App. 366-70; R. Doc. 119, at 22-26; *see also* 5 U.S.C. § 706(2) (authorizing courts to "hold unlawful and set aside agency action"). The court concluded that plaintiffs' challenges were directed at FHFA's failure to eliminate the liquidation preference and that such agency *inaction* was not subject to review under 5 U.S.C. § 706(2). App. 366-70; R. Doc. 119, at 22-26. The court also rejected plaintiffs' APA claim brought pursuant to 5 U.S.C. § 706(1), which authorizes courts to "compel agency action unlawfully withheld." App. 370-71; R. Doc. 119, at 26-27. Though § 706(1) targets agency inaction, the court held that plaintiffs' § 706(1) claim failed because plaintiffs had not demonstrated that FHFA was under a legal obligation to eliminate the liquidation preference, as § 706(1) requires. *Id.* Finally, the court held that all three of plaintiffs' APA claims were barred by the Recovery Act's anti-injunction provision, 12 U.S.C. § 4617(f). App. 371-73; R. Doc. 119, at 27-29.

SUMMARY OF ARGUMENT

In its decision in *Collins v. Yellen*, 141 S. Ct. 1761 (2021), the Supreme Court concluded that the statutory provision limiting the President's authority to remove FHFA's Senate-confirmed Director was unconstitutional, but the Court declined to provide plaintiffs with the primary remedy they sought: the invalidation of the Third Amendment to the preferred stock Purchase Agreements. In light of that decision, this Court remanded this case to the district court to provide plaintiffs with an opportunity to show that they were harmed by the statutory provision during the later implementation of the Third Amendment. On remand, plaintiffs claim that the unconstitutional provision purportedly prevented President Trump from eliminating Treasury's liquidation rights in the enterprises and seek an injunction that would zero-out Treasury's liquidation preference either directly or by requiring Treasury to convert its preferred stock to less valuable common stock.

The district court properly rejected plaintiffs' theory of harm and their proposed remedy. The premise of plaintiffs' asserted injury is that President Trump wanted to reduce dramatically *Treasury*'s liquidation preference in the enterprises but was prevented from doing so by the removal restriction limiting his authority to remove *FHFA*'s Director. But President Trump controlled Treasury's interest in the enterprises at all times and could have directed the Secretary of the Treasury to reduce that interest, if he so desired. And there is no indication that any FHFA Director

Appellate Case: 23-1051 Page: 22 Date Filed: 05/04/2023 Entry ID: 5273348

would have objected to such a course, nor any plausible reason why any Director would have done so.

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

Plaintiffs' claim that the Trump Administration had settled on a plan to write-off Treasury's liquidation preference is also belied by the very documents on which plaintiffs rely, including a post-Presidency letter that former President Trump

purportedly sent to Senator Rand Paul. App. 129; R. Doc. 87-1, at 2. Those documents not only make clear that the Administration had not settled on a specific plan, they also repeatedly emphasize the importance of protecting Treasury's economic interests in the enterprises. No plausible reading of those documents supports the notion that former President Trump planned to eliminate Treasury's valuable liquidation preference, at no cost to the enterprises and with no corresponding benefit to Treasury.

ARGUMENT

I. Standard of Review

This Court reviews a district court's grant of a motion to dismiss de novo. *See Dunbar v. Wells Fargo Bank*, 709 F.3d 1254, 1256 (8th Cir. 2013).

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

Plaintiffs speculate that, were it not for the Recovery Act's removal restriction, President Trump would have "eliminate[d] the liquidation preference on Treasury's senior preferred stock." Br. 21. That conjecture cannot be squared with the former President's power to issue directions to the Secretary of the Treasury or with the actions and statements of the former President's own confirmed FHFA Director and other Administration officials.

Appellate Case: 23-1051 Page: 24 Date Filed: 05/04/2023 Entry ID: 5273348

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

The President's control over the Secretary of the Treasury—FHFA's contractual counterparty—negates any attempt by plaintiffs to show that the Recovery Act's removal restriction prevented the President from altering the implementation of the Third Amendment in a manner that would have benefited the enterprises and their shareholders at Treasury's expense. *See Collins v. Mnuchin*, 938 F.3d 553, 594 (5th Cir. 2019) (en banc) (concluding that, in light of Treasury's status as a contractual counterparty, "[t]his is thus a unique situation where we need not speculate about whether [there was] appropriate presidential oversight"), *rev'd on other grounds*, 141 S. Ct. 1761 (2021); *see also Collins*, 141 S. Ct. at 1802 (Kagan, J., concurring in part and concurring in the judgment) (noting that Treasury's involvement as a counterparty "seems sufficient to answer the question the Court kicks back").

Plaintiffs theorize that, absent the removal restrictions, President Trump would have appointed an FHFA Director who would have renegotiated the Purchase Agreements between Treasury and the enterprises to "eliminate the liquidation preference on Treasury's senior preferred stock." Br. 21 (quoting App. 102; R. Doc. 87, at 22.). They declare that this might have been "accomplished in either of two ways: (1) by writing down the liquidation preference to zero and promising not to further increase the liquidation preference in the absence of additional draws on

Appellate Case: 23-1051 Page: 25 Date Filed: 05/04/2023 Entry ID: 5273348

Treasury's funding commitment; or (2) by converting Treasury's senior preferred stock to common stock." Br. 21-22 (quoting App. 102; R. Doc. 87, at 22.).

The Recovery Act's removal restriction did not impair President Trump's ability to take that action. Had he wished to accomplish that end, he could have directed the Secretary of the Treasury to give up Treasury's dividend rights in the enterprises, to eliminate or reduce its liquidation preference, or to trade in its preferred shares for less valuable common shares. The President had "plenary authority" over Treasury's stake in the enterprises and could have reduced that stake at any time if he so desired. *Collins*, 938 F.3d at 594.

Plaintiffs do not dispute that the President could have directed Treasury to take these or similar actions. They urge, however, that the President's will was thwarted by the removal restriction because President Trump purportedly wished to take actions to end the conservatorships in "*a particular way*" that required FHFA's cooperation. (Br. 50). This speculation fails on its own terms. The "particular way" plaintiffs allege that President Trump wanted to end the conservatorships was through a write-down of Treasury's liquidation preference. That action did not require FHFA's cooperation. Even making the improbable assumption that FHFA would have opposed an attempt by Treasury to forgo a contractual benefit at no cost to the enterprises, nothing would have prevented Treasury from doing so unilaterally. For years, Treasury voluntarily waived the periodic commitment fee to which it was entitled under the initial stock

purchase agreements, *see Collins*, 141 S. Ct. at 1773 n.4, and it could have done the same with other contractual benefits.

Moreover, plaintiffs provide no basis for their speculation that Director Watt, or any FHFA Director, would have objected to an offer that would have benefited the enterprises by relieving them of contractual obligations at no cost to themselves. Plaintiffs declare that the "principal practical effect" of an injunction eliminating Treasury's liquidation preference "would be to put Fannie and Freddie in a *stronger* financial position." Br. 37. That was clearly the goal of Director Watt; indeed, the plaintiff shareholders in *Collins* emphasized that Director Watt described the Third Amendment as "especially irresponsible" because it limited the amount of internal, private capital the enterprises could retain. *See* Supplemental En Banc Brief of Plaintiffs-Appellants at 31, *Collins*, 938 F.3d 553 (5th Cir. Dec. 12, 2018) (No. 17-20364) (quoting FHFA, *Statement of Melvin L. Watt, Director, FHFA, Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs* (May 11, 2017), https://perma.cc/PA98-J2EX).

In the absence of any support for their hypothesis, plaintiffs cite statements made by a former Treasury official, Craig Phillips, in a press interview in which Mr. Phillips stated that some members of the Trump Administration had decided it was preferrable to wait until the end of Director Watt's tenure to pursue housing and enterprise reform issues. Br. 23; *see also* App. 109; R. Doc. 87, at 29. The statement makes no reference to Treasury's liquidation preference, much less to a desire to

eliminate that liquidation preference. Nor does it suggest that Director Watt was an obstacle to such a goal. Indeed, as the district court noted, in the same interview Mr. Phillips emphasized that Director Watt's views on the conservatorships were "'not terribly different than [current] Director Calabria's,' that Watt thought the conservatorships should end, 'felt very strongly' that the Net Worth Sweep should end, and 'would have actually done almost anything [Treasury] wanted to do.'" App. 364-65; R. Doc. 119 at 20-21 (quoting *On the Hill Episode 10: Craig Phillips, Former Counselor to U.S. Secretary of the Treasury*, SitusAMC, 10:28-10:52 (May 2021), https://www.situsamc.com/resources-insights/podcasts/hill-episode-10-craig-phillips-former-counselor-us-secretary-treasury). And plaintiffs certainly have offered no reason to believe that Director Watt would have been reluctant to accept a cost-free write-off of Treasury's interest in the enterprises.

Plaintiffs are on no firmer ground in urging that Treasury's ability to unilaterally forgo its liquidation preference would have been insufficient to accomplish that hypothetical aim (Br. 49-50) because eliminating the liquidation preference was the last of "five key steps" that they claim would have been necessary to recapitalize the enterprises and allow them to exit the conservatorships. *See* App. 111-14; R. Doc. 87 at 31-34 (delineating the five steps). Those purported five steps are (1) end the net worth dividend; (2) cease paying Treasury quarterly cash dividends; (3) develop a regulatory framework for determining the amount of capital the enterprises would require post-conservatorship; (4) hire financial advisors to develop regulatory and

business plans for raising capital; and (5) eliminate Treasury's liquidation preference. App. 112-14; R. Doc. 87, at 32-34. Plaintiffs do not explain why these steps had to be undertaken sequentially, nor why President Trump could not have accomplished the first, second, and fifth step by simply ordering the Secretary of the Treasury to reduce or forgo Treasury's interests in the enterprises. The President plainly could have done so, but he did not.

Moreover, even if FHFA's approval was required for any step of the plan, plaintiffs again offer no reason to conclude that Director Watt opposed any of those steps. With regard to the first two steps, as noted, Director Watt favored amending the Purchase Agreements to allow the enterprises "to retain the profits they were earning and build their net worth back up rather than being forced to hand every dollar over to Treasury" and "to build[] capital." App. 112; R. Doc. 87, at 32. Like any FHFA Director, he would have had every reason to welcome an amendment to the Purchase Agreements that reduced the enterprises' dividend payments to Treasury and allowed them to increase their capital. And, in fact, Director Watt negotiated such an amendment with President Trump's Treasury Secretary in December 2017. *See supra* p. 7 (describing amendment to the Purchase Agreements under which Treasury agreed to forgo cash dividends so that the enterprises could retain additional capital). With regard to plaintiffs' third "step," Director Watt promulgated a proposed rule governing "the amount of capital that would be required once [the enterprises] were under private control," App. 113; R. Doc. 87, at 33. *See* 83 Fed. Reg.

33,312 (July 17, 2018). That proposal later supplied the "foundation" for the final rule FHFA promulgated under Director Calabria. 85 Fed. Reg. 82,150, 82,150 (Dec. 17, 2020). And there is no reason to assume Director Watt would not have undertaken the minimal step of "hir[ing] financial advisors" to explore the possibility of a stock offering, plaintiffs' proposed fourth step. App. 113; R. Doc. 87, at 33.

In sum, President Trump could have instructed Treasury to reduce or eliminate Treasury's liquidation preference without the agreement of FHFA, and there is also no reason at all to conclude that Director Watt would have opposed such action.

B. The Actions Taken by the FHFA Directors President Trump Selected Confirm that Plaintiffs' Conjectures Are Without Basis.

The actions of the FHFA Directors appointed by President Trump following Director Watt similarly make clear that there is no basis for plaintiffs' speculation that President Trump would have eliminated Treasury's liquidation preferences but for the Recovery Act's removal restriction. *See Collins*, 938 F.3d at 594; *see also Collins v. Yellen*, 27 F.4th 1068, 1069-70 (5th Cir. 2022) (Haynes, J., dissenting). President Trump appointed two Directors during his Administration: an Acting Director in January 2019 and a Senate-confirmed Director in April 2019. *Collins*, 938 F.3d at 594. If President Trump had wished to bring about the significant reduction in Treasury's rights that plaintiffs propose, he would have "install[ed] someone who would carry out th[at] policy vision." *Id.* He did not. The Directors appointed by President Trump, together with Treasury, "consistently reevaluated" the Purchase Agreements,

Collins, 141 S. Ct. at 1781. But at no point did either Director seek to negotiate a change in Treasury's rights along the lines plaintiffs propose, although, in plaintiffs' view, Treasury would readily have accepted such a proposal.

Under the confirmed Director chosen by President Trump (Mark Calabria), FHFA and Treasury twice altered the terms of Purchase Agreements. In both instances the Director selected by the President took no steps to decrease Treasury's liquidation preferences. On the contrary, in the first instance, in exchange for allowing the enterprises to retain additional capital, Treasury received a $22 billion *increase* in its liquidation preference in Fannie Mae and a $17 billion increase in its liquidation preference for Freddie Mac. In that letter agreement of September 27, 2019, the enterprises' internal capital buffers were increased from $3 billion to $25 billion (for Fannie Mae) and $20 billion (for Freddie Mac). *See supra* p. 8.

The second alteration also resulted in an increase in Treasury's liquidation preferences in the two enterprises. In January 2021, the parties agreed to amend the Purchase Agreements by suspending all quarterly cash dividend payments to Treasury until the enterprises build sufficient capital to meet specified thresholds. *Collins*, 141 S. Ct. at 1774. Once those thresholds are met, cash dividend payments to Treasury will resume. *Id.* at 1774-75. In the meantime, however, the dividends that the enterprises would have paid to Treasury in cash under the Third Amendment are added to Treasury's liquidation preference. *Id.* The Director actually chosen by the President, in contrast to plaintiffs' hypothetical Director, did not seek to reduce "the

Appellate Case: 23-1051 Page: 31 Date Filed: 05/04/2023 Entry ID: 5273348

liquidation preference [on Treasury's senior preferred stock] to zero" and end further increases to the liquidation preference or to "exchang[e]" some or all of Treasury's senior preferred stock "for common stock," Br. 21-22 (quotation marks omitted). President Trump's selected Director instead renegotiated the Purchase Agreements in a way that increases the enterprises' internal, non-Treasury-funded capital in exchange for an increase in Treasury's liquidation rights.

C. The Absence of Any Support for Plaintiffs' Theory Is Further Illustrated by the Documents on Which They Rely.

Plaintiffs' contention that President Trump had settled on a plan to eliminate Treasury's liquidation preference in the enterprises is also undermined by the very documents on which plaintiffs rely. In asserting that President Trump had decided to write-off Treasury's liquidation preference, plaintiffs rely primarily on a 2019 Housing Reform Plan issued by the Treasury Department. *See* Br. 20; App. 99; R. Doc. 87, at 19 (citing U.S. Dep't of the Treasury, *Housing Reform Plan* (Sept. 2019), https://perma.cc/VPS6-6974 (Housing Reform Plan)).

That Plan does not suggest that Treasury had decided to forgo its liquidation preference or other rights at no cost to enterprises and instead discusses various ways the enterprises might be recapitalized during the conservatorships. Housing Reform Plan 27. In that discussion, it identifies "[e]liminating all or a portion" of Treasury's liquidation preference or "exchanging all or a portion of that [liquidation preference] for common stock or other interests in the [enterprise]" as one possible "option[]"

Appellate Case: 23-1051 Page: 32 Date Filed: 05/04/2023 Entry ID: 5273348

among five "[p]otential approaches to recapitalizing a[n] [enterprise]." *Id.* The other options included "[a]djusting the variable dividend on Treasury's senior preferred shares" or "[p]lacing the [enterprise] in receivership." *Id.* The Plan did not endorse any of the options or discuss their feasibility. Instead, it recognized that each option "poses a host of complex financial and legal considerations" that would require "careful consideration." *Id.*

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

Plaintiffs' reliance on the January 2021 letter agreement between Treasury and FHFA (headed at the time by President Trump's chosen Director Mark Calabria) similarly illustrates the absence of any support for their speculation. Br. 24-25. As discussed above, in the letter, FHFA and Treasury agreed to amend the Purchase

Agreements in a manner that increased Treasury's liquidation preference, defeating any suggestion that the former President wished to achieve the opposite result. Disregarding the significance of the agreement, plaintiffs instead cite a section of the agreement entitled "Commitment to Develop Proposal to Resolve Conservatorship," under which Treasury and FHFA "commit[ted] to work" on a proposal "to establish a timeline and process to terminate the conservatorship and raise capital." Br. 25 (quoting App. 206; R. Doc. 100-2, at 23.); App. 206; R. Doc. 100-2, at 23. That section does not state, nor even suggest, that Treasury had settled on a plan that involved writing-off its valuable liquidation preference. To the contrary, it makes clear that any proposal developed by the parties would have to "fairly compensate[] taxpayers for the support they have provided and continue to provide" and "ensure[] Treasury is appropriately compensated." App. 206; R. Doc. 100-2, at 23.

Plaintiffs do not advance their argument by asserting that the Supreme Court's decision in *Collins* does not require "some heightened showing of certainty" of harm. Br. 38. *Collins* requires plaintiffs challenging an unlawful removal restriction to establish that the provision caused them compensable harm. *Collins*, 141 S. Ct. at 1789. To survive a motion to dismiss, plaintiffs' allegations must cross "the line between possibility and plausibility of entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). Plaintiffs' allegations do not even reach the point of possibility: Every circumstance

on which plaintiffs attempt to rely demonstrates that there was no presidential intention to eliminate Treasury's liquidation preference.

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

As discussed, all evidence from the period of the Trump Presidency makes clear that the former President could have eliminated Treasury's liquidation preference and that his Administration had no intention of doing so.

Plaintiffs thus place considerable emphasis on a post-Presidency, November 2021 letter from the former President to Senator Rand Paul which states that he would have fired Director Watt absent the removal restriction. *See* Br. 20-22, 32-34. Plaintiffs' reliance on this letter fails in all respects.

As plaintiffs note, the Supreme Court suggested that the shareholders in *Collins* might be able to establish harm by showing "that the President had made a public statement expressing displeasure with actions taken by a Director and had asserted that he would remove the Director if the statute did not stand in the way," *Collins*, 141 S. Ct. at 1789. The Supreme Court referred to the possibility of a statement the President "had made" during his time in office, not to statements made in a private letter a year after leaving office. *Id.*

Plaintiffs' reliance on the letter is particularly anomalous because it corresponds to no actions or statements made during the former President's Administration. Plaintiffs acknowledge that they are unable to muster any contemporaneous "public

Appellate Case: 23-1051 Page: 35 Date Filed: 05/04/2023 Entry ID: 5273348

statement[s]" from the President "expressing displeasure with actions taken by [Watt]" with respect to the conservatorships, the Purchase Agreements, or the implementation of the Third Amendment, and "assert[ing] that he would remove the Director if the statute did not stand in the way." *Collins*, 141 S. Ct. at 1789. And, as discussed, all evidence demonstrates that the Trump Administration at no time sought to eliminate Treasury's liquidation preference or settled on a plan to do so (and, in fact, did the opposite).

Even on its own terms, the November 2021 letter from former President Trump does not advance plaintiffs' argument. The letter does not reference Treasury's liquidation preference, let alone state that the President would have eliminated that preference at no cost to the enterprises. Moreover, as discussed above, President Trump could have directed the Secretary of the Treasury to sell Treasury's stock in the companies or otherwise reduce Treasury's interest at any time. He did not do so, and his post-Presidency letter confirms that he had no interest in foregoing Treasury's stake in the enterprises without compensation. Instead, he states that his "Administration would have . . . sold the government's common stock in these companies at a huge profit." Br. 10 (quotation marks omitted). That assertion is at odds with plaintiffs' contention that the former President wanted simply to write-

off Treasury's valuable liquidation preference or forgo its more valuable preferred shares.[4]

There is also little basis for assuming that President Trump considered himself bound by the Recovery Act's removal restriction. The Trump Administration did not defend the constitutionality of the removal restriction and argued before various courts, including the Supreme Court, that the provision was invalid and unenforceable. *See, e.g.*, *Collins*, 141 S. Ct. at 1775. The Administration was of the view, later affirmed by the Supreme Court, that the President at all times had plenary authority to remove FHFA's Director if he so desired.

Consistent with that understanding, plaintiffs have not demonstrated that "the President had attempted to remove [Director Watt] but was prevented from doing so by a lower court decision holding that he did not have 'cause' for removal." *Collins*, 141 S. Ct. at 1789. Nor, as noted, have plaintiffs identified any contemporaneous statements from the President "expressing displeasure with actions taken by [Watt]"

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[4] Plaintiffs contend that the former President's letter is entitled to a "presumption of regularity" and should therefore be taken at face value. Br. 27-28 (quoting *United States v. Chemical Found.*, 272 U.S. 1, 14-15 (1926)). The "presumption of regularity" attaches to "the official acts of public officers"—*i.e.*, acts undertaken in the discharge of their "official duties." *Beverly v. United States*, 468 F.2d 732, 743 (5th Cir. 1972) (quoting *Chemical Found.*, 272 U.S. at 14). Plaintiffs cite no support for the proposition that the presumption applies to a private letter sent by a former government official after his government service has ended. In any event, as explained above, even taken at face value, the letter fails to support plaintiffs' claim that President Trump would have written-off Treasury's interest in the enterprises but was prevented by the removal restriction from doing so.

Appellate Case: 23-1051 Page: 37 Date Filed: 05/04/2023 Entry ID: 5273348

and "assert[ing] that he would remove the Director if the statute did not stand in the way." *Id.* Despite his Administration's belief that he had the authority to do so, President Trump never attempted to remove the Director or order the Director to take specific actions. Nor is there any indication that he was prevented from doing so. Those facts also negate the underlying premise of plaintiffs' alleged injury.

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

Plaintiffs cannot salvage their position by insisting that the government bears the "burden" of proving that a constitutional violation caused no harm where a plaintiff makes "a *prima facie* showing that [an] unconstitutional removal restriction inflicted compensable harm," Br. 27, or by urging that the Court should resolve in their favor any "uncertainty" over whether and how the Trump Administration would have amended the Purchase Agreements but for the unconstitutional removal provision, Br. 26.

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

lawful and thus any uncertainty over the validity of those actions is properly resolved in the government's favor.

In any event, for the reasons explained above, plaintiffs have not established a "*prima facie* case" that the removal restriction prevented President Trump from renegotiating the Purchase Agreements to the plaintiffs' benefit. Nor is there any uncertainty over whether and how the Trump Administration would have amended the Purchase Agreements but for the removal provision. As discussed, to establish harm stemming from the removal restriction, plaintiffs would have to show that the removal restriction prevented President Trump from reducing Treasury's interest in the enterprises. As explained, plaintiffs cannot do so given that President Trump had plenary authority over the Secretary of the Treasury and could have directed the Secretary to forgo or reduce Treasury's interests at any time. Moreover, plaintiffs' claim that the removal restriction thwarted President Trump's alleged desire to eliminate Treasury's liquidation preference at no cost to the enterprises is at odds with the actions his chosen Directors and Director Watt took and with the key materials on which plaintiffs rely.[5]

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[5] The district court dismissed plaintiffs' APA claims—which are premised on the same theory of harm and seek the same relief as their constitutional claim—on various additional, independent grounds. *See* App. 365-73; R. Doc. 119, at 21-29. Were the Court to deem it necessary to reach those alternative grounds for dismissal, it should affirm the dismissal of plaintiffs' APA claims for the reasons stated by the district court and in FHFA's brief on appeal.

CONCLUSION

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

Respectfully submitted,

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Appellate Case: 23-1051 Page: 40 Date Filed: 05/04/2023 Entry ID: 5273348

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 7752 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

Pursuant to Circuit Rule 28A(h)(2), I further certify that the brief has been scanned for viruses, and the brief is virus free.

s/ Gerard Sinzdak
Gerard Sinzdak

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

s/ Gerard Sinzdak
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