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 (No. 17-2185)

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INTRODUCTION

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

Plaintiffs' allegations conform *precisely* to the Supreme Court's specifications, and they include a letter from the former President himself explaining what he would have done in the absence of the constitutional violation. That alone ends the motion to dismiss inquiry. And apart from the President's letter, Plaintiffs' other allegations independently establish that the FHFA Director's unconstitutional removal protection harmed them.

That Plaintiffs' claims must survive follows directly from the Supreme Court's decision in *Collins*. Defendants attempt to undermine this conclusion by splicing the verb tenses of the Supreme Court's opinion and imposing a new contemporaneity requirement on Plaintiffs' evidence. Ultimately, Defendants appear

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to assume that Plaintiffs must prove their claims to a *certainty*. Defendants ask this Court to read limitations into *Collins* that the Supreme Court did not impose while at the same time ignoring the clear language the Supreme Court did use. None of Defendants' attempts to impose new limitations on Plaintiffs' claims find purchase.

Nor do any of the threshold issues raised by Defendants bar relief. First, Plaintiffs have alleged agency action. Defendants' contrary argument confuses Plaintiffs' claims with their requested remedies. Second, Plaintiffs' claims are not barred by 12 U.S.C. § 4617(f). That provision permits relief if "FHFA *exceeded* [its] authority." *Collins*, 141 S. Ct. at 1776 (emphasis added). Here, Plaintiffs allege that FHFA exceeded its authority by maintaining the Net Worth Sweep and the attendant liquidation preference after President Trump was unconstitutionally inhibited from firing the Director. And even if the Court disagrees, section 4617(f) does not provide the kind of "clear statement" required to deprive Plaintiffs of *any* remedy for a constitutional violation. *Webster v. Doe*, 486 U.S. 592, 603 (1988). Plaintiffs have not yet been awarded declaratory relief, contrary to Defendants' mistaken assertion. And because this case now solely concerns Plaintiffs' entitlement to a remedy, the denial of a remedy would deny Plaintiffs a forum for their constitutional claims.

The Supreme Court provided instructions. Plaintiffs followed them. There is nothing left for this Court to do but apply the Supreme Court's instructions. That means that at a minimum this Court must permit this case to move forward to

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summary judgment, if not hold outright that Plaintiffs are entitled to relief. Under the right standards and a fair reading of the Supreme Court's decision, Plaintiffs have not only met, but exceeded, their burden. The district court's dismissal should be reversed.

ARGUMENT

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

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

A. Defendants' Agency Action Argument Fails.

FHFA reprises an argument that Plaintiffs have not alleged any final agency action by FHFA. *See* Br. of Defs.-Appellees Federal Housing Finance Agency & Sandra L. Thompson, at 48 (May 4, 2023) ("FHFA Br."). To be clear, Defendants' agency action arguments do not apply to Plaintiffs' claim under Count I. Separate from the APA, that claim implicates the Court's equitable authority to grant relief to redress constitutional violations by federal officials. App. 119; R. Doc. 87, at 39 (citing *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 491 n.2 (2010)). Defendants have

cited no case, and Plaintiffs are not aware of any, in which a court extended the APA's agency action requirement to such an equitable claim.

In any event, even with respect to the claims in this case to which the APA's agency action requirement does apply, FHFA's argument misconceives of Plaintiffs' claims.

Plaintiffs have pointed to agency "conduct" and "action" that repeatedly harmed them—the transfer of value from the Companies' shareholders to Treasury through both quarterly dividends and increases in the liquidation preference. *See Collins*, 141 S. Ct. at 1779. Those actions easily fall within the APA's definition of agency "action," "which is meant to cover comprehensively every manner in which an agency may exercise its power." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001). Likewise, Defendants' failure to return that ill-gotten value to the shareholders is not only "unlawful conduct" that harmed Plaintiffs under Article III, but also agency action under the APA, which defines the term "agency action" to include an agency's "failure to act," 5 U.S.C. § 551(13).

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

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liquidation preference is that it is the appropriate *remedy* for the constitutional violation Plaintiffs have alleged.

Plaintiffs have also plausibly alleged a claim to compel agency action unlawfully withheld under 5 U.S.C. § 706(1). FHFA's argument that this claim does not satisfy the requirements of § 706(1) fails. Plaintiffs and FHFA agree on the relevant test: a claim under § 706(1) requires (1) a discrete agency action that the agency is (2) legally required to take. Plaintiffs have plausibly alleged just that.

First, Plaintiffs do not raise "the kind of broad programmatic attack" the Court has previously rejected as not targeting discrete agency action. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) ("*SUWA*"). Rather, the agency action Plaintiffs seek to compel is discrete: that the liquidation preference be written down to zero or that Treasury convert its preferred stock to common stock. *See* App. 126; R. Doc. 87, at 46. FHFA retorts by pointing to potential *downstream* policy implications of the agency action unlawfully withheld that may be significant or may require additional action by the agency. *See* FHFA Br. at 54 ("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"). Even if true, that does not change the fact that the *particular* agency action unlawfully withheld is itself discrete. FHFA may well choose to take additional policy steps beyond those that Plaintiffs request. Whether or not it does, the discrete, limited

nature of the actions unlawfully withheld make clear that there is no risk of "day-to-day agency management" by the *courts*. *Norton*, 542 U.S. at 67.

Second, as to whether the requested agency action would be legally required, FHFA argues that Plaintiffs improperly "bootstrap" their § 706(1) claim to their other claims. FHFA Br. at 54–55. Defendants provide no authority whatsoever for this "bootstrap" limitation on § 706(1) claims. In any case, Plaintiffs *have* alleged that their requested relief would be legally required. The "legally required" prong merely limits the court's power to prescribe relief where "the manner of" an agency's "action is left to the agency's discretion" by statute. *Norton*, 542 U.S. at 65. For example, "when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be." *Id.* This focus on the degree of agency discretion to determine whether an agency action is legally required is consistent with *Norton*'s focus on not embroiling the courts in the minutia of agency management. "If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved . . . injecting the judge into day-to-day agency management." *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898, 907 (8th Cir. 2005) (quoting *Norton*, 542 U.S. at 66–67).

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Defendants, meanwhile, cite no examples of this Court applying *Norton*'s legal requirement prong in the novel way they suggest: not to a broad statutory mandate preserving agency discretion, but because the legal requirement to act is triggered by a constitutional violation. Defendants fail to muster that authority because this Circuit has applied the *Norton* limitation in line with *Norton* itself: to preclude relief only where a broad statutory term leaves the agency ample *discretion* to take various courses of action. *See, e.g.*, *Darst-Webbe Tenant Ass'n Bd.*, 417 F.3d at 907 ("This case, like *Norton,* involves a broad, general statutory mandate, HUD's 'duty to affirmatively further fair housing'"). That is not the case here. Under the counterfactual framework the Supreme Court prescribed in *Collins*, the agency would have virtually *no* room for discretion. If President Trump, unburdened by the unconstitutional removal restriction, was able to achieve his policy goals and ordered FHFA and Treasury to implement those goals, they would have no discretion to countermand that presidential directive. Certainly no "broad statutory term" would give them "ample discretion" to ignore the order. *Darst-Webbe Tenant Ass'n Bd.*, 417 F.3d at 907. In conclusion, under the counterfactual framework the Supreme Court prescribed in *Collins*, the limitation Defendants invoke does not apply, and Plaintiffs state a claim under § 706(1).

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

FHFA argues that relief for Plaintiffs' proven constitutional violation is barred

by 12 U.S.C. § 4617(f). That provision states: "no court may take any action to restrain or affect the exercise of [the] powers or functions of the Agency as a conservator." *Id.* The provision *permits* relief, however, "if the FHFA exceeded [its] authority." *Collins*, 141 S. Ct. at 1776. Plaintiffs allege that FHFA exceeded its authority in maintaining the Net Worth Sweep and the liquidation preference after President Trump was unconstitutionally barred from executing on his stated desire to change those policies by firing FHFA Director Watt.[1]

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

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[1] FHFA's arguments that the anti-injunction clause bars APA claims, *see* FHFA Br. at 42–43, cannot justify dismissal of the entire case because Plaintiffs bring a freestanding constitutional claim under Count I.

The *Collins* decision provides that when HERA's unconstitutional removal provision "inflict[s] compensable harm," it does so because the Director's activities cease to be authorized. *See* 141 S. Ct. at 1789. Justice Thomas explains this idea in concurrence, positing that "[i]f the President tries to remove an official but a court blocks this action, then that official is not lawfully occupying his office and would likely be acting without authority." *Id*. at 1793 n.6 (Thomas, J., concurring). The majority opinion, meanwhile, places both the example of a removal blocked by a court and a statement by a President on the same footing. *Id.* at 1789. In both circumstances, the insulated official acts beyond his authority.

Even if Plaintiffs did not allege that FHFA exceeded its authority, Section 4617(f) does not provide the kind of "clear statement" required to deprive Plaintiffs of any remedy for a constitutional violation. *Webster*, 486 U.S. at 603. FHFA responds that "§ 4617(f) does not bar judicial review of constitutional claims . . . . it simply bars certain types of relief." FHFA Br. at 43. At this point, though, as the Supreme Court made clear in *Collins* and as this Court already recognized, this case is *only* about remedy. *Bhatti v. FHFA*, 15 F.4th 848, 853 (8th Cir. 2021) ("The only question is about remedy with respect to only the actions that confirmed Directors have taken to implement the third amendment during their tenures." (cleaned up) (citing *Collins*, 141 S. Ct. at 1787)); *see also id*. (remand[ing] to the district court to determine if the shareholders suffered 'compensable harm' and are entitled to

'retrospective relief.'" (quoting *Collins*, 141 S. Ct. at 1789)). Thus, under the circumstances of this case, barring remedies in effect bars review of Plaintiffs' claims. Indeed, if FHFA were right, Section 4617(f) would bar all forms of relief potentially available to Plaintiffs. That is because, if the agency were acting within its authority, Section 4617(f) would bar all forms of equitable relief, not just injunctions. *See Perry Cap. LLC v. Mnuchin*, 864 F.3d 591, 606 (D.C. Cir. 2017).

Nor is it accurate that "a significant portion of the relief [Plaintiffs] 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." FHFA Br. at 44 (cleaned up). This Court did not order the district court to award the declaratory relief Plaintiffs have sought, and the district court dismissed Plaintiffs' claims entirely. Indeed, Defendants' reading of Section 4617(f) and FHFA's exercise of authority would bar the declaratory relief Defendants inaccurately claim Plaintiffs already received. *See Perry Cap.*, 864 F.3d at 606 ("The plain statutory text draws a sharp line in the sand against litigative interference—through judicial injunctions, declaratory judgments, or other equitable relief—with FHFA's statutorily permitted actions as conservator or receiver.").

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

Defendants attempt to nullify Plaintiffs' dispositive evidence of presidential intent to fire the FHFA Director but for the unconstitutional removal restriction by

reading the Supreme Court's decision to require that such a statement be made at the time the President first held the view, rather than later in time. In other words, Defendants (and the district court, App. 361; R. Doc. 119, at 17) seek to impose a contemporaneity requirement akin to that required of administrative agencies explaining their actions on plaintiffs seeking to prove *Collins* claims. This effort fails.

Defendants argue that the verb tenses the Supreme Court used in its hypothetical require contemporaneity. The Court stated: "suppose that the President had made a public statement expressing displeasure with actions taken by a Director and had asserted that he would remove the Director if the statute did not stand in the way." 141 S. Ct. at 1789. In "th[at] situation[], the statutory provision would clearly cause harm." *Id.* Defendants posit that "[t]he Supreme Court referred to the possibility of a statement the President 'had made' during his time in office, not one made in a letter a year after leaving office." Br. for Treasury Appellees at 28–29 (May 4, 2023) ("Treasury Br."); *see also* FHFA Br. at 19–20, 34–35.

This grammatical splicing is illogical. First, this is no way to read a Supreme Court opinion. "Judicial opinions must not be confused with statutes, and general expressions must be read in light of the subject under consideration." *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010). The Court remanded for a broad determination of whether Plaintiffs could demonstrate compensable harm. If the

Court wanted to import an administrative law contemporaneity requirement to limit Plaintiffs' potential recovery for a proven constitutional violation, it would have said so. Second, Defendants' argument ignores the rules of grammar. The Supreme Court was giving a hypothetical, urging the reader to "*suppose* that the President *had* made" a statement of intent. 141 S. Ct. at 1789 (emphasis added). So, the use of the word "had" throughout the hypothetical does not imply a requirement to look only into a certain period of time before the Court's writing—it indicates a discussion of events that, at the time of the Court's writing, were hypothetical.

Nor does importing the analogy to administrative agencies through the contemporaneity requirement "make[] sense." FHFA Br. at 34–35. Here, the former President explains what he *would have done* in a counterfactual situation made relevant for the first time by a Supreme Court decision that issued after he left office. It makes no sense to require a sitting President to make a public, contemporaneous statement for every action he does *not* take because the action is barred under current law—especially in this case, where the President had no notice of such a requirement while in office. And it makes no sense to bar a President's reflection on what he would have done, with the benefit of hindsight, after his term has ended. If anything, such a reflection is likely to produce a broader and more considered view based on additional information.

II. Plaintiffs Have Plausibly Alleged Their Claims.

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

The Supreme Court's decision in *Collins* makes this appeal straightforward. The Supreme Court stated: "suppose that the President had made a public statement expressing displeasure with actions taken by a Director and had asserted that he would remove the Director if the statute did not stand in the way." 141 S. Ct. at 1783, 1789. In "th[at] situation[], the statutory provision would clearly cause harm." *Id.* Plaintiffs have alleged, and in fact produced, the exact evidence the Supreme Court said would clearly demonstrate harm. That concludes the motion to dismiss inquiry. But even apart from the President's statement, Plaintiffs' other allegations independently meet their burden under *Collins*.

Defendants criticize the former President's letter, arguing that the letter does not "even mention[] the liquidation preferences." FHFA Br. at 35. But this assumes a far higher burden than Plaintiffs face. Even if it were proper to weigh evidence at the motion-to-dismiss stage, former President Trump's letter leaves no doubt that Plaintiffs were harmed. The letter explains:

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

> this problem because of the unconstitutional restriction on firing Mel Watt.

App. 129; R. Doc. 87-1, at 2.

The letter from the former President—the precise evidence the Supreme Court stated would clearly demonstrate harm—should bring the motion to dismiss inquiry to an end. But Plaintiffs have gone further, providing additional support in the form of *fourteen* different statements from President Trump and Trump Administration officials expressing goals that, had President Trump controlled FHFA for long enough to achieve them, would have benefited Plaintiffs. *See* App. 97–100; R. Doc. 87, at 17–20; App. 102–03; R. Doc. 87, at 22–23. Thus, Plaintiffs support their claim for a remedy with both direct and circumstantial evidence of presidential intent absent the unconstitutional removal restriction.[2]

Plaintiffs' allegations are far from "unbridled speculation." FHFA Br. at 21. Plaintiffs allege a coherent factual theory: the Trump Administration had two

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[2] If the Court decides that former President Trump's statement—the precise evidence *Collins* said would "clearly" show harm—is not dispositive, the Court should hold that Defendants may avoid Plaintiffs' requested remedy only by making a clear showing that the removal restriction did *not*, in fact, harm Plaintiffs. *See* Opening Br. at 31. FHFA responds that the courts to have addressed *Collins* claims so far, plus some other more general authorities, place the burden on Plaintiffs to show harm. FHFA Br. at 37. But this does not preclude a burden shifting framework, which would still require an initial *prima facie* showing of harm by the Plaintiff. Likewise, FHFA's assertion that the presumption of regularity does not apply to a letter signed by a former President begs the question whether Defendants are right about their asserted requirement that a President's statement be contemporaneous.

overarching goals for Fannie Mae and Freddie Mac. App. 97; R. Doc. 87, at 17. First, the Administration planned to lead the Companies out of conservatorship quickly. *Id.* Then, the Administration planned to end government ownership of the Companies by selling off Treasury's stake in the Companies at a large profit. *Id.* The Administration intended to achieve these goals by selling new shares of the Companies' common stock to investors. App. 101; R. Doc. 87, at 21.

Like many major policy shifts, those goals could not be achieved without certain preparatory steps. In particular, two things had to happen before the Administration could achieve its goals. First, the Net Worth Sweep had to be eliminated so that the Companies could retain profits. This makes sense—no private investor would purchase stock in a company that has its net worth assigned exclusively to another investor. App. 92; R. Doc. 87, at 12. Second, Treasury's liquidation preference had to be eliminated for the same reason: no private investor would purchase stock if Treasury's massive liquidation preference effectively eliminated the possibility of any other investor earning a return. App. 102–05; R. Doc. 87, at 22–25. The Trump Administration had a plan to eliminate Treasury's liquidation preference by either writing the liquidation preference down to zero or converting Treasury's senior preferred shares (which carried the liquidation preference) to common stock (or some combination of the two). App. 102; R. Doc. 87, at 22. Either approach would have allowed Treasury to sell its stake in the

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Companies for a large profit as part of the recapitalization—achieving the Administration's goals. App. 101–02; R. Doc. 87, at 21–22; App. 104; R. Doc. 87, at 24.

That intermediate steps were necessary to achieve the Administration's ultimate policy goals does not render Plaintiffs' case speculative, as Defendants insist. Plaintiffs have not been tasked with proving to a certainty what would have happened in the counterfactual world without the unconstitutional removal restriction. If that heightened, perhaps impossible, standard were required to state a claim for a remedy under *Collins*, the Supreme Court surely would have said so. Rather, Plaintiffs have (1) provided the direct evidence the Supreme Court stated would clearly show harm, and (2) additionally, provided plausible factual allegations about the steps the Trump Administration would have taken if not hampered by the unconstitutional removal restriction.

And as Plaintiffs allege, the Trump Administration was ultimately unable to achieve its goals of leading the Companies out of conservatorship and into private ownership *because of* the removal restriction. App. 105; R. Doc. 87, at 25; App. 114; R. Doc. 87, at 34. The Trump Administration and Director Watt disagreed on at least two critical issues. First, they disagreed about implementing the Net Worth Sweep. App. 107–08; R. Doc. 87, at 27–28. Second, they disagreed about whether the executive branch could or should lead the Companies out of conservatorship without

further congressional action. App. 106; R. Doc. 87, at 26. Director Watt thought that any effort to release the Companies from conservatorship should occur by legislation, while the Trump Administration thought it both lawful and desirable for the executive branch to act without further legislation. App. 106–08; R. Doc. 87, at 26–28. These are fundamental disagreements. This standoff continued until Director Watt's term ended two years into the Trump presidency. App. 109; R. Doc. 87, at 29. The Trump Administration's steps following the end of Director Watt's term further indicate the policy disagreement between Director Watt and the Trump Administration. Once able to select his own Director, President Trump moved quickly. He announced who he would choose to serve as acting FHFA director and nominated a permanent director the month before Director Watt's term expired. App. 96–97; R. Doc. 87, at 16–17. And President Trump installed a new acting director the *same day* Watt's term ended, despite statutory authority allowing President Trump to keep Watt in a holdover capacity following the end of his term. *Id.* (citing 12 U.S.C. § 4512(b)(4)).

Taking these factual allegations together, Plaintiffs have clearly stated a claim for relief. Plaintiffs plausibly allege—indeed, with significant support that goes beyond Plaintiffs' burden at this motion to dismiss stage—that the Trump Administration: (1) intended to take the Companies out of conservatorship and privatize the Companies; (2) took several key steps to achieving those goals; and

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(3) was unable to achieve those goals because of the two years lost to the unconstitutional removal restriction.

That the Trump Administration did not ultimately achieve its goals is no strike against Plaintiffs. It is exactly the point. The unconstitutional removal restriction prevented the Administration from achieving the goals that would have benefitted Plaintiffs. App. 111; R. Doc. 87, at 31; App. 114; R. Doc. 87, at 34; App. 117–18; R. Doc. 87, at 37–38. Again, despite the apparent assumption of Defendants and the district court, Plaintiffs need not prove to a certainty that no other, perhaps unforeseen, factors could have prevented the Administration from achieving its goals, even absent the unconstitutional removal restriction. *See* App. 364; R. Doc. 119 at 20 (the district court referencing impeachment and the COVID-19 pandemic as other events that would have taken the "administration's attention and political capital"). The Supreme Court did not task Plaintiffs with that impossible endeavor.

B. Defendants' Attacks on Plaintiffs' Well-Pleaded Allegations Are Unavailing.

Defendants' attempts to undermine the extensive allegations and evidence detailed above fail. Defendants point to certain actions the Trump Administration did not take, or actions that it did take that purportedly did not further its goals of ending the conservatorships and selling Treasury's stake in the Companies. *See, e.g.*, Treasury Br. at 25–26 (the 2019 Treasury report recognized various options "pose[] a host of complex financial and legal considerations" and would require "careful

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consideration”). That the Administration acknowledged the availability of other options and urged careful consideration is not the knockout blow Defendants think it is. It is a commonplace aspect of policymaking. Indeed, this argument highlights the absurd standard Defendants would have this Court set—one in which *every* action taken by a presidential administration must make forward progress toward the ultimate policy goal. This finds no basis in the Supreme Court’s *Collins* opinion or in common sense. Plaintiffs are not burdened to prove that *every* intermediate step taken by the Administration was consistent with the Administration’s goals. It is enough that the Administration stated its goals and took steps to achieve them, but was hindered in achieving those goals by the unconstitutional removal restriction. Plaintiffs are not required to prove harm to an irrebuttable certainty. Here again, the circumstantial evidence Plaintiffs have alleged satisfies the required showing, but President Trump’s letter alone closes the case. And in any event, Plaintiffs are at most required to demonstrate what most likely *would have happened* absent the unconstitutional removal restriction; they do not have to show that the plan was precisely formulated in advance.

Instead of engaging with Plaintiffs’ well-pleaded factual allegations, Defendants attack strawmen. They assert that Plaintiffs’ theory would have required a “cost-free write-off of Treasury’s interest in the enterprises.” Treasury Br. at 21; *id.* at 29–30 (Plaintiffs content “that the former President wanted simply to write-off

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Treasury's valuable liquidation preference or forgo its more valuable preferred shares."). Not so. The write-down of Treasury's liquidation preference would not have been a giveaway. Rather, it was one critical step in the overall effort to recapitalize Fannie and Freddie, so that Treasury could sell its stake to other investors at a profit. Indeed, it is writing off the liquidation preference that would have given value to Treasury's common stock warrants, thereby unlocking the Administration's ability to, in President Trump's words, sell "the government's common stock in these companies at a huge profit." App. 129; R. Doc. 87-1, at 2.

Further, Defendants dispute the disagreement between Director Watt and the Trump Administration. Plaintiffs plausibly allege that President Trump's policy disagreement with Director Watt prevented the Trump Administration from achieving its goals.[3] App. 105; R. Doc. 87, at 25; *see also* App. 105–09; R. Doc. 87, at 25–29; App. 116–17; R. Doc. 87, at 36–37 (outlining the policy disagreements between Director Watt and the Trump Administration). Treasury insists that Plaintiffs "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."

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[3] Defendants accuse Plaintiffs of "vilify[ing]" Director Watt. FHFA Br. at 31. Plaintiffs do no such thing. The policy disagreements between Director Watt and the Trump Administration were a consequence of the unconstitutional removal restriction. It is only natural for a new President to want his own appointee in this important office, which is presumably why President Biden fired President Trump's chosen Director and nominated his own within hours of the Supreme Court's *Collins* decision. App. 118; R. Doc. 87, at 38.

Treasury Br. at 21. Plaintiffs need not show that Director Watt took "specific action" to "obstruct" the Administration. *Id.* The Supreme Court's opinion evinces no such requirement. It is enough that Director Watt held a different view of the relevant policy issues—including the Executive's authority to even act without Congress, App. 106; R. Doc. 87, at 26—and that the Trump Administration understood that it needed to wait for its own Director before taking on the multi-step effort of achieving its goals, App. 109; R. Doc. 87, at 29.

Likewise, Defendants' policy argument, *see* FHFA Br. at 34–35 (predicting that granting Plaintiffs relief would "throw[] the government into chaos"), does nothing to undermine the fact that Plaintiffs have plausibly alleged their claims sufficient to survive a motion to dismiss. And in any case, the argument is belied by law and fact. Remedies for violations of the Constitution's separation of powers will often serve to limit the policy options of a current Administration. As a matter of fact, however, that would likely not be the case here. The principal practical effect of Plaintiffs' requested remedy would be to put the Companies in a stronger financial position, which would ultimately expand the policy options of the current Administration.

Finally, Defendants are incorrect that Plaintiffs' claims are "far afield" from what the Supreme Court envisioned in *Collins*. FHFA Br. at 23. Of note, Defendants do not argue that Plaintiffs' claims lie outside the Court's mandate on remand. They

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simply complain that Plaintiffs "read[] far too much into *Collins*" and that Plaintiffs changed certain aspects of their case on remand. *Id.* at 23–24. *First*, Plaintiffs have focused their case on *exactly* the evidence the *Collins* Court prescribed—a direct presidential statement of intent to remove the FHFA Director but for the unconstitutional removal restriction. *Second*, there is no question that Plaintiffs' requested relief is still retrospective, as envisioned by *Collins*. *See Rop v. FHFA*, 50 F.4th 562, 576 (6th Cir. 2022) ("But, on appeal, like in *Collins*, shareholders ask only for relief effecting a zeroing out of Treasury's liquidation preference or converting of Treasury's senior preferred stock to common stock. The Court identified this as retrospective relief, *Collins*, 141 S. Ct. at 1787 & n.22, and this request for retrospective relief is tethered to shareholders' argument that the Recovery Act's removal restriction is unconstitutional."). Indeed, Justice Kagan recognized that "plaintiffs alleging a removal violation are entitled to injunctive relief—a rewinding of agency action . . . when the President's inability to fire an agency head affected the complained-of decision," because "relief [is then] needed to restore the plaintiffs to the position they 'would have occupied in the absence of the removal problem.'" *Collins*, 141 S. Ct. at 1801 (Kagan, J., concurring in part and dissenting in part) (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)). Plaintiffs ask to be put in the position they would be in but for the constitutional violation that harmed them. That relief is, by definition, retrospective, and exactly the relief

envisioned by the Supreme Court in *Collins*. *Third*, FHFA complains that the precise details of Plaintiffs' requested *remedy* has changed since the Supreme Court held the removal restriction unconstitutional. But this does not preclude Plaintiffs from requesting the remedy they seek. The Supreme Court did not purport to limit Plaintiffs in that way. Indeed, the Supreme Court remanded to the lower courts to determine whether Plaintiffs could even allege harm "*in the first instance*." *Id.* at 1789 (emphasis added).

In the end, Defendants' case really comes down to one premise: Defendants do not believe former President Trump's letter. *See* FHFA Br. at 18 (referencing the "purported" letter "allegedly" signed by President Trump); *id.* at 18 n. 4 (noting they do not concede the "veracity" of the letter); *id.* at 19 (referencing an "unauthenticated, *post hoc* letter"); *id.* at 34 (referencing the letter "allegedly" from former President Trump); *id.* at 35 (referencing the "purported" letter); Treasury Br. at 16–17 (similar). Defendants are of course entitled to disbelieve the former President of the United States, and to challenge the veracity of his letter, should they choose to. And they will have the chance to do just that via a motion for summary judgment or at trial. But this case comes to this Court on a motion to dismiss. And on a motion to dismiss, the Court must "accept the factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff[s'] favor." *Rydholm v. Equifax Info. Servs. LLC*, 44 F.4th 1105, 1108 (8th Cir. 2022). Any

credibility judgment regarding President Trump's letter cannot be made at the motion to dismiss stage, when the court must "view[ ] the facts in [the] complaint as true[.]" *McIvor v. Credit Control Servs.*, 773 F.3d 909, 912 (8th Cir. 2014). What is more, Plaintiffs have pleaded a plausible claim under *Collins* wholly apart from the Trump letter.

C. The District Court's Legal Errors, Including a Critical Misreading of *Collins* that Would Bar All Constitutional Remedies for a Proven Constitutional Violation, Requires Reversal.

The district court's dismissal failed to account for many of the Plaintiffs' well-pleaded factual allegations. More fundamentally, the district court made several errors of law that require reversal. In particular, the district court misread *Collins* and imposed its own heightened evidentiary standards to dismiss Plaintiffs' claims.

The district court misread *Collins* to completely bar constitutional claims. *See* App. 358; R. Doc. 119, at 14 ("[P]laintiffs cannot directly attack any of the agency's actions as unconstitutional."). In other words, the district court read *Collins* to implicitly limit Plaintiffs to "only seek a remedy for the agency's actions under the APA by identifying an agency action that was" arbitrary and capricious "or otherwise not in accordance with law." *Id.* (quoting 5 U.S.C. § 706(2)(A)). The Supreme Court recognized *no* such limitation, instead remanding broadly for the lower courts to determine whether the unconstitutional removal restriction "inflict[ed] compensable harm." *Collins*, 141 S. Ct. at 1789. The Supreme Court in

no way stated or implied that Plaintiffs would be limited to a narrow class of APA claims in making that showing. The district court had no basis for assuming as much, and that error of law requires reversal.

As to the evidentiary standard, the district court created and imposed on Plaintiffs a new, heightened requirement for stating a claim. The district court said that courts should require *a very strong showing* that the former President in question would, in fact, have fired the director," App. 361–62; R. Doc. 119, at 17–18, and that the former President "would, in fact, have been successful in implementing the action that the plaintiffs allege would have occurred if the President had not been mistaken about the scope of his removal authority." *Id.* (emphasis added); *see also* App. 362; R. Doc. 119, at 18 ("Due regard for the enormous reliance interests of the American public in the regular functioning of government likewise calls for a very high showing before courts entertain such claims."). The district court based this new standard on a policy judgment that granting Plaintiffs relief would "throw[] the government into chaos," and undermine the policies of the current presidential administration. App. 362; R. Doc. 119, at 17. This heightened requirement for a "very strong showing," *id.*, or "very high showing," App. 362; R. Doc. 119, at 18, contradicts the Supreme Court's decision in *Collins.* There, the Supreme Court provided an example which the Court said would "clearly" involve compensable harm without any additional analysis of any "strong showing." The Supreme Court's

example consisted *solely* of a statement by a President. *Collins*, 141 S. Ct. at 1789. Full stop. The district court erred in creating a new standard contrary to the Supreme Court's instructions and imposing it on Plaintiffs at the motion to dismiss stage.

Ultimately, the district court expressed serious doubts about whether the Supreme Court got it right in *Collins* and whether the Court's test is workable. *See, e.g.*, App. 365; R. Doc. 119, at 21 ("Writing alternate histories of this sort is the work of fiction authors, not federal judges."); App. 264; R. Doc. 114 at 45 ("[T]hat whole section of the opinion, I just don't know what to make of it. I really don't."); *id.* (explaining that the opinion may have been "designed to paper over some differences among the justices" and that "that kind of language ends up just confusing everybody and just teeing up the next case that will come up there years later"); App. 239; R. Doc. 114 at 20 ("I'm trying to get myself in the *Collins* mindset. It's difficult."). The district court of course may disagree with the Supreme Court's decision and its prescription that the lower courts engage in a counterfactual inquiry. But it was error to dismiss Plaintiffs' claims for relief for a proven constitutional violation on the basis of that disagreement.

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

CONCLUSION

The district court's judgment should be reversed.

Dated: May 25, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 6,478 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionately spaced typeface using the 2016 version of Microsoft Word in 14-point Times New Roman font.

As required by Eighth Cir. R. 28A(h), this brief and the addendum have been scanned for viruses and are virus-free.

Date: May 25, 2023

/s/ David H. Thompson
David H. Thompson

CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by 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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