IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL ROP, STEWART KNOEPP, AND ALVIN WILSON, *Plaintiffs*, v. THE FEDERAL HOUSING FINANCE AGENCY, SANDRA L. THOMPSON, in her official capacity as Director of the Federal Housing Finance Agency, THE DEPARTMENT OF THE TREASURY, JANET L. YELLEN, in her official capacity as Secretary of the Treasury, *Defendants*.	Case No. 1:17-cv-00497 Hon. Paul L. Maloney

MEMORANDUM OF LAW
IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Constitutional Provisions and Codes

INTRODUCTION

In *Collins v. Yellen*, 141 S. Ct. 1761, 1771 (2021), the Supreme Court agreed with Plaintiffs that a restriction on the President's ability to remove the Director of the Federal Housing Finance Agency ("FHFA") was unconstitutional. The Supreme Court left the task of determining whether Plaintiffs could prove that they were entitled to a remedy for the unconstitutional removal restriction to the lower courts. The Supreme Court remanded to the Sixth Circuit, which in turn remanded to this Court.

Plaintiffs now seek leave to amend their complaint in light of the Supreme Court's decision. In particular, Plaintiffs seek to amend their allegations demonstrating how they were harmed by the unconstitutional removal restriction and add claims alleging that FHFA's funding structure violates the Constitution's Appropriations Clause. Both sets of amendments follow directly from the Supreme Court's decision and satisfy the liberal standard for leave to amend. As explained in the parties' most recent joint status report, (Joint Status Report, ECF No. 77, PageID.1866), Defendants do not oppose Plaintiffs' motion for leave to amend their claims to add allegations regarding harm caused by the unconstitutional removal restriction. Defendants only oppose the motion as to the addition of Plaintiffs' Appropriations Clause claims, on the grounds that the claims exceed the Court's mandate on remand and lie outside the statute of limitations. *Id.* Because the amendments relating to the Appropriations Clause claims are the only ones that are contested, we focus our arguments here on those claims. *Cf.* Fed. R. Civ. P. 15(a)(2) ("[A] party may amend its pleading only with the opposing party's written consent or the court's leave."). As explained below, the proposed Appropriations Clause amendments do not exceed the Sixth Circuit's mandate and are within the statute of limitations. The Court should grant Plaintiffs' motion in full.

STANDARD OF REVIEW

"The court should freely give leave [to amend] when justice so requires." *Id.*; *see Foman v. Davis*, 371 U.S. 178, 182 (1962) ("Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded."). "[T]he thrust of Rule 15 is to reinforce the principle that cases should be tried on their merits rather than the technicalities of pleadings." *Moore v. City of Paducah*, 790 F.2d 557, 559 (6th Cir. 1986) (internal citations omitted). Consequently, "Rule 15 plainly embodies a liberal amendment policy." *Morse v. McWhorter*, 290 F.3d 795, 800 (6th Cir. 2002); *see also Marks v. Shell Oil Co.*, 830 F.2d 68, 69 (6th Cir. 1987) (Rule 15 promotes a "liberal policy of permitting amendments to ensure the determination of claims on their merits.").

A "district court may weigh the following factors when considering a motion to amend: undue delay or bad faith in filing the motion, repeated failures to cure previously-identified deficiencies, futility of the proposed amendment, and lack of notice or undue prejudice to the opposing party." *Knight Cap. Partners Corp. v. Henkel AG & Co.*, 930 F.3d 775, 786 (6th Cir. 2019).

ARGUMENT

The Sixth Circuit has explained that leave to amend should be freely granted except in cases of delay *and* resulting prejudice to the opposing party; bad faith; futility; or repeated failure to cure deficiencies by previously allowed amendments. *Roskam Baking Co. v. Lanham Mach. Co.*, 288 F.3d 895, 906 (6th Cir. 2002). None of those factors is present here. Plaintiffs' proposed amendments, made relevant by the Supreme Court's decision in *Collins v. Yellen*, plainly satisfy the liberal standard for leave to amend.

I. THERE IS NO UNDUE DELAY AND ASSOCIATED PREJUDICE, BAD FAITH, OR FAILURE TO CURE PREVIOUSLY-IDENTIFIED DEFICIENCIES.

Defendants cannot demonstrate that Plaintiffs have unduly delayed and that they would be unduly prejudiced by that delay.

As an initial matter, Plaintiffs have not unduly delayed in amending their complaint. Plaintiffs' Appropriations Clause claims were made newly relevant by the Supreme Court's decision in *Collins*, 141 S. Ct. at 1772, decided in June of 2021. The Supreme Court explicitly discussed the FHFA's unusual appropriations structure in the *Collins* majority opinion. *Id*. The Court explained that "the FHFA is not funded through the ordinary appropriations process." *Id.* "Rather, the Agency's budget comes from the assessments it imposes on the entities it regulates, which include Fannie Mae, Freddie Mac, and the Nation's federal home loan banks." *Id.* Besides the Supreme Court's direct discussion of FHFA's unusual funding structure, the Supreme Court's decision in *Collins* recognized a fundamental shift in the constitutional separation of powers as applied to FHFA. The agency's unusual funding structure likewise implicates that shifted balance of power. The question of FHFA's place in the constitutional separation of powers, including Congress's important appropriations powers, flows directly from the Court's separation of powers holding in *Collins*. *See CFSA v. CFPB*, 51 F.4th 616, 640 (5th Cir. 2022) (explaining that "the Director's newfound presidential subservience exacerbates the constitutional problem arising from the Bureau's budgetary independence" (cleaned up)).

The Sixth Circuit issued its decision on remand from *Collins* on October 4, 2022. *Rop v. FHFA*, 50 F.4th 562 (6th Cir. 2022), *cert. denied sub nom. Rop v. FHFA*, No. 22-730, 2023 WL 3937607 (U.S. June 12, 2023). The Supreme Court denied certiorari review of the Sixth Circuit's *Rop* decision in June of 2023. Accordingly, given that the relevant appellate decisions issued a

mere two months before this filing, Plaintiffs have not unduly delayed in amending their Complaint in light of these intervening decisions.

Further, even if there were an undue delay, Defendants would not be unduly prejudiced by this Court permitting Plaintiffs to plead their Appropriations Clause claims. The Sixth Circuit "has required at least some significant showing of prejudice to deny a motion to amend based solely upon delay." *Prater v. Ohio Educ. Ass'n*, 505 F.3d 437, 445 (6th Cir. 2007) (cleaned up). To determine whether prejudice exists, "the court considers whether the assertion of the new claim or defense would: require the opponent to expend significant additional resources to conduct discovery and prepare for trial; significantly delay the resolution of the dispute; or prevent the plaintiff from bringing a timely action in another jurisdiction." *Phelps v. McClellan*, 30 F.3d 658, 662–63 (6th Cir. 1994). None of these factors is present here. Plaintiffs' Appropriations Clause claims present a pure question of law, the resolution of which is unlikely to require significant resources in discovery. Likewise, Plaintiffs' Appropriations Clause claims are unlikely to bring any additional delay. Prejudice may be found when amendments follow the end of discovery, summary judgment, or otherwise displace a pre-existing trial schedule. *See Church Joint Venture, L.P. v. Blasingame*, 947 F.3d 925, 934 (6th Cir. 2020). Here, by contrast, the amendment comes at the initial stage of these remand proceedings and would not displace any existing trial schedule.

As to the remaining factors, Plaintiffs have not acted in bad faith by amending their claims made relevant by a decision of the Supreme Court. Likewise, no deficiencies in the Complaint have been previously recognized yet uncured, given the early stages of this matter on remand.

II. THE AMENDMENTS WOULD NOT BE FUTILE.

Plaintiffs' Appropriations Clause claims would not be futile. Plaintiffs have alleged that FHFA's self-funding structure violates the Appropriations Clause, and Plaintiffs' Appropriations Clause claims lie within the Court's mandate on remand and the statute of limitations.

A. Plaintiffs Would Plausibly Allege an Appropriations Clause Violation.

Plaintiffs plausibly allege a violation of the Appropriations Clause. In its effort to make FHFA an "independent agency," *Collins*, 141 S. Ct. at 1770, Congress gave FHFA sweeping powers and largely insulated FHFA from democratic accountability. Congress attempted to achieve this goal in two ways. First, it insulated the FHFA Director from presidential removal. And second, it granted FHFA budgetary independence. The Supreme Court has already rejected the first aspect of Congress's attempt to insulate FHFA from democratic accountability. In *Collins v. Yellen*, the Supreme Court held that HERA's prohibition on the President firing the FHFA director at will violates the separation of powers and is unconstitutional. *Id.* at 1783–84.

Now, the second piece of Congress's plan to insulate FHFA from democratic accountability—FHFA's budgetary independence—has come under constitutional scrutiny. As the Supreme Court recognized, "FHFA is not funded through the ordinary appropriations process." *Id.* at 1772. Rather, FHFA is free to determine its own budget with no oversight from Congress.

Article I of the Constitution, meanwhile, grants *Congress* the power over the purse through the appropriations power. U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]"). The Appropriations Clause is "a bulwark of the Constitution's separation of powers" that gives Congress "exclusive power over the federal purse" as "a restraint on Executive Branch officers." *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1346–47 (D.C. Cir. 2012) (Kavanaugh, J.). The Clause covers all "public money,"

including "all the taxes raised from the people[] as well as revenues arising from other sources." *OPM v. Richmond*, 496 U.S. 414, 427 (1990) (quoting 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1348 (3d ed. 1858)). And the Appropriations Clause not only empowers Congress. It also restricts the Executive by limiting "the disbursing authority of the Executive department," *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937), "to secure regularity, punctuality, and fidelity[] in the disbursements of the public money," *Richmond*, 496 U.S. at 427.

For this reason, agencies with a self-funding structure like FHFA's have recently come under constitutional scrutiny. In *CFSA v. CFPB*, the Fifth Circuit held that the self-funding structure of another agency, the Consumer Financial Protection Bureau ("CFPB"), violates the Appropriations Clause. 51 F.4th at 644. The Fifth Circuit drew on the text, history, and structure of the Appropriations Clause to conclude that: "The Appropriations Clause's straightforward and explicit command ensures Congress's *exclusive* power over the federal purse." *Id.* at 637 (internal quotation marks omitted, emphasis in original). The Supreme Court recently granted certiorari to consider whether CFPB's self-funding structure violates the Appropriations Clause. *See CFPB v. CFSA*, 143 S. Ct. 978 (Mem), 978 (2023) (petition granted Feb. 27, 2023).

FHFA's structure is virtually indistinguishable from the CFPB's, except in ways that make FHFA's structure *more* problematic. In the wake of recent Supreme Court decisions, both FHFA and the CFPB are non-independent federal agencies headed by single Directors. *CFSA*, 51 F.4th at 640 (noting that the "director's newfound presidential subservience exacerbates the constitutional problem arising from the Bureau's budgetary independence" (cleaned up)); *see also Collins*, 141 S. Ct. at 1783–84 (holding the removal restriction on the FHFA Director unconstitutional). Both agencies do not receive appropriations, thus preventing Congress from exercising direct control over their funding. *Compare* 12 U.S.C. § 4516(f)(2) (providing that

FHFA assessments are not appropriations), *with CFSA*, 51 F.4th at 638 (discussing analogous statutory provision as to CFPB). Both agencies are funded via assessments that are "drawn from a source that is itself outside the appropriations process"—in FHFA's case, Fannie Mae, Freddie Mac, and the Federal Home Loan Banks. *See CFSA*, 51 F.4th at 639. And both agencies do "important work" with significant consequences for the national economy. *Collins*, 141 S. Ct. at 1784. If anything, FHFA's funding structure is more constitutionally problematic than CFPB's. While CFPB's assessments are limited to no more than 12% of the operating expenses of the independent Federal Reserve, *CFSA*, 51 F.4th at 624, the sole limitation on FHFA's funding power is the Director's unbounded judgment of what is "reasonable," *see* 12 U.S.C. § 4516(a).

Plaintiffs' allegations that FHFA's structure violates the Constitution's separation of powers by empowering it to act without oversight from Congress through the appropriations process are plausible.

B. Plaintiffs' Appropriations Clause Claims Would Fall Within the Court's Mandate on Remand.

Defendants oppose the addition of Plaintiffs' Appropriations Clause claims as exceeding the Court's mandate on remand. The so-called "mandate rule" is a "specific application" of the law of the case doctrine. *See Jones v. Lewis*, 957 F.2d 260, 262 (6th Cir. 1992), *cert. denied*, 506 U.S. 841 (1992). The doctrine provides that a lower court on remand must "implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994) (citations omitted). This doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messenger v. Anderson*, 225 U.S. 436, 444 (1912).

Thus, the trial court "may consider those issues not decided expressly or impliedly by the appellate court or a previous trial court." *Allard Enters., Inc. v. Advanced Programming Res., Inc.*,

249 F.3d 564, 570 (6th Cir. 2001). Indeed, "[i]n the absence of an explicit limitation, the remand order is presumptively a general one." *See United States v. Moore*, 131 F.3d 595, 598 (6th Cir. 1997); *United States v. Jennings*, 83 F.3d 145, 151 (6th Cir. 1996). To impose a limited remand, the appellate court must speak with "unmistakable" language that "articulate[s] with particularity" "the procedure the district court is to follow." *United States v. Campbell*, 168 F.3d 263, 268 (6th Cir. 1999). Even then, if the reconsideration of issues remanded would alter the treatment of issues outside the scope of the remand, the district court may have the discretion to expand the parameters of the mandate. *Id.*

Here, Plaintiffs' Appropriations Clause claims fall within the scope of the Supreme Court and the Sixth Circuit's mandate and would not require any issues to be redecided. The Supreme Court "remanded for further proceedings consistent with [its] opinion." *Collins*, 141 S. Ct. at 1789. The Sixth Circuit in turn remanded "[c]onsistent with the Supreme Court's recent decision in *Collins*…to determine whether the unconstitutional removal restriction inflicted harm on shareholders." *Rop*, 50 F.4th at 574. Plaintiffs' Appropriations Clause claims fall comfortably within that broad language, which must be understood in the context of the substantive content of the case until that point—which solely concerned the unconstitutional removal restriction. Neither the Supreme Court's mandate nor the Sixth Circuit's mandate can be read to explicitly or impliedly foreclose consideration of other related issues. The only thing the broad remands foreclose is this Court refusing to consider the stated question: whether Plaintiffs were harmed by the unconstitutional removal restriction. Further, as described above, the Supreme Court specifically discussed the FHFA's unusual funding structure in its decision holding the removal restriction unconstitutional, and specifically held unconstitutional the removal provision of FHFA's structure,

which bears directly on the separation of powers issues implicated by the FHFA's funding structure.

Alternatively, even if Plaintiffs' Appropriations Clause claims did not naturally fit within the mandate on remand, they also fall within a recognized exception to the discretionary mandate rule for intervening changes in law. The Sixth Circuit recognizes "exceptions to the mandate rule that are the same as the exceptions to the law of the case doctrine as a whole." *Waste Mgmt. of Ohio, Inc. v. City of Dayton*, 169 F. App'x 976, 987 n.3 (6th Cir. 2006). The Court retains the discretion to reopen issues where there is: "an intervening change of controlling law[.]" *Ent. Prods., Inc. v. Shelby Cnty.*, 721 F.3d 729, 742 (6th Cir. 2013). Here, the Supreme Court's constitutional holding in *Collins*, which recognized a major shift in the understanding of FHFA's basic constitutional structure, provides an indisputable intervening change in controlling law.

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

Defendants have argued that Plaintiffs' Appropriations Clause Claims fall outside the statute of limitations. Not so. Plaintiffs filed their original complaint within the six-year statute of limitations. *See* 28 U.S.C. § 2401(a). And a claim asserted in an amended complaint relates back to the date of the original pleading if the amended claims "arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). Plaintiffs' Appropriations Clause claims arose out of the very same conduct and occurrences that were the focus of the original complaint: Defendants' adoption and continued implementation of the Third Amendment to Defendants' Preferred Stock Purchase Agreements with Fannie Mae and Freddie Mac.

That Plaintiffs have refined their legal theories to account for the Supreme Court's decision has no effect on whether the claim relates back. "[A] court will permit a party to add *even a new*

legal theory in an amended pleading as long as it arises out of the same transaction or occurrence." *Miller v. Am. Heavy Lift Shipping*, 231 F.3d 242, 248 (6th Cir. 2000) (emphasis added); *see also Hageman v. Signal L.P. Gas, Inc.*, 486 F.2d 479, 484 (6th Cir. 1973); *Koon v. Lakeshore Contractors*, 128 F.R.D. 650, 653 (W.D. Mich. 1988) ("[A]n added theory of liability for the same occurrence may relate back."). Defendants are entitled to notice of *facts* within the prescribed statute of limitations; they are not entitled to advance notice of *all legal theories* that may arise from that set of facts. Especially so where, as here, the underlying law has since changed.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for leave to amend their complaint.

Dated: August 11, 2023

Respectfully Submitted,

s/ Ashley G. Chrysler

David H. Thompson*
Brian W. Barnes*
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
(202) 220-9601 (fax)
dthompson@cooperkirk.com
bbarnes@cooperkirk.com

Matthew T. Nelson
Ashley G. Chrysler
WARNER NORCROSS & JUDD LLP
150 Ottawa Avenue NW, Suite 1500
Grand Rapids, Michigan 49503
(616) 752-2000
mnelson@wnj.com
achrysler@wnj.com

*application for admission to W.D. Michigan bar pending

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with Local Rule 7.2(b)(i), and contains 2,853 words, including headings, footnotes, citations, and quotations. The foregoing word count was generated using Microsoft Word 365.

s/ Ashley G. Chrysler
Matthew T. Nelson
Ashley G. Chrysler
WARNER NORCROSS & JUDD LLP
150 Ottawa Avenue NW, Suite 1500
Grand Rapids, Michigan 49503
(616) 752-2000
mnelson@wnj.com
achrysler@wnj.com