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

MICHAEL ROP, *et al.*, Plaintiffs, v. THE FEDERAL HOUSING FINANCE AGENCY, *et al.*, Defendants.	Case No. 1:17-cv-00497

FHFA'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND

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INTRODUCTION

The Federal Housing Finance Agency Defendants ("FHFA") oppose Plaintiffs' effort to inject a new constitutional theory relating to FHFA's funding into this six-year-old case because the proposed amendment strays far beyond the limited purpose for which the Sixth Circuit remanded this case: "to determine whether the unconstitutional removal restriction inflicted harm on shareholders." *Rop v. FHFA*, 50 F.4th 562, 577 (6th Cir. 2022), *cert. denied*, 2023 WL 3937607 (U.S. June 12, 2023). The mandate rule bars Plaintiffs' proposed amendment.

The same attempted expansion was rejected on remand in *Collins* itself, where the district court found the plaintiffs' attempts to add new Appropriations Clause claims exceeded the mandates of the Supreme Court and Fifth Circuit. *See Collins v. Lew*, 2022 WL 17170955, at *6 (S.D. Tex. Nov. 21, 2022), *appeal docketed*, No. 22-20632 (5th Cir.). The mandate rule applies with even greater force here because, unlike in *Collins*, Plaintiffs already litigated a claim that FHFA's funding mechanism unconstitutionally insulates FHFA from congressional oversight. This Court rejected that claim in its earlier dismissal order, and Plaintiffs failed to appeal that issue. The mandate rule forbids using remands to revive issues that could have been, but were not, pursued in the appellate court.

In addition, the new theory is time-barred. Accordingly, the Court should deny Plaintiffs' motion for leave to file their proposed amended complaint adding the Appropriations Clause claims.

PROCEDURAL HISTORY

A. Plaintiffs' Original Complaints

This action was filed on June 1, 2017, several months after Plaintiffs' counsel filed *Collins* in the Southern District of Texas. ECF No. 1 (PageID.63). The original complaint and a first amended complaint[1] alleged in their lead count that a statutory provision in the Housing and Economic Recovery Act ("HERA") stating that the President could remove the FHFA Director only for "good cause" violated Article II of the Constitution. ECF No. 1 ¶¶ 128-139 (PageID.59-62); ECF No. 17 ¶¶ 134-45 (PageID.257-260). Relying on that removal restriction, Plaintiffs sought vacatur of a 2012 amendment, known as the Third Amendment, to preferred stock purchase agreements between FHFA, as Conservator for Fannie Mae and Freddie Mac, and the Department of the Treasury.

The original and first amended complaints also alleged additional counts raising various other constitutional issues, such as Appointments Clause and nondelegation claims. In Count II, Plaintiffs alleged that FHFA's structure was unconstitutional because HERA "exempts FHFA from the appropriations process by permitting FHFA to self-fund through fees it assesses on the entities it regulates without any oversight from Congress." ECF No. 17, ¶ 148 (PageID.261). According to Count II, such "[e]xemption from the appropriations process" both "diminishes congressional oversight" and "reduces the President's influence over the agency

[1] While Plaintiffs' *current* proposed amended complaint is styled "First Amended," it would be their second amendment. This brief uses the phrase "Proposed Amended Complaint" to avoid confusion.

since the agency need not seek the President's assistance to obtain funding from Congress." *Id.*; *see also* ECF No. 17 ¶ 20 (PageID.202) (arguing that 12 U.S.C. § 4516(f)(2), which establishes FHFA's funding through assessments on regulated entities, means FHFA is not "constrained by the congressional appropriations process").

B. Defendants' Motions to Dismiss

FHFA and Treasury both moved to dismiss. While the motions focused primarily on the removal restriction and Appointments Clause issues, they also rebutted Plaintiffs' claim of a constitutional problem with FHFA's funding mechanism. *See, e.g.*, ECF No. 25 at 17 (PageID.410). Plaintiffs opposed dismissal and moved for summary judgment, arguing that, "unlike every other independent agency headed by a single individual save the CFPB, FHFA is not subject to the congressional appropriations process," leaving an "absence of . . . congressional oversight." ECF No. 33 at 9 (PageID.912) (citing 12 U.S.C. § 4516(f)(2)).

C. This Court's 2020 Opinion

In a 2020 opinion, this Court denied Plaintiffs' motion for summary judgment and dismissed the First Amended Complaint in its entirety. This Court held that the for-cause removal restriction covering FHFA's Director was "almost certainly unconstitutional," ECF No. 66 at 41 (PageID.1798), but that issue did not affect the validity of the Third Amendment because it was adopted by an *Acting* Director not protected by the restriction—both conclusions validated by the Supreme Court the following year in *Collins v. Yellen*, 141 S. Ct. 1761 (2021). This Court likewise dismissed Plaintiffs' Appointments Clause claims, which related to the duration of

the FHFA Acting Director's service. This Court also held that Plaintiffs' allegations of a constitutional problem with FHFA's funding mechanism "fail[ed] to state a claim," pointing to Plaintiffs' failure to substantiate "that an independent source of funding creates a separation-of-powers problem." ECF No. 66 at 49 (PageID.1806). The Supreme Court, moreover, had "strongly implied" in a decision relating to the CFPB "that the CFPB's source of funding was not a problem by itself." *Id.* (citing *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2209 (2020)).

Plaintiffs appealed to the Sixth Circuit. Before briefing commenced, the appeal was held in abeyance by mutual consent to await the Supreme Court's decision in *Collins*.

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

The Supreme Court ultimately held in *Collins*—consistent with the view this Court expressed in its earlier decision in this case—that HERA's restriction on the President's power to remove the FHFA Director violated Article II of the Constitution. 141 S. Ct. at 1783. Also consistent with this Court's holding, the Supreme Court held that the shareholders' arguments for setting aside the Third Amendment failed because that transaction was entered into by an *Acting* Director who was removable at will, and not covered by the removal restriction. That "defeat[ed] the shareholders' argument for setting aside the third amendment[.]" *Id.* at 1787.

The Supreme Court observed that "FHFA is not funded through the ordinary appropriations process," but rather through "assessments it imposes on the entities it regulates." *Id.* at 1772. These facts did not alter the conclusion that "there is no

reason to regard any of the actions taken by the FHFA in relation to the third amendment as void" and "no basis for concluding that any head of the FHFA lacked the authority to carry out the functions of the office." *Id.* at 1787-88.

Because the Court nevertheless understood the shareholders' claims to extend beyond the initial *adoption* of the Third Amendment to its *implementation*, the Court separately "consider[ed] the shareholders' contention about remedy with respect to only the actions that confirmed Directors have taken to *implement* the third amendment during their tenures." *Id.* at 1787. Although the Court mostly rejected the shareholders' implementation arguments as well, finding them "neither logical nor supported by precedent," *id.*, it ultimately allowed a narrowly circumscribed remand because a theoretical possibility that the unconstitutional removal restriction might have affected implementation of the Third Amendment could not "be ruled out." *Id.* at 1789.[2]

E. The Sixth Circuit's Opinion in this Case

After the Supreme Court decided *Collins*, the parties briefed and argued this case in light of *Collins*. Plaintiffs did not assign error to this Court's holding that FHFA's funding mechanism was constitutional; neither of Plaintiffs' appellate

[2] In several concurring opinions, five Justices openly doubted Plaintiffs' prospects on remand. *See Collins*, 141 S. Ct. at 1795 (Thomas, J., concurring) ("I seriously doubt that the shareholders can demonstrate that any relevant action by an FHFA Director violated the Constitution. And, absent an unlawful act, the shareholders are not entitled to a remedy."); *id.* at 1799 (Gorsuch, J., concurring in part) (describing remand as "speculative enterprise" expected to "go nowhere"); *id.* at 1802 (Kagan, J., concurring in part and concurring in the judgment, joined in part by Breyer and Sotomayor, JJ.) ("the lower court proceedings may be brief indeed" because the President's undisputed plenary control over Treasury "seems sufficient to answer the question the Court kicks back").

briefs even mentioned the issue. *See* Br. of FHFA Appellees at 10 n.1, *Rop v. FHFA*, No. 20-02071 (6th Cir.) (filed Feb. 18, 2022) (noting that Plaintiffs had pursued several theories in this Court "that the district court dismissed and plaintiffs no longer pursue on appeal"). Under well-established Sixth Circuit precedent, such failure by an appellant to raise an issue in his brief constitutes waiver and abandonment of the issue. *See*, *e.g.*, *Doe v. Mich. State Univ.*, 989 F.3d 418, 425 (6th Cir. 2021) ("Doe waived any appeal of the district court's decision regarding timeliness by failing to raise the issue in his initial brief.").

The Sixth Circuit held that "FHFA Acting Director DeMarco was not serving in violation of the Constitution when he signed the third amendment." *Rop*, 50 F.4th at 569. Given that ruling, the court also noted that the shareholders' claims for retrospective relief were "speculative" and would be "no easy feat" on remand. *Id.* at 576. Nevertheless, because "the majority in *Collins* instructed that the proper remedy for the FHFA Director's unconstitutional insulation from removal is remand for further consideration of whether the restriction actually affected any actions implementing the third amendment that allegedly harmed shareholders," the Sixth Circuit took that same approach. *Id.* at 576-77. Following the path forged in *Collins*, the appellate court remanded the case to this Court for the narrow purpose of "determin[ing] whether the unconstitutional removal restriction inflicted compensable harm on shareholders entitling them to retrospective relief." *Id.* at 577.

F. Plaintiffs' Motion for Leave to Amend on Remand

On remand, Plaintiffs now seek leave to file a proposed amended complaint that would replace all of the counts in the operative complaint with six new counts. Four of those counts (Counts I, III, V, and VI) assert that the removal restriction impeded certain Trump Administration financial reforms that would have enriched them as junior shareholders. The other two counts (Counts II and IV) claim that FHFA's funding mechanism is unconstitutional under the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7. Although FHFA submits all of the counts are legally infirm and should be dismissed for failure to state a claim, the present dispute over leave to amend relates only to Counts II and IV.

ARGUMENT

I. Plaintiffs' Proposed New Appropriations Clause Claims Exceed the Mandate in this Limited Remand

The mandate rule limits remand proceedings to the scope directed by the court of appeals. *See United States v. Campbell*, 168 F.3d 263, 265 (6th Cir. 1999). The mandate rule comprises "independently operating constraints, one of limited remand and one of issue waiver, that serve to prohibit review." *United States v. Alcantara*, 116 F. App'x 693, 696-97 (6th Cir. 2004), *vacated on other grounds*, 544 U.S. 970 (2005). Plaintiffs' proposed new Appropriations Clause claims here defy both constraints.

A. The Appropriations Clause Claims Exceed the Scope of the Sixth Circuit's Limited Remand

The mandate rule means "the district court is without authority to expand its inquiry beyond the matters forming the basis of the appellate court's remand."

Campbell, 168 F.3d at 265. A remand "can either be general or limited in scope, and that distinction governs the district court's authority on remand." *Monroe v. FTS USA, LLC*, 17 F.4th 664, 669 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 1232 (2022). "General remands . . . give district courts authority to address all matters as long as remaining consistent with the remand." *Campbell*, 168 F.3d at 265. In contrast, "[l]imited remands explicitly outline the issues to be addressed by the district court and create a narrow framework within which the district court must operate." *Id.* For example, a remand for consideration of a *remedy* is a limited remand that precludes injection of new issues relating to *liability*. *See Monroe*, 17 F.4th at 670-71 (affirming district court's refusal to consider new "arguments on judicial estoppel, aggregate judgment, and sufficiency of the evidence" as "outside the scope of [the Sixth Circuit's] limiting instructions" governing remand to recalculate damages). To distinguish between general and limited remands, "the court examines the entirety of the previously entered opinion to determine whether and how the appellate court limited the remand." *JPMorgan Chase Bank, N.A. v. Winget*, 678 F. App'x 355, 360 (6th Cir. 2017).

Here, the Sixth Circuit issued a *limited remand*. The appellate court remanded for a single express purpose, which it repeated multiple times: "to determine whether the unconstitutional removal restriction inflicted harm on shareholders." *Rop*, 50 F.4th at 577; *see also id.* at 564, 574, 576. This language "convey[s] clearly the intent to limit the scope of the district court's review." *Campbell*, 168 F.3d at 267.

While Plaintiffs protest that the mandate does not "explicitly or impliedly foreclose consideration of other related issues," Mot. at 8, limited remands, by definition, foreclose consideration of other issues. *See Campbell*, 168 F.3d at 265. The expression of the activities to be conducted on remand automatically creates a "narrow framework" foreclosing others. *Id.* The appellate court does not have to append language saying "*and*, further, the district court shall *not* conduct proceedings on any other issues"; that goes without saying.

Contrary to Plaintiffs' suggestion (Mot. at 8), the Supreme Court's discussion of "the FHFA's unusual funding structure" in *Collins* does not cancel out the express limitation in the Sixth Circuit's remand instructions. If anything, it militates *against* expanding the remand. After having discussed FHFA's funding, the Supreme Court concluded that "there is no reason to regard any of the actions taken by the FHFA in relation to the third amendment as void" and "no basis for concluding that any head of the FHFA lacked the authority to carry out the functions of the office," and the Court remanded solely for proceedings on whether the shareholders were entitled to retrospective relief for harm caused by the removal restriction. 141 S. Ct. at 1787-88.

Indeed, on remand in *Collins* itself, the district court correctly held that the mandate rule precluded plaintiffs' proposed expansion of the Supreme Court's and Fifth Circuit's mandates to include the exact same Appropriations Clause claims Plaintiffs seek to add here. *See* 2022 WL 17170955, at *6. The proposed amendments in this case warrant the same treatment, particularly because the

Sixth Circuit expressly invoked the Fifth Circuit's example in remanding for determination of "whether the unconstitutional removal restriction inflicted compensable harm on shareholders entitling them to retrospective relief." *See* 50 F.4th at 576-77 (citing *Collins v. Yellen*, 27 F.4th 1068, 1069 (5th Cir. 2022)).

B. Plaintiffs Waived Their Challenge to FHFA's Funding Mechanism by Not Appealing this Court's Earlier Ruling

Application of the mandate rule is doubly appropriate here because Plaintiffs have waived issues related to the constitutionality of FHFA's funding. "[W]here an issue was ripe for review at the time of an initial appeal but was nonetheless foregone, the mandate rule generally prohibits the district court from reopening the issue on remand unless the mandate can reasonably be understood as permitting it to do so." *United States v. O'Dell*, 320 F.3d 674, 679 (6th Cir. 2003) (citation omitted).

As noted above, Plaintiffs attacked the constitutionality of FHFA's funding through assessments (versus congressional appropriations) in their original Complaint, ECF No. 1 ¶¶ 2, 20, 128-139 (PageID.2, 7, 59-62) and First Amended Complaint, ECF No. 17 ¶¶ 2, 20, 134-45 (PageID.197, 202, 257-260). Defendants moved to dismiss the First Amended Complaint in its entirety, Plaintiffs moved for summary judgment, and the parties' briefs joined issue on the significance of FHFA's funding. *See*, *e.g.*, ECF No. 33 at 9 (PageID.912) (Plaintiffs' summary judgment brief). In dismissing, this Court correctly rejected the contention that "the FHFA's self-funding and exemption from the Congressional appropriations process" violated the Constitution. *See* ECF No. 66 at 8, 49 (PageID.1765, 1806).

Plaintiffs could have, but did not, seek review of that holding from the Sixth Circuit. Such failure to seek review results in waiver and abandonment of those issues. *See*, *e.g.*, *Doe*, 989 F.3d at 425. On remand, courts naturally do not allow amendments to reintroduce any claims or issues that have been waived. *See, e.g.*, *Pipefitters Loc. 636 Ins. Fund v. Blue Cross & Blue Shield of Mich.*, 418 F. App'x 430, 435 (6th Cir. 2011) (finding prior decision had dismissed claims on the merits and reversing district court's decision to allow an amended complaint on remand); *Owens Corning v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 257 F.3d 484, 497 (6th Cir. 2001) (holding party could not raise a new issue outside the mandate because its own "failure to brief the issue at the proper time . . . prevented a direct ruling"); *Miller v. Ret. Program Plan for Emps. of Consol. Nuclear Sec., LLC*, 2019 WL 5865924, at *4 (E.D. Tenn. Nov. 8, 2019) ("Plaintiff knew he could bring the claim prior to his appeal, and by choosing not to do so, he has waived his right to raise the claim.").

C. No Intervening Change in Law Exception Applies

Plaintiffs cannot rely on the "intervening change of controlling law" exception (Mot. at 9). Plaintiffs identify "the Supreme Court's constitutional holding in *Collins*" as the supposed intervening change. *Id.* However, the Sixth Circuit's October 2022 decision and mandate in this case postdated the Supreme Court's July 2021 decision in *Collins*. The parties briefed, and the Sixth Circuit decided, the appeal in this case with the full benefit of *Collins*. Indeed, *Collins* is the cornerstone of the Sixth Circuit's mandate and remand in this case. *See*, *e.g.*, *Rop*, 50 F.4th at 564. In contrast to the case Plaintiffs cite, where the putative change in

law arose from a 2010 Supreme Court decision *postdating* the Sixth Circuit's 2009 mandate in a prior appeal, *Ent. Prods., Inc. v. Shelby Cnty.*, 721 F.3d 729, 742 (6th Cir. 2013), *Collins* is not "intervening." *See Amado v. Microsoft Corp.*, 517 F.3d 1353, 1359 (Fed. Cir. 2008) ("intervening" decision is one that "comes between an appellate decision and the proceedings on remand").

Even if *Collins* could somehow be considered intervening, it did not change any legal principle undergirding the Sixth Circuit's decision. *See Ent. Prods.*, 721 F.3d at 742 (rejecting exception because intervening Supreme Court decision enunciated "no new principle of First Amendment law" that disrupted Sixth Circuit's prior holding). Nor did *Collins* change the law relating to constitutionality of agency funding mechanisms. If anything, the opposite is true. As discussed *supra* at pp. 4-5, after expressly observing that FHFA is funded by assessments, the Supreme Court held that FHFA did not lack constitutional authority at any time and rejected the shareholders' arguments for blanket invalidity of FHFA actions, remanding solely for proceedings on alleged harm caused by the removal restriction.

While Plaintiffs' motion puts forward only *Collins* as an "intervening change in law," extensive citations in both the motion and proposed amended complaint itself leave no doubt that the real inspiration for the new claims comes from a pair of recent Fifth Circuit decisions involving the Consumer Financial Protection Bureau. *See CFSA v. CFPB*, 51 F.4th 616 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 978 (2023); *CFPB v. All Am. Check Cashing, Inc.*, 33 F.4th 218, 242 (5th Cir. 2022), *cited in* Proposed Amended Complaint ¶¶ 3, 106, 108, 126, 128, ECF No. 79-1

(PageID.1874, 1910, 1913). Those decisions, however, are neither "intervening" nor "controlling." *All American Check Cashing* came out in May 2022, a month before the Sixth Circuit oral argument in this case; *CFSA* came out in October 2022, before the Sixth Circuit mandate issued in this case. They are not "controlling" both because they are out-of-circuit and because they disclaim applicability to agencies, like FHFA, that are funded by assessments on regulated entities.

For avoidance of doubt, FHFA submits that the Fifth Circuit's CFPB decisions are outliers and wrongly decided. The Appropriations Clause "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress," *OPM v. Richmond*, 496 U.S. 414, 424 (1990) (citation omitted), and it does not limit the specific mechanisms through which Congress may fund agencies. All other courts that have addressed the CFPB's funding mechanism have upheld its constitutionality.[3] Even under the Fifth Circuit's analysis, there is no constitutional problem with FHFA's funding-by-assessments, which follows the longstanding, prevailing model for federal financial regulators. The CFPB is *not* funded by assessments on regulated entities, and the Fifth Circuit sharply distinguished it from agencies like FHFA that are funded by assessments, calling this "mix[ing] apples with oranges," or "more accurately, with a grapefruit." *CFSA*, 51 F.4th at 641. Before the Supreme Court, the litigants challenging the CFPB have confirmed agencies like FHFA that are funded by

[3] *See, e.g., CFPB v. L. Off. of Crystal Moroney, P.C.*, 63 F.4th 174, 182 (2d Cir. 2023); *PHH Corp. v. CFPB*, 881 F.3d 75, 95 (D.C. Cir. 2018) (en banc), *abrogated on other grounds by Seila Law*, 140 S. Ct. 2183.

assessments are "in an entirely unrelated family" from the CFPB, have "historical pedigree," and are fully compatible with the Appropriations Clause. Br. for Respondent at 34, *CFPB v. CFSA*, No. 22-448 (U.S.) (filed June 3, 2023).[4]

Thus, for a variety of reasons, the Fifth Circuit decisions are neither "intervening" nor "controlling." Plaintiffs have no valid basis for avoiding the consequences of the mandate rule and their prior waiver.

II. The Proposed New Appropriations Clause Claims Are Barred by the Statute of Limitations

Plaintiffs' proposed new Appropriations Clause claims are also time-barred. Counts II and IV attack and seek vacatur of the Third Amendment or, alternately, of "the PSPAs in their entirety." Proposed Amended Complaint ¶¶ 115-16, 135-36, Prayer for Relief ¶ 6, ECF No. 79-1 (PageID.1911, 1914, 1918). The PSPAs originated on September 7, 2008, *id.* ¶¶ 23-24 (PageID.1879), and the Third Amendment was adopted on August 17, 2012, *id.* ¶ 37 (PageID.1882). As Plaintiffs acknowledge (Mot. at 9), the applicable statute of limitations is six years. 28 U.S.C. § 2401(a); *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 818 (6th Cir. 2015). Thus, the limitations period expired on September 7, 2014, for vacatur of the PSPAs and on August 17, 2018, for vacatur of the Third Amendment. Plaintiffs concede (at Mot. 9-

[4] Plaintiffs' motion argues that amendment should not be denied on grounds of futility because their proposed new Appropriations Clause claims are "plausibly allege[d]." Mot. at 5-7. The FHFA Defendants disagree that the claims are plausibly alleged, but the Court need not reach the merits in order to deny leave to amend because the mandate rule and statute of limitations plainly bar the proposed amendments on procedural grounds. If Plaintiffs are permitted to add the Appropriations Clause claims, FHFA anticipates addressing the merits via a motion to dismiss under Fed. R. Civ. P. 12(b)(6).

10) that the proposed new claims can only be deemed timely if they relate back under Fed. R. Civ. P. 15(c).

Plaintiffs have not merely "refined their legal theories" while keeping the same operative "facts." Mot. at 9-10. The Appropriations Clause counts assert new claims arising out of a distinct constitutional provision (Article I, § 9, cl. 7) from their removal restriction theory (Article II, §§ 1, 3). That the original and new claims both relate to the Third Amendment does not mean they arise from a "common core of operative facts." *Mayle v. Felix*, 545 U.S. 644, 664 (2005) (quotation marks omitted). The operative facts that the original claims alleged made the Third Amendment illegal were that the for-cause provision purported to limit the President's power to remove FHFA's Director, while the core operative facts for the proposed new Appropriations Clause claims revolve around FHFA's funding through assessments on regulated entities. Neither the original nor new claims assert that the legality of the Third Amendment turns on historical facts about the runup to and adoption of that transaction. Indeed, the 28 paragraphs comprising the Proposed Amended Complaint's Appropriations Clause counts (II and IV) have virtually no overlap with the facts alleged in the prior complaints.[5]

[5] Plaintiffs make no argument that the proposed new Appropriations Clause claims relate back to the funding mechanism allegations in their original complaints, perhaps recognizing that relying on those dismissed and abandoned allegations would seal the fate of the proposed amendments under the mandate rule. *See* Mot. at 9-10. Plaintiffs should not be heard to make such an argument for the first time in reply. The purpose of Rule 15(c) relation-back is not to permanently immunize plaintiffs from statutes of limitations for reintroduction of issues previously asserted but waived.

Mayle is illustrative. There, a *habeas* petitioner argued that an amendment to challenge his conviction based on his Fifth Amendment right against self-incrimination related back to original claims in his habeas petition based on the Sixth Amendment's Confrontation Clause. Similar to Plaintiffs' argument that the Third Amendment is the "same conduct and ocurrence[s]" out of which both claims "arose" (Mot. at 9), Mayle argued that his "trial itself is the 'transaction' or 'occurrence' that counts." 545 U.S. at 660. The Supreme Court rejected that analysis as "artificially truncate[d]" and held that the new claims did not relate back because the "essential predicate[s]" and "dispositive question[s]" were different across the two types of claims. *Id.* at 661; *accord Watkins v. Deangelo-Kipp*, 854 F.3d 846, 850 (6th Cir. 2017) (relation-back not satisfied when amendment to habeas petition asserted "another ineffective assistance claim based upon an entirely distinct type of attorney misfeasance" than in the original petition) (quoting *Cox v. Curtin*, 698 F. Supp. 2d 918, 931 (W.D. Mich. 2010))). So too here: The essential predicates and dispositive questions for the removal restriction and Appropriations Clause claims are distinct even if, just as both claims in *Mayle* attacked the same conviction, both claims here challenge the Third Amendment.

Thus, in addition to exceeding the mandate, the new claims are untimely. The Court should deny leave to amend on that basis as well.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' motion for leave to amend to add Appropriations Clause claims.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with Local Rule 7.2(b)(i), and contains 4,279 words, including headings, footnotes, citations, and quotations. The foregoing word count was generated using Microsoft Word 365.

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