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

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

TREASURY'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT

More than six years after this litigation commenced, after Plaintiffs sought review from both the Sixth Circuit and the Supreme Court, leading to a narrow remand explicitly limited "to determin[ing] 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 (June 12, 2023), Plaintiffs now seek leave to amend their complaint to recycle substantive theories that this Court already rejected and Plaintiffs abandoned on appeal. The only issue before this Court on remand is whether Plaintiffs can meet their burden to establish that they suffered compensable harm resulting from President Trump's constraint on removal of a confirmed director of the Federal Housing Finance Agency. Plaintiffs' attempt to add Appropriations Clause claims, which are wholly unrelated to their removal theory, violates the mandate rule and, in any event, are waived and time-barred. The Court should deny Plaintiffs' motion and require them either to rest on their existing allegations or amend to add allegations limited solely to the question remanded by the Supreme Court and Sixth Circuit.

BACKGROUND

The Department of the Treasury ("Treasury") incorporates by reference, and adopts, the thorough procedural history and background set forth in the Opposition to Plaintiffs' Motion for Leave to Amend filed by the Federal Housing Finance Agency ("FHFA") Defendants, *see* ECF 83.

ARGUMENT

I. Plaintiffs' Belated Attempt to Add New Claims is Barred by Both the Mandate Rule and Principles of Waiver.

As a threshold matter, Plaintiffs' reliance on the liberal standard for leave to amend set forth in Federal Rule of Civil Procedure 15, *see* Pls.' Mot. for Leave to Amend Compl. at 2, ECF No. 80 (PageID.1926) ("Mot."), is misplaced. This is not, as Plaintiffs portray, a routine question whether "justice so requires" granting leave to amend, *see* Fed. R. Civ. P. 15(a)(2). On the contrary, Plaintiffs here seek to *replead* a theory that expressly has been rejected by this Court, after years of litigation,

including a trip to the Supreme Court, and despite Plaintiffs' own failure to appeal their previous loss on the same substantive allegations. Such gamesmanship should not be countenanced. Plaintiffs' request must be evaluated under the mandate rule and principles of waiver; straightforward application of these doctrines dictates that Plaintiffs' motion be denied.

A. *The Mandate Rule Forbids Plaintiffs' Tardy Addition of New Claims*

"The mandate rule binds a district court to the scope of the remand issued by the court of appeals" and "instructs that the district court is without authority to expand its inquiry beyond the matters forming the basis of the appellate court's remand." *Monroe v. FTS USA, LLC*, 17 F.4th 664, 669 (6th Cir. 2021) (citing *Campbell*, 168 F.3d at 265), *cert. denied*, 142 S. Ct. 1232 (2022). "The mandate rule has two components—the limited remand rule, which arises from action by an appellate court, and the waiver rule, which arises from action (or inaction) by one of the parties." *United States v. O'Dell*, 320 F.3d 674, 679 (6th Cir. 2003). It serves to conserve judicial resources, prevent wasteful litigation, and ensure finality of legal proceedings. *Id.* at 680. An appellate mandate may be either general or limited in scope. A general remand allows a district court freely to "address all matters as long as it remains consistent with the appellate court's opinion," and is identified by a lack of any "explicit limitation." *Monroe,* 17 F.4th at 669. But where the appellate court includes "language denoting a specific limitation," the district court on remand is "constrain[ed]" and lacks authority to consider anything outside "the issue or issues specifically articulated in the appellate court's order." *Id.* at 669-70 (citation omitted).

Both the Supreme Court in *Collins*, and the Sixth Circuit in this case, issued narrow remands constraining this Court to the determination whether Plaintiffs can demonstrate compensable harm from the sole constitutional violation they have established. The Supreme Court indicated that the lower courts should resolve, in the first instance, the "parties' arguments" regarding whether the "unconstitutional removal provision inflicted harm" entitling shareholders to any measure of "retrospective relief." *Collins v. Yellen*, 141 S. Ct. 1761, 1788-89 (2021). In so doing, the Court plainly envisioned that further proceedings would be limited to resolution of the parties' competing views on

the applicability of potential retrospective relief for the sole violation established. The Sixth Circuit likewise limited this Court to consideration of potential remedies—and even referenced similar actions by sister circuits: "Following *Collins,* and the Fifth and Eighth Circuits' examples,[1] we remand for the district court to determine whether the unconstitutional removal restriction inflicted compensable harm on shareholders entitling them to retrospective relief." *Rop*, 50 F.4th at 577.

These orders leave no doubt that this Court's authority is limited to the question whether Plaintiffs can demonstrate any entitlement to relief for cognizable harm flowing from the President's constraint on removal of a confirmed FHFA Director. In particular, the Sixth Circuit's explicit instructions create a "narrow framework within which the district court must operate," *Campbell*, 168 F.3d at 265, to determine whether Plaintiffs can establish any compensable harm. Indeed, even Plaintiffs freely acknowledge that the court's remand contained explicit limiting language: "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.'" Mot. at 8 (quoting *Rop*, 50 F.4th at 574). Plaintiffs' attempt to add claims challenging FHFA's funding structure under the Appropriations Clause plainly exceeds this limited mandate. *See Monroe*, 17 F.4th at 669-70 (confirming that remand for the purpose of determining damages did not permit district court to reconsider other issues, including liability).

The cases upon which Plaintiffs rely only serve to highlight the flaws in their position. Plaintiffs quote *Allard Enterprises, Inc. v. Advanced Programming Resources, Inc.*, 249 F.3d 564, 570 (6th Cir. 2001), for the proposition that this Court "may consider those issues not decided expressly or impliedly by the appellate court or a previous trial court." Mot. at 7-8. But Plaintiffs ignore that the Sixth Circuit

[1] Both the Eighth and Fifth Circuits have concluded that *Collins* left open the narrow question whether shareholders can establish harm from the removal restriction. *See Collins v. Yellen*, 27 F.4th 1068, 1069 (5th Cir. 2022) ("[T]he possibility that the unconstitutional restriction on a President's power to remove a Director of the FHFA could have [inflicted compensable harm] cannot be ruled out" and "the prudent course is to remand to the district court to fulfill the Supreme Court's remand order. And that is what we do."); *Bhatti v. FHFA*, 15 F.4th 848, 854 (8th Cir. 2021) ("This court also reverses the dismissal of the separation-of-powers claim and remands to the district court to determine if the shareholders suffered compensable harm and are entitled to retrospective relief." (citation omitted)).

qualified that statement as applicable only to *general remands*. *Allard Enters.* at 570-71 (noting that "it is important to determine whether the remand issued by this court … was of a general or limited nature"). In *Allard Enterprises*, the prior appellate opinion had "provided explicit, limited instructions to the district court" (to adjust the geographic scope of an injunction based on additional factfinding), so the remand was "limited in scope" and the district court "violated the mandate rule" by allowing amendments of the pleadings to add new claims. *Id.* at 571. Similarly, in two other cases relied upon by Plaintiffs, remands also were held to be limited and barred attempts to inject new issues in proceedings on remand. *See Campbell*, 168 F.3d at 268-69 (on limited remand for hearing on criminal defendant's financial status for purposes of fine, defendant could not seek recalculation of drug quantity under new guidelines); *United States v. Moore*, 131 F.3d 595, 599 (6th Cir. 1997) (where prior opinion "specifically limited the scope of the remand to a consideration of whether the evidence supported [defendant's] § 924(c) conviction," district court "violate[d] the mandate rule" by adding to defendant's sentence based on new enhancements).[2] Likewise here, Plaintiffs' contention that the proposed Appropriations Clause claims are within the scope of the Sixth Circuit's limited remand does not withstand scrutiny.

Finally, Plaintiffs' attempt to rely on a narrow exception to the mandate rule—where there has been an "intervening change of controlling law"—fails for the simple reason that there has not been *any* change in controlling law since the Sixth Circuit's decision. *See* Mot. at 9 (PageID.1933). Plaintiffs' vague assertion that *Collins* "recognized a major shift in the understanding of FHFA's basic constitutional structure," thereby creating an "indisputable intervening change in controlling law," is disingenuous. *Id. Collins* cannot be an intervening change in law because the Sixth Circuit's decision in

[2] In contrast, the Sixth Circuit decisions cited by Plaintiffs that found the scope of a remand not exceeded reflect common-sense outcomes, where the district court's actions fell comfortably within the mandate's scope, and thus represent situations far afield from that here. *See United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994) (on remand for resentencing, district court did not exceed mandate by *sua sponte* correcting a "mistake" it discovered in its earlier calculation of loss); *Jones v. Lewis*, 957 F.2d 260, 262 (6th Cir. 1992) (where appellate court had remanded for "new trial" on civil rights claim, district court did not exceed the mandate by allowing the retrial jury to decide relevant liability issues) (citation omitted)).

this case postdated and applied *Collins*. Moreover, the Supreme Court mentioned FHFA's funding structure *just once* in the entire *Collins* decision—in a passing observation in background, noting that the agency is "not funded through the ordinary appropriations process" and instead its budget "comes from the assessments it imposes on the entities it regulates." *Collins*, 141 S. Ct. at 1772. This brief recognition of the statutory scheme neither changed nor even addressed the legal issues surrounding the constitutionality of funding mechanisms outside the traditional appropriations process. On the contrary, the Court's holding (and analysis more generally) turned on established law regarding the President's removal authority. *Id.* at 1784 ("A straightforward application of our reasoning in *Seila Law* dictates the result here."). No exception to the limited-remand doctrine applies.

B. *Plaintiffs waived any ability to challenge FHFA's funding mechanism.*

Plaintiffs' attempt to add Appropriations Clause claims at this late stage of litigation fails for the alternative reason that they have waived reliance on any such allegations. In addition to the limited-remand doctrine, the mandate rule also precludes parties from reintroducing issues that they could have—but elected not to—pursue on appeal. "[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." *O'Dell*, 320 F.3d at 679 (citation omitted). Waiver operates to prevent "[a] party who could have sought review of an issue or ruling during a prior appeal" from challenging settled decisions on remand, for it "would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost." *United States v. Adesida,* 129 F.3d 846, 850 (6th Cir.1997) (citation omitted). Similar to the limited-remand doctrine, waiver promotes "efficiency and finality" and prevents "piece-meal appeals." *Waste Mgmt. of Ohio, Inc. v. City of Dayton*, 169 Fed. App'x 976, 987 (6th Cir. 2006).

Plaintiffs already presented to this Court an essentially coextensive theory arguing that FHFA's funding through assessments, not appropriations, violates the separation of powers. *See, e.g.*, First Am.

Compl. ¶ 2, 148, ECF No. 17 (PageID.197, 261) ("HERA also 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"); Br. in Supp. Pls.' Mot. for Summ. Disp. at 9, ECF No. 33 (PageId.912) ("[U]nlike every other independent agency headed by a single individual save the CFPB, FHFA is not subject to the congressional appropriations process."). But this Court rightly rejected Plaintiffs' premise, holding that they "fail to state a claim" that "other features of the FHFA's independence—*including its source of funding*, [and] the alleged lack of 'meaningful direction or oversight by Congress' … render the FHFA's structure unconstitutional." Mem. Op. at 49, ECF No. 66 (PageID.1806) (emphasis added) (citation omitted). As this Court explained, "no authority support[s] the notion that an independent source of funding creates a separation-of-powers problem." *Id.* That decision assuredly was ripe for review in Plaintiffs' previous appeal, yet they chose not to challenge that holding. Such a conscious relinquishment of the right to appeal an adverse determination constitutes a binding waiver. *See, e.g.*, *Doe v. Mich. State Univ.*, 989 F.3d 418, 425 (6th Cir. 2021).

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This same gambit has been attempted by similarly situated plaintiffs—represented by the same counsel representing Plaintiffs here—on direct remand from *Collins*. The district court rejected the *Collins* plaintiffs' attempt to argue that the Supreme Court's remand had paved the way for addition of an Appropriations Clause claim, explaining that "[t]he time for raising new issues has passed" and that "allowing parties to introduce new issues on remand" would "frustrate the very purpose of the mandate rule." *Collins v. Lew*, No. 4:16-CV-03113, 2022 WL 17170955, at *6 (S.D. Tex. Nov. 21, 2022) *appeal filed sub nom. Collins v. Treasury*, No. 22-20632 (5th Cir. Dec. 8, 2022). This Court likewise should reject Plaintiffs' attempt to inject new issues in these proceedings and confirm that the only remaining question is whether Plaintiffs can meet their burden to establish an entitlement to retrospective relief for cognizable harm caused by the removal restriction.

II. Plaintiffs' Proposed Claims Are Time-Barred.

Plaintiffs' attempt to add Appropriations Clause claims fails for the additional reason that the statute of limitations has long since run. The statute of limitations for non-tort civil actions against the United States is six years. 28 U.S.C. § 2401(a); *Sierra Club v. Slater*, 120 F.3d 623, 629 (6th Cir. 1997). Plaintiffs seek either vacatur of the Third Amendment or, in the alternative, of "the PSPAs in their entirety." Prop. Am. Compl. ¶¶ 115-16, 135-36, Prayer for Relief ¶ 6, ECF No. 14 (PageID.1911, 1914, 1918). The PSPAs were instituted in September 2008, *id.* ¶¶ 23-24, so any claim challenging those actions had to be brought by 2014, and the Third Amendment was adopted in August 2012, *id.* ¶ 37, rendering any challenge to it untimely after August 2018 (PageID.1879, 1882).

Plaintiffs contend, however, that their claims relate back to their original complaint, *see* Federal Rule of Civil Procedure 15(c). That contention is meritless. Mot. at 9 (PageID.1933). In Plaintiffs' telling, their appropriations theory relates back to their removal theory merely because both claims seek to undo the same challenged action—adoption of the Third Amendment. But that would allow any plaintiff an unlimited opportunity to add new claims, so long as the relief sought (*i.e.*, unwinding of the challenged action) remained the same. That is not the law. Instead, for claims to relate back, Plaintiffs must show that the claims "share a common core of operative facts." *Raglin v. Shoop*, No. 19-3361, 2022 WL 1773719, at *5 (6th Cir. June 1, 2022), *cert. denied sub nom. State v. Raglin*, 143 S. Ct. 791 (2023). Here, there is no overlap between the operative facts underlying a removal violation—*i.e.*, that the President was unconstitutionally constrained from firing the FHFA Director—and an Appropriations claim—*i.e.*, that FHFA's ability to self-fund through assessments thwarts congressional control through the appropriations process. *See* Proposed Amended Complaint ¶¶ 103-116, 123-136 (PageID.1909-1911, 1913-1914). Plaintiffs' proposed claims are wholly distinct from the

removal violation upheld in *Collins*, do not relate back to its original complaint, and thus are time-barred.

CONCLUSION

The Court should deny Plaintiffs' motion for leave to amend and direct them either to proceed based on allegations in their current operative complaint, or to file an amended pleading adding allegations related solely to "whether, considering *Collins*, the unconstitutional removal restriction inflicted harm on shareholders." *Rop*, 50 F.4th at 564.

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Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

JACQUELINE COLEMAN SNEAD
Assistant Branch Director

/s/ Kate Talmor
KATE TALMOR (Md. Bar)
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, DC 20005
(202) 305-5267
kate.talmor@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record are CM/ECF participants and service of this filing will be accomplished through filing on the public docket.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with Local Rule 7.2(b)(i), and contains 2,686 words, including headings, footnotes, citations, and quotations. The foregoing word count was generated using Microsoft Word 365.

/s/ Kate Talmor

KATE TALMOR (Md. Bar)