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

BRIEF OF FHFA DEFENDANTS IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

(ORAL ARGUMENT REQUESTED)

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Pursuant to Federal Rule of Civil Procedure 12(c), the Federal Housing Finance Agency ("FHFA") Defendants[1] move for judgment on the pleadings in this eight-year-old litigation, which is now before this Court on limited remand from the Sixth Circuit. Plaintiffs' first amended complaint (ECF No. 17) does not plausibly plead any entitlement to relief within the limited remand. Judgment on the pleadings accordingly is appropriate. Further, under *Collins v. Yellen*, 594 U.S. 220 (2021), any relief Plaintiffs seek is barred by a statute precluding judicial action that would "restrain or affect the exercise of [the] powers or functions of the Agency as a conservator" because *Collins* confirms all relevant actions by FHFA were within its constitutional authority. 12 U.S.C. § 4617(f). Equally determinative is the clear Supreme Court ruling that FHFA's "business decisions are protected from judicial review" when acting as Conservator. *Collins*, 594 U.S. at 254.

Although Plaintiffs have indicated a desire to change their theory of the case, this Court already has denied leave to amend once and should not entertain another request for leave to amend. It is now time to draw this long-running litigation to a close. Defendants are entitled to judgment on the pleadings.

[1] The FHFA Defendants are FHFA and its Director William J. Pulte in his official capacity as Director. Pursuant to Federal Rule of Civil Procedure 25(d), Mr. Pulte in his official capacity should be substituted for former Director Mark Calabria.

BACKGROUND

This Court has previously recounted the background and history of this lawsuit, as has the Sixth Circuit. ECF No. 87 (order denying motion for leave to amend); ECF No. 66 (order granting prior motion to dismiss); *Rop v. FHFA*, 50 F.4th 562, 564-69 (6th Cir. 2022), *cert. denied*, 143 S. Ct. 2608 (2023).

In brief, Plaintiffs allege they own shares of the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") (together, the "Enterprises"), each of which was placed in conservatorship during the 2008 financial crisis. In September 2008, FHFA, as Conservator of the Enterprises, entered into preferred stock purchase agreements with the Department of the Treasury in exchange for substantial funding to avoid the Enterprises going into insolvency. In August 2012, FHFA, as Conservator, and Treasury entered into an amendment to those agreements that is known as the "Third Amendment." This lawsuit arises from the Third Amendment.

Plaintiffs filed this action in June 2017, following on the heels of a similar lawsuit in the Southern District of Texas called *Collins*, and concurrently with an identical lawsuit on behalf of other Enterprise shareholders in the District of Minnesota called *Bhatti*. The same counsel representing Plaintiffs here represented the shareholders in *Collins* and *Bhatti*. All three lawsuits alleged that the Third Amendment was invalid on account of various alleged constitutional defects in FHFA's structure.

The first amended complaint in this case had five counts: violation of the President's constitutional removal authority (Count I), violation of other aspects of

the separation of powers (Count II), Appointments Clause (Count III), nondelegation (Count IV), and private nondelegation (Count V). *See generally* ECF No. 66 PageID.1765-66 (prior decision of this Court describing the counts).

In 2020, this Court dismissed all five claims. *Id.* at PageID.1818. Plaintiffs appealed only the dismissal of Counts I (removal restriction) and III (Appointments Clause). While the case was on appeal, the United States Supreme Court decided *Collins v. Yellen*, 594 U.S. 220 (2021). In *Collins*, the Supreme Court held that the "for-cause restriction on the President's removal authority [over FHFA's Director] violates the separation of powers." *Id.* at 250. However, the shareholders' arguments in *Collins* for setting aside the Third Amendment failed because that transaction was entered into by an *Acting* Director who was removable at will, and was not covered by the removal restriction. The inapplicability of the removal protection to the Acting Director "defeat[ed] the shareholders' argument for setting aside the third amendment[.]" *Id.* at 257.

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.* 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,

stating that it "cannot be ruled out" that the unconstitutional removal restriction might have affected implementation of the Third Amendment. *Id.* at 259.

Five Justices who wrote or joined in concurring opinions expressed doubts about Plaintiffs' prospects on remand. *See Collins*, 594 U.S. at 270-71 (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 282 (Gorsuch, J., concurring in part) (describing remand as "speculative enterprise" expected to "go nowhere"); *Id.* at 275-76 (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").

After the Supreme Court decided *Collins*, the Sixth Circuit decided the appeal in this case. The Sixth Circuit upheld dismissal of the Appointments Clause claim (Count III), although on different grounds than this Court. *Rop*, 50 F.4th at 569-74. As to the removal restriction claim (Count I), the Sixth Circuit held, consistent with *Collins* (and this Court's 2020 decision), that the removal restriction was no basis for invalidating the Third Amendment because that amendment was adopted by an Acting Director unprotected by the removal restriction. *Id.* at 575.

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. The Sixth Circuit read Plaintiffs' first amended complaint as seeking such retrospective relief for implementation of the Third Amendment through its request for "return to Fannie and Freddie [of] all dividend payments made pursuant to the [third amendment's net worth sweep] or, alternatively, recharacterizing such payments as a pay down of the liquidation preference and a corresponding redemption of Treasury's Government Stock." *Id.* at 576 (quoting ECF No. 17 PageID.271). As the Sixth Circuit explained, the first amended complaint alleges that "Fannie and Freddie paid Treasury $215.6 billion in net worth sweep dividends from January 2013 to June 2017" pursuant to the Third Amendment. *Id.* at 576 n.7; *see* ECF No. 17 PageID.248-49 (underlying allegations).

Following the path forged in *Collins*, the Sixth Circuit 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. The appellate court echoed the *Collins* Justices' skepticism about the ultimate prospects of the shareholders' claims for retrospective relief, characterizing those claim as "speculative" and "no easy feat" on remand. *Id.* at 576.

After the case was remanded to this Court (following an unsuccessful petition for certiorari by Plaintiffs on their Appointments Clause claim), Plaintiffs moved for leave to file an amended complaint that would have replaced all of the counts in the first amended complaint, and would have added two new counts raising a new theory

based on the Appropriations Clause of the United States Constitution. ECF No. 79. On December 11, 2024, this Court denied Plaintiffs' motion for leave to amend. ECF No. 87. Plaintiffs took no immediate steps toward filing any other amended complaint. In January 2025, this Court ordered Defendants to answer the first amended complaint, and Defendants did so. ECF No. 92 (FHFA); ECF No. 93 (Treasury).

After the Sixth Circuit's decision remanding this case, many other courts have rejected similar claims seeking relief related to implementation of the Third Amendment. *Collins* itself was litigated to its final conclusion: dismissal with prejudice on the pleadings of the remanded claims. *Collins v. Lew*, 642 F. Supp. 3d 577 (S.D. Tex. 2022). The Fifth Circuit unanimously affirmed, and the time for a petition for certiorari has expired. 83 F.4th 970 (5th Cir. 2023) . The other copycat case filed concurrently with this one, *Bhatti*, met the same fate. *Bhatti v. FHFA*, 646 F. Supp. 3d 1003 (D. Minn. 2022). That dismissal with prejudice on the pleadings was also unanimously affirmed by the Eighth Circuit, and the time for certiorari has expired. 97 F.4th 556 (8th Cir. 2024). In a related Third Amendment case raising removal restriction claims alongside other theories, the Federal Circuit held that shareholders could not establish any viable claims of the type hypothesized in the *Collins* remand instructions. *Fairholme Funds, Inc. v. United States*, 26 F.4th 1274, 1304-05 (Fed. Cir. 2022).

LEGAL STANDARD

A motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) turns on the same standard as a motion to dismiss under Rule 12(b)(6).

VanderKodde v. Mary Jane Elliott, P.C., 2022 WL 897136, at *1 (W.D. Mich. Mar. 23, 2022). That standard "tests whether a cognizable claim has been pled in the complaint." *Nitz-Lentz v. Metro. Life Ins. Co.*, 2024 WL 4555413, at *1 (W.D. Mich. Oct. 10, 2024) (citing *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988)). Thus, to survive a motion to dismiss or for judgment on the pleadings, "a plaintiff must allege facts [that], when accepted as true, are sufficient to raise a right to relief above the speculative level." *Id.* (citing *Mills v. Barnard*, 869 F.3d 473, 479 (6th Cir. 2017)). "At bottom, a complaint must do more than allege entitlement to relief; its facts must show such an entitlement." *Id.* (citing *Gavitt v. Born*, 835 F.3d 623, 640 (6th Cir. 2016)). In other words, "[t]o withstand a Rule 12(c) motion for judgment on the pleadings, 'a complaint must contain direct or inferential allegations respecting all the material elements under some viable legal theory.'" *VanderKodde*, 2022 WL 897136, at *1 (quoting *Barany-Snyder v. Weiner*, 539 F.3d 327, 332 (6th Cir. 2008)).

ARGUMENT

I. Plaintiffs' First Amended Complaint Does Not State any Viable Legal Theory Entitling Them to Relief

This Court's and the Sixth Circuit's prior rulings already disposed of most of this case, including Counts II through V. All that remains is such portion of Count I as seeks retrospective relief for compensable harm to shareholders, if any, due to the removal restriction affecting implementation of the Third Amendment. The first amended complaint does not allege facts suggesting that the removal restriction

affected implementation of the Third Amendment or harmed shareholders, and it does not establish any viable claim for retrospective relief.

The Sixth Circuit prescribed a remand in this case that would track the *Collins* remand. *See Rop*, 50 F.4th at 576-77. The *Collins* Court explained, *dubitante*, that its remand was for litigation of any possible claims that the removal restriction blocked a President from "replac[ing] one of the confirmed Directors who supervised the implementation of the third amendment" or that a confirmed Director subject to at-will removal "might have altered his behavior in a way that would have benefited the shareholders." 594 U.S. at 260. In this regard, the Sixth Circuit understood Plaintiffs to be seeking "'return to Fannie and Freddie [of] all dividend payments made pursuant to the [Third Amendment's net worth sweep],'" namely "$215.6 billion in net worth sweep dividends from January 2013 to June 2017," or recharacterization of those dividends as paying down Treasury's liquidation preferences. 50 F.4th at 576 & n.7 (quoting ECF No. 17 PageID.271).

Although the first amended complaint's prayer for relief includes that language, the first amended complaint alleges no facts suggesting that being subject to at-will removal would have "altered [any FHFA Director's] behavior" with respect to those dividends. To the contrary, the first amended complaint acknowledges that *Acting* Director DeMarco—who was not confirmed by the Senate and never protected by the removal restriction at all—led FHFA from the time of the Third Amendment through January 2014. ECF No. 17 PageID.219. Most of the referenced dividends

were paid during that period. *See id.* at PageID.248-249 (alleging that $130 billion of $215 billion in "Dividend Payments Under the Net Worth Sweep" occurred in 2013).

In January 2014, Director Mel Watt was confirmed by the Senate and took office. *Id.* at PageID.219. The first amended complaint does not allege that there was ever any difference of views between the sitting President and the Senate-confirmed FHFA Director over the subject of Third Amendment implementation. Thus, the period in which there were Senate-confirmed Directors accounts for the other $85 billion of implementation in the form of "Dividend Payments Under the Net Worth Sweep." *See* ECF No. 17 PageID.248-249. In any event, as the Federal Circuit observed, at all times "there was adequate presidential oversight over the actions of all FHFA Directors regarding the net worth sweep" through Treasury's participation. *Fairholme Funds*, 26 F.4th at 1305.

In short, the first amended complaint puts forward no facts that would provide any underpinning for the very limited kind of claim that the Supreme Court, and by extension Sixth Circuit, hypothesized could be grounds for further litigation. That failure is unsurprising given "the Supreme Court's description of the extreme limits on the possible relief available to similarly situated shareholders," the President's plenary control of the Treasury Department at all relevant times, and the reality that FHFA and Treasury have continued to defend the Third Amendment in this and other litigation. *Id.* at 1305.

II. Section 4617(f) Bars Judicial Action Restraining or Affecting the Powers or Functions of the Conservator

The Court also should grant judgment on the pleadings because 12 U.S.C. § 4617(f) forbids relief that would "restrain or affect the exercise of [the] powers or functions of the Agency as a conservator." This provision covers any situation "where the FHFA action at issue fell within the scope of the Agency's authority as a conservator." *Collins*, 594 U.S. at 237. "[R]elief is allowed" *only* "if the FHFA exceeded that authority." *Id.*; *see Robinson v. FHFA*, 876 F.3d 220, 227-228 (6th Cir. 2017) (describing § 4617(f) as a "sweeping ouster of courts' power to grant equitable remedies" with the only exception being "[i]f the FHFA were to act beyond statutory or constitutional bounds" (citations omitted)).

The Supreme Court held in *Collins* that entering into the Third Amendment was within FHFA's authorized Conservator powers and functions, including "put[ting] the regulated entity in a sound and solvent condition" and "carry[ing] on the business of the regulated entity." *Collins*, 594 U.S. at 238 (quoting 12 U.S.C. § 4617(b)(2)(D)); *see also id.* at 239 (HERA "authorized the Agency to choose this option" because it "ensured that all of Treasury's capital was available to backstop the companies' operations during difficult quarters" and "the FHFA could have reasonably concluded that it was in the best interests of members of the public who rely on a stable secondary mortgage market"). Because "FHFA did not exceed its authority as a conservator," *Id.* at 242, and "[i]ts business decisions are protected from judicial review," *Id.* at 254, Section 4617(f) barred plaintiffs' requested relief invalidating the Third Amendment.

The same logic applies to any relief seeking to undo Conservator action implementing the Third Amendment, to force the Conservator to implement the Third Amendment in a particular way, or otherwise to force a change of the terms of the Conservator's relationship with Treasury under the Senior Preferred Stock Purchase Agreements. There can be no doubt that such an injunction would "restrain or affect" the Conservator, which Congress entrusted by statute with managing the Enterprises' finances.[2]

The fact that the Supreme Court remanded for possible further litigation of retrospective relief claims in *Collins* does not mean § 4617(f) is inapplicable. The Court did not imply that any further claims of the shareholders had merit; on the contrary, it expressed pronounced skepticism of such claims. The Court made clear that defenses to such claims were fully preserved for litigation on remand. And the Court emphasized that the existence of the unconstitutional removal provision never stripped any Director of constitutional or statutory authority to act, negating the only possible exception to § 4617(f). *See Collins*, 594 U.S. at 258 ("there is no basis for concluding that any head of the FHFA lacked the authority to carry out the functions of the office"). As the *Bhatti* court explained on remand, § 4617(f) barred the

[2] To the extent Plaintiffs seek injunctive relief that implicates the bond requirement of Fed. R. Civ. P. 65(c) and the President's Memorandum Ensuring the Enforcement of Federal Rule of Civil Procedure 65(c), Plaintiffs would be required to post a bond to cover all damages caused by such an injunction. *See* www.whitehouse.gov/presidential-actions/2025/03/ensuring-the-enforcement-of-federal-rule-of-civil-procedure-65c/. The Court need not address such issues at this time, however, since Section 4617(f) bars injunctive relief and Plaintiffs' claims otherwise fail as a matter of law.

shareholders' claims because "FHFA's actions were all within its constitutional authority." *Bhatti*, 646 F. Supp. 3d at 1017, *aff'd*, 97 F.4th 556 (8th Cir. 2024).[3]

III. Plaintiffs Cannot Pursue New Factual Theories Outside the First Amended Complaint

Plaintiffs sought leave on August 11, 2024, to file a proposed second amended complaint that would have raised new factual allegations relating to time periods postdating the first amended complaint, as well as impermissible Appropriations Clause claims. ECF No. 79-1. The Court denied leave to file that second amended complaint. ECF No. 87. Thus, the issues before the Court are limited to those within the four corners of the first amended complaint, which must be examined in the context of the very limited remand from the Sixth Circuit. FHFA notes, however, that the new factual allegations and theory Plaintiffs apparently sought to inject in that second amended complaint have been decisively rejected by all other courts faced with them. *See Bhatti v. FHFA*, 97 F.4th 556 (8th Cir. 2024), *aff'g* 646 F. Supp. 3d 1003 (D. Minn. 2022); *Collins v. Dep't of the Treasury*, 83 F.4th 970 (5th Cir. 2023), *aff'g* 642 F. Supp. 3d 577 (S.D. Tex. 2022).

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[3] While the Fifth Circuit held on remand in *Collins* that § 4617(f) did not apply to one count of the shareholder complaint there, it based that exception on *Webster v. Doe*, 486 U.S. 592 (1988), which requires statutes to have a "clear statement" in order to "deny any judicial forum for a colorable constitutional claim." *Collins*, 83 F.4th at 980 (citing *Webster*). As the *Bhatti* district court persuasively explained, however, *Webster* is "inapposite" as it concerned a provision "that bar[red] judicial review altogether," whereas § 4617(f) bars certain forms of relief. *Bhatti*, 646 F. Supp. 3d at 1017. The Fifth Circuit also relied on its prior decision involving a similar anti-injunction provision in the FDIC's statute, *FDIC v. Bank of Coushatta*, 930 F.2d 1122, 1130 (5th Cir. 1991). That decision is not binding on this Court, however, and the Sixth Circuit's cases do not reflect any such limitation.

It is time for this litigation to end. If Plaintiffs should seek to amend—again—to raise new issues, FHFA submits that such amendments would be without merit and should be denied on the basis of futility.

CONCLUSION

For the foregoing reasons, this Court should grant FHFA's motion for judgment on the pleadings and dismiss this case with prejudice.

Dated: March 27, 2025

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 3,249 words, including headings, footnotes, citations, and quotations. The foregoing word count was generated using Microsoft Word 365.

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