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

MICHAEL ROP, *et al*.,

Plaintiffs,

-vs-

THE FEDERAL HOUSING FINANCE AGENCY, *et al*.,

Defendants.

CIVIL ACTION NO. 1:17-CV-00497

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

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Defendants have repudiated their previously expressed position that they "do not oppose Plaintiffs amending the complaint to add allegations relevant to the presidential removal claims," (Joint Status Report, ECF No. 77, PageID.1866), and Plaintiffs must hereby move for leave to file an amended complaint under Federal Rule of Civil Procedure 15(a). The proposed amendments add only allegations to demonstrate that "the unconstitutional removal restriction" protecting the Director of the Federal Housing Finance Agency ("FHFA") "inflicted harm on shareholders." *Rop v. FHFA*, 50 F.4th 562, 564 (6th Cir. 2022).

INTRODUCTION

In *Collins v. Yellen*, the Supreme Court agreed with Plaintiffs that a restriction on the President's ability to remove the Director of the FHFA was unconstitutional. 594 U.S. 220, 229 (2021). The Supreme Court, however, did not decide whether that restriction made actions undertaken by the Director with respect to the Third Amendment unlawful. *Id.* It left that determination to the lower courts, which were better positioned to make the necessary factual judgments. *Id.* at 258–61.

Plaintiffs now seek leave to amend their complaint in light of the Supreme Court's decision. In particular, Plaintiffs seek to further demonstrate how they were harmed by the FHFA Director's unconstitutional removal restriction. The proposed amendments include explicit statements from then-President Trump which conclusively show that he, and the FHFA, would have acted differently but for the unlawful removal statute shielding the Director of the FHFA. Despite their previous consent, Defendants now oppose this motion. *See* Ex. B (July 5, 2023, Email Chain) ("Defendants would consent to amendment of the complaint to reflect the Article II removal restriction claim that is addressed in the 6th Circuit's decision remanding the case."). It is unclear

what has changed since Defendants told this Court and the Plaintiffs that they consented, but this Court should hold them to their word, as "justice so requires." FED. R. CIV. P. 15(a)(2).

STANDARD OF REVIEW

"The court should freely give leave" to amend. *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."). "The 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, 561 (6th Cir. 1986) (quotation marks and citations omitted). As the Sixth Circuit has acknowledged, "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) (cleaned up).

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 exist here. Plaintiffs' proposed

amendments plainly satisfy the liberal standard for leave to amend, and *Plaintiffs* will suffer prejudice if the Defendants' tactics are allowed to succeed.

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

Plaintiffs have been diligent in pursuing these amendments. *See Roskam Baking Co.*, 288 F.3d at 906. The Sixth Circuit remanded this case in October of 2022, and the Supreme Court denied certiorari in June of 2023. *See Rop*, 50 F.4th 562; *Rop v. FHFA*, 143 S. Ct. 2608 (2023) (mem.). After the Supreme Court elected not to review the judgment of the Sixth Circuit, this Court issued a status-report order on June 21, 2023, directing the parties to "suggest[]" an "approach for further litigation in light of the remand" by the Sixth Circuit. (Order for Joint Status Report, ECF No. 75, PageID.1865).

Because the Supreme Court stated in *Collins* that Plaintiffs would need to show that the implementation of the challenged program would have differed but for the removal protections, Plaintiffs sought to amend the complaint to add facts along these grounds and to add a related Appropriations Clause claim. Defendants agreed not to "oppose Plaintiffs amending the complaint to add allegations relevant to the presidential removal claims," but did oppose "Plaintiffs adding a claim under the Appropriations Clause." (Joint Status Report, ECF No. 77, PageID.1866). After Defendants' position became clear, the parties filed a joint status report on July 12, 2023, explaining their respective positions. *Id.* Plaintiffs then filed their motion for leave to amend on October 11, 2023. (Plaintiffs' Motion for Leave to Amend Complaint, ECF No. 79, PageID.1870–71). The motion for leave to amend was denied on December 11, 2024, because the request to add the Appropriations Clause claim "exceed[ed] the limited scope of Sixth Circuit's remand order." (Opinion and Order Denying Motion for Leave to Amend Complaint, ECF No. 87, PageID.2011). In its opinion, the Court only discussed the Appropriations Clause claims—the only aspect of

Plaintiffs' proposed amendments that Defendants had indicated they opposed. But Defendants recently had a change of heart. They revoked their consent and now oppose amendments to which they previously agreed.

The above timeline shows that Plaintiffs have diligently sought to amend their complaint. At no point have they allowed the case to languish on the docket. Indeed, they have worked diligently with the Court and with Defendants to ensure this case moves as quickly as possible after *Collins* showed what was required to obtain a retrospective remedy.

Nor is there any plausible argument that Defendants have suffered undue prejudice from any delay. 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). 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.

Perhaps most importantly, Defendants cannot claim undue prejudice when *they* are the reason this motion had to be filed in the first place. Defendants previously represented to Plaintiffs and the Court that they did not oppose "amending the complaint to add allegations relevant to the presidential removal claims." (Joint Status Report, ECF No. 77, PageID.1866); *see also* Ex. B. If that were still true, this Court's leave would not be required to file an amended complaint. FED. R. CIV. P. 15(a). But for reasons unbeknownst to Plaintiffs, Defendants have withdrawn their consent.

If anything, Plaintiffs would suffer from significant undue prejudice if this motion for leave to amend is denied. Plaintiffs previously relied on Defendants' representations when crafting their original motion for leave to amend to add the Appropriations Clause claim. Indeed, the brief

supporting the original motion explicitly states that "[b]ecause the amendments relating to the Appropriations Clause claims are the only ones that are contested, we focus our arguments here on those claims." (Memorandum of Law in Support of Plaintiffs' Motion for Leave to Amend Complaint, ECF No. 80, PageID.1925). If Plaintiffs knew that Defendants would ultimately renege, they would have addressed the propriety of the allegations related to the remedy in their first motion.

II. THE PROPOSED AMENDMENTS ARE NOT FUTILE.

In their recently filed motions for judgment on the pleadings, Defendants indicate that they believe the proposed amendments should be rejected on futility grounds. (FHFA's Brief in Support of Motion for Judgment on the Pleadings, ECF No. 100, PageID.2244; Treasury's Brief in Support of Motion for Judgment on the Pleadings, ECF No. 102, PageID.2262). That position is (at a minimum) in tension with their prior representations because Defendants possessed a copy of the proposed amended complaint when they consented to the amendments in question and never raised futility as an issue. Nonetheless, if the Court does consider Defendants' futility arguments, they are without merit.

An amendment is futile when it could not save the complaint from being dismissed. *Blakely v. United States*, 276 F.3d 853, 875–76 (6th Cir. 2002). That is not the case here. The proposed additional allegations contain precisely the information that the Supreme Court said would be required to establish entitlement to a retrospective remedy. In *Collins*, the Court explained that to obtain a retrospective remedy when a removal restriction violates the Constitution, a plaintiff had to produce evidence that the complained-of decision would have been different but for the removal restriction. 594 U.S. at 258–60. Plaintiffs in this case have exactly that evidence in the form of a letter from then-President Trump to Senator Rand Paul, which explains,

> [t]he Supreme Court's decision [in *Collins*] asks what I would have done had I controlled FHFA from the beginning of my Administration, as the Constitution required. 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.

Rop, 50 F.4th at 575 (quoting Letter from Donald Trump to Sen. Rand Paul, Real Clear Politics (Nov. 11, 2021), https://perma.cc/M3CA-TGD9). Defendants are sure to argue that the President did not really mean what he said, but that is not an argument for a motion to dismiss or for judgment on the pleadings, much less an argument to oppose an amendment as futile.

On that point, if the Court has any doubts whether the additional allegations will get over the motion-to-dismiss line, it should allow leave to amend. As the leading treatise on federal practice explains, a proposed amendment must be "*clearly* futile" before it is proper to deny leave to amend on futility grounds. 6 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1487 (3d ed. 2024) (emphasis added). That standard makes perfect sense because amendments can often raise complex legal issues that warrant a court's careful consideration. The relatively truncated memoranda of law accompanying and opposing a motion for leave to amend are generally no substitute for full merits briefing. That maxim is especially true here, as this Court is yet to analyze whether the FHFA Directors would have acted differently but for their unlawful removal protections. *See Rop v. FHFA*, 485 F. Supp. 3d 900, 940 (W.D. Mich. 2020); *see also Rop*, 50 F.4th at 576 ("[T]he district court did not have the benefit of *Collins* to guide its analysis.").

CONCLUSION

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

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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 1,842 words, including headings, footnotes, citations, and quotations. The foregoing word count was generated using Microsoft Word 365.

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