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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

Through years of litigation, this case has narrowed to a lone factual dispute: Did the unconstitutional removal restriction on the President's ability to remove the FHFA Director harm the Plaintiffs as shareholders of Fannie Mae and Freddie Mac? Plaintiffs' operative complaint and proposed second amended complaint plead facts showing that it did. But ultimately, this Court's determination should be based on the facts that are borne out through the discovery process.

In an apparent rush to avoid the process that would help finally resolve this factual dispute, Defendants have now filed two largely identical (and equally abbreviated) motions for judgment on the pleadings. Each Defendant has submitted a little over five pages of argument contending that, after eight years of litigation, the Court should short-circuit the discovery process (or preemptively rule on a yet-to-be-filed amended complaint) to dispose of a case that involves an undisputed constitutional violation and the alleged wrongful transfer of hundreds of billions of dollars that has been taken from shareholders by the government. Defendants' nothing-to-see-here strategy is all the more astonishing given that their briefs rely on arguments that have all been previously rejected by the Supreme Court, the Sixth Circuit, or this Court. And Defendants fail to even acknowledge that they are asking this Court to contradict the Sixth Circuit or reverse this Court's prior rulings on questions of law.

The Sixth Circuit held that the operative complaint seeks retrospective relief that is tied to the unconstitutional removal restriction—precisely what *Collins* requires. Defendants have answered that complaint, and the case should proceed to discovery to resolve this matter on the merits once and for all. Defendants' motions are meritless, and the Court should deny them.

BACKGROUND

A. FHFA Forces The Companies Into Conservatorship, Signs The PSPAs, And Implements The Net Worth Sweep While Its Directors Are Insulated From Removal.

In 2008, Congress enacted the Housing and Economic Recovery Act (HERA), which created FHFA as the new regulator of Fannie Mae and Freddie Mac, two privately owned companies ("the Companies") that sell mortgage-backed securities. First Am. Compl., Doc. 17 ¶¶ 15-16, 19-20, PageID.200-02 (July 27, 2017) ("FAC"). Under HERA, FHFA was led by a single director who could be removed only for cause. *Id.* ¶ 20. HERA also gave FHFA the authority to take the Companies into conservatorship, which the agency did in September 2008. *Id.* ¶¶ 26, 37, Page ID.206, 211.

At the same time, FHFA entered into two agreements with the Treasury Department on behalf of the Companies as their conservator. *Id.* ¶¶ 41-42, Page ID.212-13. These agreements—known as the Preferred Share Purchase Agreements or "PSPAs"—established an arrangement where Treasury provided the Companies with funding to permit them to maintain a positive net worth each quarter. *Id.* ¶ 43, Page ID.213.

In return, Treasury received several forms of consideration. First, FHFA agreed that the Companies would issue warrants entitling Treasury to buy 79.9% of their common stock at a nominal price. *Id.* ¶ 44-45, Page ID.213-14. Second, Treasury received senior preferred stock that carried an initial "liquidation preference," meaning that the shares included the right to receive funds before any other shareholder in the event the company is ever liquidated. *Id.* ¶ 46, Page ID.214. Treasury's initial liquidation preference was $1 billion. *Id.* The liquidation preference increased by one dollar for every dollar the Companies drew on Treasury's funding commitment. *Id.* In addition, because Treasury's shares were "senior preferred stock"—as opposed to "junior preferred" or "common" stock—Treasury was entitled to quarterly dividends before all other

shareholders. *Id.* ¶ 46-47, Page ID.214-15. Finally, the PSPAs provided for the Companies to pay Treasury a quarterly market-based periodic commitment fee, but that fee was never charged and had to be mutually agreed upon. *Id.* ¶ 52, Page ID.217.

In August 2012, FHFA and Treasury entered into the "third amendment" to the PSPAs. *Id.* ¶ 84, Page ID.233. Among other things, this amendment imposed what is known as the "Net Worth Sweep," which replaced the PSPAs' prior dividend structure. *Id.* Rather than a dividend paid as a percentage of the liquidation preference, the Companies would now pay their entire net worth every quarter, leaving only a small capital buffer. *Id.* This new structure resulted in massive payments to Treasury, totaling over $270 billion at the time the first amended complaint was filed —approximately $83 billion *more* than the Companies had received from Treasury. *Id.* ¶ 123, Page ID.251-52.

B. The Supreme Court Declares The FHFA Director's Removal Restriction Unconstitutional, And The Sixth Circuit Remands For This Court To Determine The Remedy.

Plaintiffs are shareholders of Fannie Mae and Freddie Mac who contended (among other things) that the FHFA Director's for-cause removal restriction was unconstitutional. *Id.* ¶¶ 9-11, 134-45, Page ID.200, 257. The Court dismissed their complaint. *See Rop v. FHFA*, 485 F. Supp. 3d 900 (W.D. Mich. 2020). While this case was pending on appeal, the Supreme Court decided *Collins* and held that the removal restriction was unconstitutional. *See Collins v. Yellen*, 594 U.S. 220 (2021). Having determined that the removal restriction violated the Constitution, the Supreme Court remanded the case for the lower courts to determine whether the unconstitutional restriction "inflict[ed] compensable harm" on the Companies' shareholders. *Id.* at 259. Pursuant to *Collins*, the Sixth Circuit remanded this case for this Court to make the same determination. *Rop v. FHFA*, 50 F.4th 562, 576-77 (6th Cir. 2022). In late February of this year, both FHFA and Treasury filed answers to the First Amended Complaint. *See* Doc. 92 (Feb. 21, 2025); Doc. 93 (Feb. 24, 2025).

Then, on March 27, FHFA filed a motion for judgment on the pleadings. Doc. 99 (Feb. 27, 2025). Treasury filed a nearly identical motion the following day. Doc. 101 (Mar. 28, 2025). Plaintiffs now file this opposition in response to both motions.

LEGAL STANDARD

"For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." *Moderwell v. Cuyahoga Cnty., Ohio*, 997 F.3d 653, 659 (6th Cir. 2021) (internal quotations omitted). A motion for judgment on the pleadings may be granted only when "no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law." *Id.* (internal quotations omitted).

ARGUMENT

I. Defendants' Arguments Are Foreclosed By Decisions Of The Supreme Court, The Sixth Circuit, And This Court.

Defendants' motions for judgment on the pleadings are a rehash of arguments that have all been previously rejected by the Supreme Court, the Sixth Circuit, or this Court. Moreover, largely for the reasons those Courts and this one have recognized, Defendants' arguments are meritless. First, the Sixth Circuit has already held that Plaintiffs' complaint seeks retrospective relief that is tethered to the unconstitutional removal restriction, as required by *Collins*. *See Rop*, 50 F.4th at 576. Second, Defendants' argument that § 4617(f) bars judicial review of Plaintiffs' constitutional claim has been implicitly rejected by the Supreme Court and the Sixth Circuit and expressly rejected by this Court in a decision that constitutes the law of the case. Finally, this Court's previous rejection of Defendants' argument that Treasury's involvement in the PSPAs dispels any harm resulting from the unconstitutional removal restriction is both the law of the case and clearly

correct. Defendants do not even acknowledge—let alone engage with—these prior rulings. The Court should deny Defendants' motions.

A. The Sixth Circuit Already Held That Plaintiffs' Complaint Seeks Retrospective Relief That Is Tethered To HERA's Unconstitutional Removal Restriction.

The Sixth Circuit's decision largely forecloses Defendants' motions for judgment on the pleadings. As an initial matter, in reviewing the same complaint that is the subject of Defendants' motions, the Sixth Circuit held that Plaintiffs' argument—"that shareholders are entitled to relief because the removal restriction is unconstitutional—is properly preserved." *Id.* at 575 n.6. Next, the Court explained that the "amended complaint requests the 'return to Fannie and Freddie of all dividend payments made pursuant to the third amendment's net worth sweep or, alternatively, recharacterizing such payments a pay down of the liquidation preference and corresponding redemption of Treasury's Government Stock." *Id.* at 576 (citation and brackets omitted). This request, the Sixth Circuit continued, "ask[s] only for relief effecting a zeroing out of Treasury's liquidation preference or converting of Treasury's senior preferred stock to common stock." *Id.* It thus seeks the precise remedy that the Supreme Court "identified . . . as retrospective relief" in *Collins*, "and this request for retrospective relief is tethered to shareholders' argument that the Recovery Act's removal restriction is unconstitutional." *Id.*

The Sixth Circuit further recognized that "*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." *Id.* As the Sixth Circuit acknowledged, it is through no fault of this Court that it "did not have the benefit of *Collins* to guide its analysis." *Id.* Thus, "[f]ollowing *Collins*," the Sixth Circuit remanded for this Court "to determine whether the unconstitutional

removal restriction inflicted compensable harm on shareholders entitling them to retrospective relief." *Id* at 576-77.

Defendants' motions blow past this ruling entirely. They claim that the 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." *See* Br. of FHFA in Supp. of Mot. for Judg. on the Pleadings, Doc. 100 at 7-8, Page ID.2238-39 (Mar. 27, 2025) ("FHFA Br."); *see also* Br. in Supp. of Treasury's Mot. for Judg. on the Pleadings, Doc. 102 at 6-9, Page ID.2257-60 (Mar. 28, 2025) ("Treasury Br.") (arguing that "Plaintiffs' first amended complaint does not plead a connection between the removal restriction and implementation of the Third Amendment" and that the complaint "fails to allege entitlement to 'retrospective relief'" (cleaned up)). But that is precisely the opposite of what the Sixth Circuit concluded. The Sixth Circuit held that (1) Plaintiffs "preserved" the argument "that shareholders are entitled to relief because the removal restriction is unconstitutional," (2) the amended complaint "requests" the return of dividend payments or a paydown of the liquidation preference, which "is a request for retrospective relief," and (3) "this request for retrospective relief is tethered to shareholders' argument that the Recovery Act's removal restriction is unconstitutional." *Rop*, 50 F.4th at 576. Defendants ask this Court to ignore all three of those holdings.

Moreover, it is easy to see why the Sixth Circuit reached the conclusion it did. The amended complaint clearly alleges facts that the unconstitutional removal restriction caused harm and that Plaintiffs are entitled to retrospective relief as a result. First, the complaint explains that HERA insulated the FHFA Director from removal, meaning that "FHFA is n[ot] subject to presidential control." FAC ¶ 20, Page ID.202. Thus, the complaint alleges, "[w]hen FHFA makes decisions as conservator or regulator, it is not accountable to the President[.]" *Id.* ¶ 132, Page ID.256. Further,

the complaint expressly notes the issue of the Republican President being unable to fire a Director appointed by a Democratic President: "Indeed, FHFA's current Director is a former Democratic Congressman, and his five-year term will not expire until January 2019—*two years* after a Republican President was sworn into office." *Id.* ¶ 22, Page ID.203-04.[1] In addition, the complaint alleged the precise ongoing harm resulting from "implementation" of the Third Amendment that *Collins* was talking about. Specifically, "continuing to the present day," the complaint alleges, "FHFA has ordered the Companies to pay quarterly dividends on Treasury's Government Stock in cash," and "[t]his quarterly decision to order the payment of cash dividends is especially harmful after Net Worth Sweep because the Companies' calculated net worth includes changes in the value of both cash and non-cash assets." *Id.* ¶ 128, Page ID.253-54. The complaint sums it up: "Without any meaningful oversight, FHFA continues to pursue both conservatorship and regulatory policies aimed at destroying the Companies and the investments of their private shareholders," and "[i]t is highly unlikely that FHFA would be permitted to continue to pursue these reckless and arbitrary policies, which significantly harm private property interests, if it were subject to . . . supervision by the President." *Id.* ¶ 133, Page ID.256-57; *see also id.* ¶ 144-45, Page ID.260 ("Plaintiffs are suffering ongoing injuries as a result of FHFA's misuse of the Companies' resources and private shareholders' rights," and the Court should thus "strike down the provisions of HERA that purport to make FHFA independent from the President[.]"). Finally, as the Sixth Circuit highlighted, the complaint requested that Treasury "return to Fannie and Freddie all dividend payments made pursuant to the Net Worth Sweep or, alternatively, recharacterizing such payments as a pay down

[1] Treasury's brief omits this allegation—which goes to the heart of Plaintiffs' claim—in its purported collection of the complaint's references to Director Watt. *See* Treasury Br. at 6, Page ID.2257.

of the liquidation preference and a corresponding redemption of Treasury's Government Stock." *Id.* at 76, Page ID.271.

In addition to all these allegations, the Sixth Circuit likewise was aware that then-former President Trump had issued a letter directly addressing the ruling in *Collins*. Specifically, in this letter, then-former President Trump wrote to Senator Rand Paul:

> The Supreme Court's decision 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. My Administration would have also sold the government's common stock in these companies at a huge profit and fully privatized the companies. The idea that the government can steal money from its citizens is socialism and is a travesty brought to you by the Obama/Biden administration. My Administration was denied the time to fix this problem cause of the unconstitutional restriction on firing Mel Watt.

Rop, 50 F.4th at 575 (citation omitted). Although the Sixth Circuit questioned whether this statement was properly in the appellate record, it made clear that "[t]he argument itself—that shareholders are entitled to relief because the removal restriction is unconstitutional—is properly preserved" and that "[r]egardless of President Trump's statement, reverse and remand is the appropriate remedy." *Id.* at 575 n.6. In sum, the Sixth Circuit has already held that Plaintiffs' complaint seeks retrospective relief that "is tethered to" the unconstitutional removal restriction, and Defendants' arguments to the contrary are foreclosed.

B. The Supreme Court, the Sixth Circuit, And This Court Have All Rejected, Either Implicitly Or Explicitly, Defendants' Argument That Section 4617(f) Bars Plaintiffs' Constitutional Claim.

Defendants contend that § 4617(f) bars Plaintiffs' constitutional claim. *See* FHFA Br. at 10-12, Page ID.2241-43; Treasury Br. at 6-7 n.2, Page ID.2257-58 (incorporating FHFA's argument). That provision states that "no court may take any action to restrain or affect the exercise of powers

or functions of the Agency as a conservator or a receiver." 12 U.S.C. § 4617(f). But this statute lacks the clear statement necessary to conclude that Congress intended to bar all remedies for constitutional violations. To hold that § 4617(f) "den[ies] a judicial forum for constitutional claims" would raise a "serious constitutional question." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986) (citation omitted); *see also id.* ("All agree that Congress cannot bar remedies for enforcing federal constitutional rights" (brackets and internal quotations omitted)). Indeed, Defendants' reading of § 4617(f) would render that provision unconstitutional. *See Bartlett v. Brown*, 816 F.2d 695, 705 (D.C. Cir. 1987). Because Congress did not clearly bar a remedy for constitutional violations in § 4617(f), that provision does not foreclose Plaintiffs' constitutional claim.

Collins implicitly recognized this principle. The challengers in *Collins* initially raised both a statutory challenge and a constitutional challenge to the Net Worth Sweep. The Supreme Court held that § 4617(f) barred the statutory claim. *Collins*, 594 U.S. at 237-42. After spending pages analyzing and applying that provision to bar the statutory claim, however, the Court made no mention of it with respect to challengers' constitutional claim. Indeed, the entire second half of the Court's opinion in *Collins* would have been pointless if, all along, § 4617(f) barred the removal claim.

The Sixth Circuit likewise implicitly rejected this argument. FHFA spent over three full pages of its brief arguing that Plaintiffs' requested retrospective relief was barred by § 4617(f). *See* Br. of Appellees FHFA at 41-44, *Rop v. FHFA*, No. 20-2071 (6th Cir. Feb. 18, 2022), Doc. 38. But the Sixth Circuit did not even mention this argument in concluding that Plaintiffs "ask only for relief effecting a zeroing out of Treasury's liquidation preference or converting of Treasury's senior

preferred stock to common stock," and the Supreme Court "identified this as retrospective relief" that can be sought in *Collins*. *Rop*, 50 F.4th at 576.

Even if one ignores the decisions of the Supreme Court and the Sixth Circuit, this Court has already "agree[d] with Plaintiffs that HERA does not prevent them from pursuing *constitutional* claims." *Rop*, 485 F. Supp. 3d at 930 (emphasis in original). As the Court explained, courts "generally try to avoid construing statutes to 'deny any judicial forum for a colorable constitutional claim' because that would raise a 'serious constitutional question.'" *Id.* (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)). "To avoid these constitutional concerns," the Court continued, "the Supreme Court requires a 'heightened showing' that Congress intended to preclude judicial review of constitutional claims." *Id.* (quoting *Webster*, 486 U.S. at 603). That intent must be demonstrated by "'clear and convincing evidence' in the statute or its legislative history that Congress intended to 'restrict access to judicial review' of constitutional claims." *Id.* (quoting *Johnson v. Robison*, 415 U.S. 361, 373 (1974)). But the Court held that no such intent can be found in HERA. "Nothing in HERA indicates that Congress intended to prevent review of constitutional claims, and the Court is not aware of any clear and convincing evidence supporting such an intent." *Id.* "Yet that is what Defendants' construction of HERA would do here." *Id.* "It would deny any judicial forum for shareholders injured by constitutional violations stemming from the FHFA's conduct as conservator." *Id.*

Defendants do not even mention the fact that this Court has already held that § 4617(f) does not bar Plaintiffs' constitutional claim. And their argument to the contrary is foreclosed by the law of the case. "The law-of-the-case doctrine provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Griffin v. Reznick*, 609 F. Supp. 2d 695, 706 (W.D. Mich. 2008) (Maloney, J.) (internal

quotations omitted). "The doctrine bars a court from reconsidering issues decided at an early stage of the litigation either expressly or by necessary inference from the disposition." *Id.* (internal quotations omitted). Thus, when this Court held that a claim was not barred by *res judicata* at the motion-to-dismiss stage, the Court declined to revisit that ruling at the summary-judgment stage of the same case. *See id.* at 706-07.

To be sure, the "law-of-the-case doctrine is not a completely inflexible command." *Id.* at 706. "But the court's discretion to reach a result inconsistent with a prior decision reached in the same case is to be exercised very sparingly, and only under extraordinary conditions." *Id.* (internal quotations omitted). Here, Defendants have not even attempted to satisfy those "extraordinary conditions." *Id.* Indeed, Defendants do not even acknowledge that this Court previously ruled on the issue. Their argument regarding § 4617(f) is thus foreclosed by the law-of-the-case doctrine.

Moreover, even if the law-of-the-case doctrine did not apply, this Court's prior ruling was clearly correct. As the Court previously explained, it must seek to avoid construing HERA to deny a judicial forum to a constitutional claim, but "that is what Defendants' construction of HERA would do here." *Rop*, 485 F. Supp. 3d at 930. "It would deny any judicial forum for shareholders injured by constitutional violations stemming from the FHFA's conduct as conservator." *Id.* Like this Court, the Fifth Circuit also applied the conventional canon "that judicial review cannot be precluded for this claim absent a clear statement to that effect," and likewise concluded that § 4617(f) lacked such a clear statement. *See Collins v. Dep't of Treasury*, 83 F. 4th 970, 980 (5th Cir. 2023).[2] This Court's holding that § 4617(f) does not bar Plaintiffs' constitutional claim was correct when the Court first issued it, and it is correct now.

[2] FHFA contends that the Fifth Circuit reached its conclusion only because it "relied on" a prior Fifth Circuit decision. *See* FHFA Br. at 12 n.3, Page ID.2243 (citing *FDIC v. Bank of Coushatta*, 930 F.2d 1122, 1130 (5th Cir. 1991)). But the Fifth Circuit's decision in *Collins* merely

C. This Court Already Correctly Held That Treasury's Involvement In The PSPAs Does Not Dispel The Harm From The Constitutional Violation.

Defendants argue that Plaintiffs' claim "would fail as a matter of law because the President maintained adequate oversight over all events relevant to this lawsuit through his plenary authority over Treasury's financial interests in the [Companies]." Treasury Br. at 8, Page ID.2259; *see also* FHFA Br. at 9, Page ID.2240. This argument tracks a concurring opinion in *Collins* authored by Justice Kagan. *See* 594 U.S. at 275 (Kagan, J., concurring in part).[3]

In making this argument, Defendants again failed to even acknowledge that this Court previously rejected it. Specifically, Defendants previously argued "that Treasury's approval of the Third Amendment demonstrates that the President would have accepted the Third Amendment even if he had greater control over the FHFA." *Rop*, 485 F. Supp. 3d at 919. But the Court correctly concluded "that is not necessarily the case" because the "Third Amendment required the approval of FHFA as well as Treasury." *Id.* "Defendants' argument requires the Court to assume that the FHFA, an ostensibly independent agency, had no influence on the terms of the Third Amendment and simply agreed to whatever terms Treasury proposed." *Id.* "But it is also possible that the FHFA leveraged whatever independence it had to shape the terms of that agreement, or that Treasury tailored its terms to suit the preferences of" FHFA. *Id.* "In other words," the Court continued, "the Third Amendment may have been a compromise of sorts, acceptable to both Treasury and the FHFA, rather than the outcome that the Executive could have obtained with greater control over

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applied *Webster v. Doe*, and it expressly *disclaimed* that it was bound by its prior decision in *Coushatta* but rather merely cited that case as persuasive authority, as this Court could also do. *See Collins*, 83 F.4th at 980 n.7 ("This part of *Coushatta* is not binding[.]").

[3] Defendants also cite a Federal Circuit opinion that endorsed this argument, *see Fairholme Funds, Inc. v. United States*, 26 F.4th 1274(Fed. Cir. 2022), but the Federal Circuit did so with no briefing from the parties on any of these issues.

FHFA." *Id.* "Defendants offer[ed] no reason for the Court to accept their assumption about FHFA's subservience to Treasury." *Id.* at 919-20.

Thus, Defendants' argument is again foreclosed by the law-of-the-case doctrine, and Defendants again offer no reason why the doctrine should not apply here—indeed, they (again) do not acknowledge the Court's prior ruling at all. And this Court's prior ruling was correct. Without control over FHFA with respect to the implementation of the Net Worth Sweep, the President was reduced "to a cajoler-in-chief" when pursuing his policy objectives. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 502 (2010). Therefore, the President needed FHFA's cooperation to return the Companies to private control. But under our constitutional structure, the President was entitled to pursue the policy that he desired rather than whatever policy FHFA would be willing to accept.

* * *

In sum, the Sixth Circuit already held that Plaintiffs' amended complaint seeks retrospective relief that is tethered to the unconstitutional removal restriction. Moreover, all of Defendants' arguments have been previously rejected by the Supreme Court, the Sixth Circuit, or this Court. The Court should deny Defendants' motions for judgment on the pleadings and allow this case to finally proceed to discovery.

II. Amendment Of The Operative Complaint Is Neither Necessary Nor Futile But Would Assist This Court And The Sixth Circuit In Fully And Finally Resolving This Case.

Plaintiffs have moved for leave to amend their complaint to more fully present the facts that would assist the Court in providing the retrospective relief required after *Collins*. Doc. 106 (Apr. 1, 2025). To be clear, this amendment is not necessary to overcome Defendants' pending motions: The Sixth Circuit already held that Plaintiffs' existing complaint properly presents a claim for retrospective relief under *Collins*. But the second amended complaint would assist this Court in adequately adjudicating the question of retrospective relief. In addition, Defendants should not

be permitted to short-circuit the discovery process when their own conduct—*i.e.*, providing consent for an amended complaint and then subsequently withdrawing it—has contributed to the purported delay that Defendants have highlighted as a basis for denying leave to amend. To fully and finally dispose of this case, the Court should grant Plaintiffs' motion for leave to amend the complaint.

A. As The Sixth Circuit Recognized, Plaintiffs' Operative Complaint States A Claim For Retrospective Relief Under *Collins*.

As an initial matter, Defendants' argument that amending Plaintiffs' complaint would be "futile," Treasury Br. at 10-11, Page ID.2261-62; FHFA Br. at 12-13, Page ID.2243-44, is foreclosed by the Sixth Circuit's decision. Indeed, as explained at length *supra*, pp. 5-8, the Sixth Circuit already held that the operative complaint seeks retrospective relief that is tethered to the unconstitutional removal restriction, as required by *Collins*. Thus, holding that amendment of an already-sufficient complaint is "futile" would directly contravene the Sixth Circuit's holding.

Far from being futile, Plaintiffs' proposed second amended complaint would assist review by this Court by ensuring the complaint is more focused on the critical inquiry outlined by *Collins*. Specifically, the second amended complaint would further demonstrate how Plaintiffs were harmed by the FHFA Director's unconstitutional removal restriction. Most notably, it would include the explicit statements from then-former President Trump that the Sixth Circuit highlighted in its opinion, thus ensuring the letter is in the record. Therefore, granting Plaintiffs' motion for leave to amend would sharpen the focus of the briefing and aid this Court's resolution of Defendant's inevitable motions to dismiss.

Indeed, Defendants' own conduct shows that they acknowledge amendment would be proper after *Collins*. Specifically, they previously stated that they "do not oppose Plaintiffs amending the complaint to add allegations relevant to the presidential removal claims." *See* Joint

Status Rep., Doc. 77 at 1, Page ID.1866 (Aug. 12, 2023). This consent is consistent with practice around the Nation after *Collins*, where plaintiffs amended their complaints to sharpen the legal and factual dispute after the Supreme Court issued its decision. *See, e.g.*, *Collins*, 83 F.4th at 977 (noting that, after the Supreme Court's decision in *Collins*, plaintiffs "filed an amended complaint on remand"); *Bhatti v. FHFA*, 97 F.4th 556, 559 (8th Cir. 2024) (noting that, after *Collins*, the plaintiff "amended his complaint, targeting Treasury's liquidation preference").[4]

Defendants now attempt to short-circuit the normal process by pointing to decisions holding that complaints alleging facts similar to those in Plaintiffs' proposed second amended complaint failed to state a claim. *See* FHFA Br. at 12-13, Page ID.2243-44,; Treasury Br. at 10-11, Page ID.2261-62. Plaintiffs respectfully disagree with those decisions and should be permitted an opportunity to fully explain why in the proper procedural posture—*i.e.*, in response to a Rule 12(b)(6) motion aimed at the second amended complaint.

Nevertheless, Plaintiffs offer a truncated response to those decisions here. Most significantly, they failed to adhere to the proper standard under Rule 12(b)(6). "In determining whether a complaint is facially plausible," the Court must "construe the complaint liberally, in plaintiffs' favor, accepting all factual allegations as true and drawing all reasonable inferences in favor of the plaintiff." *Johnson v. Parker-Hannifin Corp.*, 122 F.4th 205, 212 (6th Cir. 2024)

[4] In their oppositions to Plaintiffs' motion for leave to file the second amended complaint, Defendants have pointed to *Wazee Street Opportunities Fund IV LP v. FHFA*, No. 2:18-cv-03478 (E.D. Pa. Apr. 14, 2025), Doc. 64, where the district court denied the plaintiffs there leave to amend their complaint based on undue delay and a finding of futility. *See* Ex. 1 to Treasury's Opp., Doc. 111-1 (Apr. 15, 2025). But there, over three years had passed between *Collins* and any action whatsoever on the docket. *Id.* at 6, Page ID.2366. Nothing like that is present here—where Plaintiffs have moved promptly both in response to *Collins* and this Court's orders. Second, the court's decision with respect to futility was neither subject to the Sixth Circuit's ruling in this case nor persuasive on its own terms. As explained, Defendants' futility argument is foreclosed by the Sixth Circuit's decision and the proper application of the Rule 12(b)(6) standard.

(internal quotations omitted). "If it is at all plausible (beyond a wing and a prayer) that a plaintiff would succeed if he proved everything in his complaint, the case proceeds." *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018). Therefore, the motion-to-dismiss stage "is not a time for examining competing facts—it is a time for accepting the complaint's facts as true and drawing all reasonable inferences in the plaintiffs' favor." *Siefert v. Hamilton County*, 951 F.3d 753, 763 (6th Cir. 2020).

When the proper standard is applied to the facts that will be pled in Plaintiffs' second amended complaint, that complaint clearly states a claim under *Collins*. In *Collins*, the Supreme Court held that the structure of FHFA violated the separation of powers. 594 U.S. at 249-50. Although the unconstitutional statutory provision was "automatically displace[d]" by the Constitution, the Court further held that the removal restriction could nevertheless "inflict compensable harm." *Id.* at 259. And specifically in the context of litigation over the Net Worth Sweep, the Court said "the possibility that the unconstitutional restriction on the President's power to remove a Director of the FHFA could have such an effect cannot be ruled out." *Id.* The Court went on to provide examples in which the unconstitutional removal restriction "would *clearly* cause harm." *Id.* at 260 (emphasis added). For example, the Court explained, "suppose that the President had made a public statement expressing displeasure with actions taken by a Director and had asserted that he would remove the Director if the statute did not stand in the way." *Id.* In "th[at] situation[], the statutory provision would clearly cause harm." *Id.* The Court acknowledged that the shareholders argued that, absent the removal restriction, "the President might have replaced one of the confirmed Directors who supervised the implementation of the third amendment, or a confirmed Director might have altered his behavior in a way that would have benefited the shareholders." *Id.* The Supreme Court then remanded for the lower courts to evaluate that question in the first instance. *Id.*

Plaintiffs' proposed second amended complaint is keyed to the inquiry articulated by *Collins*. For starters, the proposed complaint would include the direct evidence of President Trump's letter, which the Sixth Circuit previously considered. *See* Ex. 1 to Proposed Second Am. Compl. ("SAC"), Doc. 106-1, Page ID.2326 (Apr. 1, 2025). The proposed complaint further contains numerous statements from President Trump and Trump Administration officials expressing the goals that form the backbone of Plaintiffs' requested relief—*i.e.*, the goals of (1) releasing the Companies from conservatorship as promptly as practicable; and (2) ending government ownership of the Companies by selling Treasury's stake at a large profit:

- "Steven Mnuchin said in an interview shortly after President-elect Trump nominated him to serve as Treasury Secretary that the new administration intended to get [Fannie and Freddie] out of government control." SAC ¶ 50.b, Page ID. 2294 (internal quotations omitted); *see also id.* ¶ 50.c ("In testimony before the House Financial Services Committee in the summer of 2017, Secretary Mnuchin stated that leaving [Fannie and Freddie] in conservatorship makes no sense." (internal quotations omitted)).

- "President Trump's eventual pick for FHFA Director, Mark Calabria, then serving as Vice President Pence's chief economist, said that the Trump administration is committed to ending the conservatorship of Fannie Mae and Freddie Mac." *Id.* ¶ 50.d, Page ID. 2294-95 (internal quotations omitted); *see also id.* ¶ 50.g, Page ID. 2295 ("In a speech after becoming FHFA Director, Mr. Calabria stated that the centerpiece of our strategy is to end the Fannie and Freddie conservatorships." (internal quotations omitted)).

- "In 2018, the Executive Office of the President issued a report outlining numerous proposals to end the conservatorship of Fannie Mae and Freddie Mac and transition[] Fannie Mae and Freddie Mac to fully private entities." *Id.* ¶ 50.e (internal quotations omitted).

- "In a March 2019 directive, President Trump instructed Treasury to consult with FHFA and develop proposals for [e]nding the conservatorships of Fannie and Freddie." *Id.* ¶ 50.f (internal quotations omitted).

- "During Director Calabria's tenure, FHFA also sent an annual report to Congress stating that FHFA's end-state vision for the Enterprises is to return [them] to operating as fully-private companies outside of

conservatorship." *Id.* ¶ 50.k, Page ID. 2296 (internal quotations omitted).

- "In September 2019, Treasury issued a report in response to the President's March 2019 directive. On page one, the report stated that the Companies' conservatorships should come to an end. The Treasury report also stated that the Companies should be recapitalized and exit conservatorship as promptly as practicable. On the same day, FHFA issued a press release praising the Treasury report and saying that [a]fter nearly 11 years, ending the conservatorships of Fannie Mae and Freddie Mac is now a top priority for this Administration and the FHFA." *Id.* ¶ 50.h, Page ID. 2295-96 (internal quotation marks and citations omitted).

- "Mr. Mnuchin said the new administration wanted to privatize the Companies and that [i]t makes no sense that these are owned by the government." *Id.* ¶ 57.b, Page ID.2299 (internal quotations omitted).

- "Director Calabria said he expected that, as part of a public offering of new shares of Fannie and Freddie stock, Treasury would sell off its shares to recoup the taxpayer investment." *Id.* ¶ 57.c (internal quotations omitted).

Plaintiffs will further allege that, given the financial condition of the Companies when President Trump took office, the Trump Administration could not immediately accomplish its stated goals of releasing the Companies from conservatorship without certain preparatory steps. *Id.* ¶¶ 52-56, Page ID.2297-98. Plaintiffs provide support for this factual allegation with a statement from Director Calabria, who explained that: "A precondition for responsibly ending the conservatorships is that the Enterprises must be well-regulated and well-capitalized, such that once Fannie Mae and Freddie Mac exit, they never have to return." *Id.* ¶ 51, Page ID. 2296-97 (quoting Statement of Dr. Mark A. Calabria, FHFA Director, Before the U.S. House of Representatives Committee on Financial Services (Oct. 22, 2019), https://perma.cc/4X8Y-94P5). This process would take time. "Although the Companies had returned to sustained profitability by 2017, building up the capital reserves necessary to exit conservatorship solely through retained earnings would have taken many years." *Id.* ¶ 52.

Thus, Plaintiffs will allege, "[t]o achieve its objective of ending the conservatorships as promptly as practicable, the Trump Administration's policy was to recapitalize the Companies in part by having the Companies sell new shares of common stock to private investors." *Id.* ¶ 53, Page ID.2297-98. The proposed complaint quotes a statement from Secretary Mnuchin outlining this plan. He explained: "So we really see two things. One, retaining earnings, that is one way we will accumulate capital. And then, two, we will have to raise third-party capital." *Id.* (quoting *Housing Finance Reform: Next Steps: Hearing Before the S. Comm. On Banking, Housing, and Urban Affairs*, 116th Cong. 30 (Sept. 10, 2019)). Secretary Mnuchin also stated that, in his view, the Companies "can raise a very significant amount of capital from the private sector." *Id.* (quoting *The End of Affordable Housing? A Review of the Trump Administration's Plans to Change Housing Finance in America: Hearing Before the H. Comm. on Fin. Servs.*, 116th Cong. 39 (Oct. 22, 2019)); *see also id.* ("It's always been my view that an exit from conservatorship is going to require a large capital raise by Fannie and Freddie." (quoting *CNBC Interview with FHFA Director Mark Calabria*, CNBC 07:02-07:09 (Apr. 1, 2020), https://cnb.cx/3KRDGV9)).

The Trump Administration planned to raise this needed capital "through a series of [stock] issuances." *Id.* ¶ 54, Page ID.2298. But "[t]o raise billions of dollars of capital in the private markets, the new issuances of common stock that the Trump administration intended for the Companies to sell would need to be attractive to private investors." *Id.* ¶ 55. "The only way to make such stock attractive to private investors was to eliminate the liquidation preference on Treasury's senior preferred stock." *Id.* That is because "[t]he large liquidation preference on Treasury's senior preferred stock, combined with the fact that Treasury's senior preferred stock has priority over all other stock issued by the Companies, prevented all shareholders in the Companies other than Treasury from ever receiving a return on their investments." *Id.*; *see also id.*

¶ 58, Page ID.2299-2300 ("[T]he Companies' common stock has no economic value so long as that liquidation preference remains.").

For that reason, "[p]rivate investors would not purchase a new issuance of common stock in the Companies so long as the liquidation preference remained." *Id.* ¶ 55, Page ID.2298. "Therefore, a necessary step in fulfilling the Trump Administration's goal of recapitalizing the Companies through a new issuance of common stock and releasing them from conservatorship was to eliminate the liquidation preference on Treasury's senior preferred stock." *Id.* ¶ 56. "That step could be accomplished in either of two ways: (1) by writing down the liquidation preference to zero and promising not to further increase the liquidation preference in the absence of additional draws on Treasury's funding commitment; or (2) by converting Treasury's senior preferred stock to common stock." *Id.* Plaintiffs will allege further support for this allegation in a September 2019 Treasury report, "which responded to the President's March 2019 directive and listed ending the conservatorships as a top priority in fulfilling the President's mandate." *Id.* ¶ 59, Page ID.2300. There, "Treasury recommended that the administration consider (1) [e]liminating all or a portion of the liquidation preference of Treasury's senior preferred shares; or (2) exchanging all or a portion of that interest for common stock or other interests in the Companies." *Id.* (internal quotations omitted). This indicates that in addition to either simply eliminating the liquidation preference in full or converting to common in full, the Administration could have eliminated the liquidation preference by writing it down in part and converting the rest to common stock.

In addition to alleging ample facts establishing the Trump Administration's plan for the Companies as well as the steps necessary to complete that plan, Plaintiffs will further allege that the Trump Administration was unable to complete its plan because of the unconstitutional removal restriction. When President Trump took office, Director Watt still had two years left to serve and

could not be fired without cause under HERA's removal restriction. "So long as Director Watt was at the helm of FHFA, the Trump Administration was unable to make progress on its policy objectives for Fannie and Freddie." *Id.* ¶ 62, Page ID.2301-02; *see also id.* ¶¶ 62-69, Page ID. 2301-05 (outlining the policy disagreements between Director Watt and the Trump Administration). The Trump Administration understood that "we need to wait really for Director Watt's term to end to and to have our appointee," and made the decision "to wait for a nominee" to begin effectively implementing its plan for the Companies. *Id.* ¶ 69, Page ID.2301 (quoting *Interview with Craig Phillips, Former Counselor to the Secretary of the Treasury*, SITUS AMC—ON THE HILL, at 10:14 to 11:05, https://bit.ly/3sl08yU). "In sum, although the Administration was committed to selling Treasury's stake in the Companies and ending the conservatorships, Director Watt's unconstitutionally protected tenure did nothing but cost the Administration critical time—two full years—in pursuing those goals." *Id.* ¶ 70, Page ID.2305.

When President Trump was finally able to nominate his own chosen Director, "the Trump Administration could at last begin the process of planning and implementing the concrete steps necessary to release the Companies from conservatorship and end government ownership." *Id.* ¶ 74. Plaintiffs will allege that "[t]here were five key steps necessary for the Companies to exit conservatorship—the first four of which Director Calabria and Treasury completed in whole or in part." *Id.* ¶ 75, Page ID.2306-07; *see also id.* ¶¶ 76-81, Page ID.2307-10 (outlining the five steps). And Plaintiffs further allege that several of these steps were "sequential," *id.* ¶ 82, Page ID.2310 (emphasis omitted), and "could not be carried out unilaterally by Treasury," *id.* ¶ 83, Page ID.2310-11.

As for timing, "Director Calabria repeatedly said that he anticipated that the Companies would sell new shares of stock to private investors in 2021." *Id.* ¶ 84, Page ID.2311. "When the

Trump administration ended, FHFA and Treasury were on track to position the Companies to sell a new issuance of common stock in 2021—roughly two and a half or three years after Director Watt's term ended in January 2019." *Id.* ¶ 85, Page ID.2311-12. Thus, "[i]f President Trump had fired Director Watt and installed his own FHFA director in January 2017, the administration would have been able to start pursuing its policy objectives for Fannie and Freddie two years sooner." *Id.* ¶ 86, Page ID.2312. "But for the removal restriction, President Trump would have fired Director Watt at the start of his Administration and the Companies would have raised capital by selling new shares of common stock in 2019" *Id.* And "[b]efore such a stock issuance occurred," as explained above, FHFA and Treasury would have had to "remove the liquidation preference on Treasury's senior preferred stock because the liquidation preference impeded the Companies' ability to sell new stock and Treasury's ability to monetize its warrants in subsequent stock offerings by the Companies." *Id.*

Plaintiffs' allegations will be further supported by the first Trump Administration's last official word on the matter, contained in a January 2021 letter agreement between FHFA (on behalf of the Companies) and Treasury, which turned off cash dividend payments under the Net Worth Sweep while directing those amounts to be added to the liquidation preference instead. *See id.* ¶ 90, Page ID.2313. "In order to facilitate the exit from conservatorship," the agreement specified, "Treasury and the Enterprise commit to work to restructure Treasury's investment and dividend amount in a manner that facilitates the orderly exit from conservatorship, ensures Treasury is appropriately compensated, and permits the Enterprise to raise third-party capital and make distributions as appropriate." *Id.* (cleaned up). As Plaintiffs will allege, the Administration only could have achieved these goals through elimination of the liquidation preference, whether through a write-down, conversion, or some combination of the two.

All of this publicly available information is confirmed by former President Trump's statement. *Id.* at Ex. 1, Page ID.2326. He stressed that he would have "sold the government's *common* stock in these companies at a huge profit." *Id.* (emphasis added). President Trump's reference to the government profiting from common stock reveals how his administration planned to change the Companies' capital structures; if Treasury's senior preferred shares remained outstanding with a multi-billion-dollar liquidation preference, no economic value could ever be realized by Treasury through the sale of common stock it obtained after exercising its warrants. Thus, this reference necessarily implies that the Net Worth Sweep would be ended and the liquidation preference on the Treasury's senior preferred stock would be reduced to zero.

"Taken in their most flattering light, these allegations permit the reasonable inference" that the removal restriction prevented President Trump from carrying out his policy goals for the Companies, which inflicted compensable harm on Plaintiffs. *Forman v. TriHealth, Inc.*, 40 F.4th 443, 450 (6th Cir. 2022). To be sure, "[e]qually reasonable inferences in the other direction" could show the removal restriction made no difference "once all of the facts come in." *Id.* "But at the pleading stage, it is too early to make these judgment calls." *Id.* At the very least, the Court should permit Plaintiffs to actually file their second amended complaint, and the parties can have this dispute through the proper vehicle—a Rule 12(b)(6) motion aimed at *that* complaint—rather than a couple of throwaway paragraphs at the end of Defendants' already abbreviated motions for judgment on the pleadings.

* * *

Plaintiffs and Defendants can agree on one thing: This case has been going on for a long time. But after years of litigation, it has finally been distilled to a lone factual dispute: Did the unconstitutional removal restriction actually harm the Plaintiffs? The Sixth Circuit has already

held that the current operative complaint adequately presents this question. Plaintiffs' proposed second amended complaint would focus the dispute and further aid the resolution of the case by both this Court and the Sixth Circuit. Permitting Plaintiffs to amend their complaint after *Collins*—a straightforward process that Defendants previously agreed to—would ensure that the most relevant facts are before this Court so that it may resolve this case *on the merits* once and for all.

CONCLUSION

For these reasons, the Court should deny Defendants' motions for judgment on the pleadings.

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