UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

ATIF F. BHATTI, *et al.*, Plaintiffs, v. THE FEDERAL HOUSING FINANCE AGENCY, *et al.*, Defendants.	Case No. 0:17-cv-02185 (PJS/HB) **FHFA DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN REPLY SUPPORTING FHFA DEFENDANTS' MOTION TO DISMISS**

Plaintiffs' memorandum fails to overcome the fundamental jurisdictional defects with Plaintiffs' claims, much less establish that Plaintiffs are entitled to summary judgment.

I. PLAINTIFFS' STRUCTURAL CHALLENGES FAIL

A. Plaintiffs Lack Standing

1. As to traceability, Plaintiffs do not dispute Mr. DeMarco, who executed the Third Amendment, served as an *Acting* Director under 12 U.S.C. § 4512(f), which contains no protection from removal without cause. Plaintiffs urge an "inference ... that Congress intended for the acting Director to enjoy the Director's removal protections." ECF No. 43 ("Pls.' Mem.") at 16. But "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

Plaintiffs insist that actions that "resulted in the nullification of Plaintiffs' economic rights" were taken not only by Mr. DeMarco, but also by "FHFA Directors who Defendants do not dispute enjoyed for-cause removal protection." Pls.' Mem. 17. However, Plaintiffs identify no concrete harm separable from the Third Amendment executed by Mr. DeMarco. The specific injury Plaintiffs actually allege in this case flows from the Third Amendment, not from the initial appointment of the Conservator by FHFA in 2008. FHFA's declaration of dividends since 2014 likewise does not cause Plaintiffs new or separate injury because those dividends flow from the terms of the Third Amendment executed by Mr. DeMarco.[1]

Plaintiffs maintain that the Administration's support for the Third Amendment is irrelevant to traceability because standing "cannot be defeated by speculation about what decision the government might have reached had it followed the procedures the Constitution requires." Pls.' Mem. 8. But it takes no speculation to understand that greater Administration control over the FHFA would not make FHFA more likely to *diverge* from the Administration over whether to enter into the Third Amendment. The

[1] Plaintiffs further maintain that even if the President had unfettered power to remove Mr. DeMarco, the President was "prevented ... from using any removal power he had to effect a policy change at the agency" anyway because under *other* statutory provisions, the President could only have replaced Mr. DeMarco with another FHFA Deputy Director. Pls.' Mem. 17 (citing 12 U.S.C. § 4512(c)-(f)). However, Plaintiffs did not challenge those provisions in their complaint and cannot amend to add new claims via their briefs. *See, e.g.*, *Thomas v. United Steelworkers Local 1938*, 743 F.3d 1134, 1140 (8th Cir. 2014). Moreover, this new theory *undercuts* traceability as to the claim Plaintiffs *did* make: if the agency was "unconstitutionally insulate[d]" (Pls.' Mem. 17) irrespective of the challenged removal restriction, then Plaintiffs' injury is not traceable to that removal restriction.

problem is not a lack of "precise proof of what the [Conservator]'s policies might have been in that counterfactual world," *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 512 n.12 (2010), it is that the very notion of a different outcome collapses under Plaintiffs' own theory of the case.

Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991), confirms that the traceability requirement applies here and shows why Plaintiffs do *not* have standing. There, injury consisting of "increased noise, pollution, and danger of accidents" from airport expansion was "'fairly traceable' to the Board of Review's veto power" challenged as unconstitutional. *Id.* at 264-65. That was "because knowledge that the master plan was subject to the veto power undoubtedly influenced MWAA's Board of Directors when it drew up the plan." *Id.* at 265.

Here, Plaintiffs have not explained how any protection Mr. DeMarco had from being removed by the Administration could have "influenced" him to agree to the Third Amendment with the Administration. If any inference can be drawn from Mr. DeMarco's alleged independence from the Administration, it is that his decision to enter into the Third Amendment was freely made.

2. As to redressability, Plaintiffs contend that any past action by an agency "structured in violation of the separation of powers" is automatically "*ultra vires* and must be vacated." Pls.' Mem. 22. But the cases Plaintiffs cite simply invalidated criminal convictions or other quasi-judicial proceedings on direct appeal because the adjudicator was unconstitutionally appointed and lacked power to act. In contrast,

protection from removal that exceeds constitutional limits does not oust an official of the power to hold the office and act. *See Free Enter. Fund*, 561 U.S. at 508-09.

That is particularly true where, as here, the challenged action was not even the type of executive function that is constitutionally required to be under the President's control. Plaintiffs argue at length that FHFA as Conservator acted *as the government* when it entered into the Third Amendment, Pls.' Mem. 18-21, but even if that were so (it is not), it would not mean FHFA as Conservator was exercising *the type of executive powers that demand Presidential supervision*. Contrary to Plaintiffs' judicial estoppel argument (*id.* at 19), promoting the public interest does not render the Conservator a governmental actor, let alone an executive one.

B. FHFA's Structure Is Constitutional

Plaintiffs' request for summary judgment on their structural claims rests principally on the vacated panel decision in *PHH Corp. v. CFPB*, 839 F.3d 1 (2016). There is no reason this Court should give that decision any weight when the D.C. Circuit itself is giving it none. *John Doe Co. v. CFPB*, 849 F.3d 1129, 1131-32 (D.C. Cir. 2017). Plaintiffs ignore the many decisions that reject their theory, including one dismissing the same claim by other Enterprise shareholders, *Collins v. FHFA*, 254 F. Supp. 3d 841 (S.D. Tex. 2017), *appeal docketed*, No. 17-20364 (5th Cir.), and four rejecting similar challenges to the Consumer Financial Protection Bureau.

The only non-vacated decision Plaintiffs cite finding removal restrictions unconstitutional is *Free Enterprise Fund*. However, *Free Enterprise Fund*'s reasoning supports the constitutionality of FHFA's structure. The Court held that an unusual

structure in which PCAOB members had two layers of removal protection was unconstitutional because "[t]he added layer of tenure protection makes a difference" by "chang[ing] the nature of the President's review" and "transform[ing]" the PCAOB's independence. 561 U.S. at 495-96.

Here, in contrast, FHFA's leadership by a single Director rather than a multi-member board does not "make a difference" to the President's supervision of FHFA, much less "change the nature" of that review or "transform" it. Plaintiffs speculate that a President might have more influence over a multi-member board that had staggered terms and a mandatory bipartisan composition. But those features are equally if not more likely to *impede* Presidential control by forcing the President's appointee to share power with others aligned with the previous administration. *See CFPB v. Navient Corp.*, 2017 WL 3380530, at *17 (M.D. Pa. Aug. 4, 2017). In any event, any enhancement of the President's supervision would be the result of those particular add-on features, not anything inherent in diffusion of leadership among multiple individuals.

Plaintiffs also contend that there are no historical precedents for FHFA's structure. Even if that were so, "[o]ur constitutional principles of separated powers are not violated ... by mere anomaly or innovation." *Mistretta v. United States*, 488 U.S. 361, 385 (1989). But there are precedents: in addition to the examples conceded in Plaintiffs' memorandum, Congress created the Comptroller of the Currency as an independent agency with a single head over 150 years ago. The Comptroller holds office "for a term of five years unless sooner removed by the President, *upon reasons* to be communicated by him to the Senate." 12 U.S.C. § 2 (emphasis added); *see also Case of Dist. Atty. of*

U.S., 7 F. Cas. 731, 737 (E.D. Pa. 1868); 12 U.S.C. § 1(b)(1); 44 U.S.C. § 3502(5). Congress did not violate any constitutional stricture by following this time-honored model when it created FHFA.

II. PLAINTIFFS' APPOINTMENTS CLAUSE CLAIM FAILS

A. The De Facto Officer Doctrine Precludes Count III

Plaintiffs are wrong to argue that the *de facto* officer doctrine does not apply to constitutional claims. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court held that the Federal Election Commission's structure violated the Appointments Clause, but emphasized that "past acts" of the FEC remained intact. *Id.* at 142; *see FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708 (D.C. Cir. 1996).

The cases Plaintiffs cite did not exempt constitutional claims. They simply held that appellate courts could consider whether lower court judges were improperly appointed or sitting and therefore lacked jurisdiction, even if the issue was not raised below. *See, e.g.*, *Nguyen v. United States*, 539 U.S. 69, 77 (2003). These unremarkable holdings are consistent with the *de facto* officer doctrine, which allows challenges to an officer's authority if brought "at or around the time that the challenged government action is taken." *Andrade v. Lauer*, 729 F.2d 1475, 1499 (D.C. Cir. 1984). When the challenged government action is a lower court judgment, an appeal or certiorari petition—which generally must be filed within 60 or 90 days—naturally satisfies that condition.

Here, Plaintiffs waited nearly *five years* to bring their collateral attack. Plaintiffs' argument that they sued within a general statute of limitations is irrelevant: the *de facto*

officer doctrine, which is animated by unique concerns presented by retroactive attacks on government officials' authority, is independent of and not subsumed by the statute of limitations.

B. Count III Raises Non-Justiciable Political Questions

Plaintiffs argue that the Court can avoid considering reasonableness of the President's and Senate's appointment efforts by finding that the Recess Appointments Clause sets a *per se* two-year ceiling on acting official service. That is wrong. Where, as here, the President did not use the Recess Appointments Clause, the limitations on that power do not apply. Mr. DeMarco's ability to serve was no more terminated by the "End of [the Senate's] next Session" (U.S. Const. art. II, § 2, cl. 3) than his designation in the first place was dependent on the existence of a "Recess of the Senate" (*id.*).

Plaintiffs concede Mr. DeMarco was not a recess appointee, but theorize that "the Recess Appointments Clause reflects a constitutional judgment that ... officers commissioned without Senate confirmation ought to serve just long enough to give the President a full session of the Senate in which to attempt to secure confirmation for a regular appointment." Pls.' Mem. 30 n.3. As the Department of Justice's Office of Legal Counsel has explained, that notion "ignore[s] the differences between holding an office and acting in it. An acting official does not hold the office, but only 'perform[s] the functions and duties of the office.'" *Designation of Acting Solicitor of Labor*, 2002 WL 34461082, at *3 (O.L.C. Nov. 15, 2002). Plaintiffs offer not a single authority supporting their mix-and-match theory of constitutional interpretation.

Plaintiffs also insist that "[c]ourts have long adjudicated similar challenges under the Appointments Clause" even though constitutional lines were "far from clear." Pls.' Mem. 34-35. But the political questions in this case stem not from line-drawing difficulties, but from the intractability of judicial inquiry into the reasonableness of the President's and Senate's nomination and confirmation efforts. No such inquiries were necessary in the supposedly "similar" Appointments Clause cases Plaintiffs cite.

C. Count III Is Without Merit

In addition to being barred by the *de facto* officer doctrine and non-justiciable political questions, Count III has no legal or factual merit in any event. No court has ever held that an acting official's service was unconstitutional because of its duration, let alone invalidated long past agency action on that basis.

Plaintiffs alternately propose a flat two-year "ceiling" derived by analogy from the Recess Appointments clause, or an *ad hoc* "reasonable under the circumstances" limit. The Recess Appointments Clause argument is misplaced for the reasons already discussed, and the "reasonable under the circumstances" standard is no less flawed. Plaintiffs derive that test not from any constitutional text or case law, but from language in OLC opinions construing *statutory* language addressing OMB's governance. *See Status of the Acting Director*, 1 Op. O.L.C. 287, 289-90 (1977) (basing "reasonable time" limitation on 31 U.S.C. § 16). Those opinions, moreover, were designed to provide legal and policy advice to the Executive as it makes personnel decisions, not establish a new cause of action for litigants to challenge past government actions.

Indeed, to create such an indeterminate cause of action would sow profound instability and unpredictability. Because no one could know in advance what duration might be deemed "reasonable" under a particular set of "circumstances," practically every action by an acting government official who served for more than a short time would be under a cloud and susceptible to opportunistic litigation.

If this Court nevertheless recognizes Plaintiffs' proposed new cause of action and adopts their "reasonable under the circumstances" standard as a constitutional imperative, it should find that Plaintiffs have not met their burden of showing that Mr. DeMarco's tenure as Acting Director as of the time of the Third Amendment was unreasonable. As FHFA has explained, that amount of time is comparable with other acting heads of important agencies, the President submitted two nominations during Mr. DeMarco's tenure, and the President faced major structural challenges in connection with both of those nominations. Plaintiffs dispute none of these dispositive facts.

Plaintiffs appear to consider the first nomination during Mr. DeMarco's tenure irrelevant because it was rejected quickly. But the speedy rejection of a qualified nominee only serves to show the problems the President faced. To the extent Plaintiffs contend that a nomination had to be pending at all times, or at the time of the Third Amendment, the President was not required to maintain a constant stream of nominees in order for FHFA to have an Acting Director as HERA contemplates. Plaintiffs have not carried their burden of establishing that the President's and Senate's appointment efforts,

and Mr. DeMarco's tenure as Acting Director, were unreasonable under the circumstances.[2]

III. PLAINTIFFS' NONDELEGATION CLAIMS FAIL

Plaintiffs make no claim that HERA authorized private companies to regulate their competitors, the fact pattern in the very few instances in which courts have found improper private delegations. They also concede that a private nondelegation claim requires, at a minimum, a delegation of *sovereign governmental* power to the private entity. Plaintiffs argue that FHFA exercised such sovereign power when it entered into the Third Amendment, but their reasons do not withstand scrutiny.

Plaintiffs assert, for example, that the Conservator's actions "alter[ed] the legal rights and obligations of third parties ... and promote[d] what it deemed to be in the public interest." Pls.' Mem. 24. But legal rights and obligations are altered when private entities enter into contracts, and the fact that actions promote the public interest does not necessarily make those actions sovereign in character. It is also irrelevant that FHFA acted pursuant to HERA, rather than merely under powers "inherited from the Companies." *Id.* at 25. The dispositive point is that entering into a contract amendment

[2] Plaintiffs slip into their memorandum a new, statutory claim not in their complaint: that, independent of the constitutionality of Mr. DeMarco's *tenure*, his *initial designation* as Acting Director "did not even comply with 12 U.S.C. § 4512(f)." Pls.' Mem. 33-34. Plaintiffs cannot amend their complaint through their brief. In any event, the claim is without merit and other courts have rejected it. *FHFA v. UBS Ams. Inc.*, 712 F.3d 136, 144 (2d Cir. 2013); *FHFA v. City of Chicago*, 962 F. Supp. 2d 1044, 1053-55 (N.D. Ill. 2013).

relating to preferred stock is not such an inherently sovereign and governmental activity that the Constitution forbids it from being exercised by a financial institution conservator.

The main thrust of Plaintiffs' argument is that the D.C. Circuit's *Perry Capital* decision created a nondelegation problem. But any remedy for that objection lies with the Supreme Court, where certiorari petitions filed by Plaintiffs' fellow shareholders are now pending. In any event, Plaintiffs' collateral attack on *Perry Capital* rests on a distorted exaggeration of that decision, rather than what the court actually held.

For example, the D.C. Circuit did not state that FHFA could "suspend the application of provisions of the APA and HERA that would have otherwise restricted Treasury's legal authority," Pls.' Mem. 25, only that HERA's anti-injunction provision barred equitable relief that would interfere with conservatorship operations, regardless whether the injunction nominally operates against FHFA or Treasury. *Perry Capital v. Mnuchin*, 864 F.3d 591, 616 (D.C. Cir. 2017) ("Treasury's action ... cannot be enjoined without simultaneously unraveling FHFA's own exercise of its powers and functions."), *petitions for cert. filed* (Oct. 16, 2017).

The D.C. Circuit's recognition that HERA confers permissive, discretionary authority on FHFA also does not create any nondelegation issue. Courts consistently reject nondelegation claims based on discretionary statutory grants. *See*, *e.g.*, *Mistretta*, 488 U.S. at 378-79; *United States v. Kuehl*, 706 F.3d 917, 919 (8th Cir. 2013) ("[B]road policy statements" are "sufficient."); *Defs. of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 127 (D.D.C. 2007). Nor does HERA's anti-injunction provision create a nondelegation issue by "immuniz[ing] [FHFA] from judicial review." Pls.' Mem. 25. It does not

preclude, for example, claims for damages. *Perry Capital*, 864 F.3d at 614. Congress's decision to bar certain intrusive forms of relief does not pose any nondelegation concerns, particularly where certain other outlets for judicial review may remain possible. *Touby v. United States*, 500 U.S. 160, 168-69 (1991); *United States v. Bozarov*, 974 F.2d 1037, 1041-43 (9th Cir. 1992); *see also* 5 U.S.C. § 704 (APA judicial review available only where "there is no other adequate remedy in a court.").

CONCLUSION

The Court should deny Plaintiffs summary judgment and dismiss this case.

Dated: November 16, 2017

Respectfully submitted,

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LOCAL RULE 7.1 WORD COUNT COMPLIANCE CERTIFICATE

I, Mark A. Jacobson, certify that the foregoing Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and in Reply Supporting FHFA Defendants' Motion to Dismiss complies with Local Rules 7.1(f) and (h).

I further certify that, in preparation of this memorandum, I used Microsoft Office Word Version 2010, with a 13-point font type size, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations, in the following word count.

I further certify that the above-referenced memorandum contains 2,925 words and that the combined word count for this filing and the FHFA Defendants' Memorandum of Law in Support of FHFA Defendants' Motion to Dismiss is 9,985 words.

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