No. 17-20364

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PATRICK J. COLLINS; MARCUS J. LIOTTA;
WILLIAM M. HITCHCOCK,
Plaintiffs-Appellants,
v.

JANET L. YELLEN, SECRETARY, U.S. DEPARTMENT OF TREASURY;
DEPARTMENT OF THE TREASURY; FEDERAL HOUSING FINANCE AGENCY;
SANDRA L. THOMPSON, ACTING DIRECTOR OF THE FEDERAL HOUSING FINANCE AGENCY,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas, No. 4:16-cv-03113

SUPPLEMENTAL RESPONSE BRIEF OF DEFENDANTS-APPELLEES FEDERAL HOUSING FINANCE AGENCY AND SANDRA L. THOMPSON ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Howard N. Cayne
Asim Varma
Robert J. Katerberg
Ian S. Hoffman
Dirk C. Phillips
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave. NW
Washington, DC 20001
(202) 942-5000

Counsel for FHFA Defendants-Appellees

CERTIFICATE OF INTERESTED PERSONS

Patrick J. Collins, et al. v. Janet L. Yellen, et al., No. 17-20364

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants	***Counsel for Plaintiffs-Appellants***
Patrick J. Collins Marcus J. Liotta William M. Hitchcock	Charles J. Cooper David H. Thompson Peter A. Patterson Brian W. Barnes COOPER & KIRK, PLLC Chad Flores BECK REDDEN LLP
Defendants-Appellees	***Counsel for Defendants-Appellees***
Steven T. Mnuchin Janet L. Yellen United States Department of Treasury	Hashim M. Mooppan Mark B. Stern Abby C. Wright Gerard J. Sinzdak Diane Kelleher Deepthy Kishore* Thomas D. Zimpleman* U.S. DEPARTMENT OF JUSTICE
Defendants-Appellees	***Counsel for Defendants-Appellees***
Joseph M. Otting Melvin L. Watt Mark A. Calabria Sandra L. Thompson Federal Housing Finance Agency	Howard N. Cayne Asim Varma Robert J. Katerberg Ian S. Hoffman Dirk C. Phillips ARNOLD & PORTER KAYE SCHOLER LLP

Other Persons and Entities
Federal National Mortgage Association ("Fannie Mae") Federal Home Loan Mortgage Corporation ("Freddie Mac")

* Attorneys whose names are denoted with an asterisk entered appearances in the district court but have not entered appearances in the Fifth Circuit.

/s/ Robert J. Katerberg
Robert J. Katerberg

Counsel for FHFA Defendants-Appellees

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INTRODUCTION

With some skepticism, the Supreme Court gave Plaintiffs the benefit of the doubt, allowing them one last chance to seek "retrospective relief" to the extent they could concretely demonstrate that the unenforceable removal provision made the implementation of the Third Amendment worse for them than if it had not existed. Plaintiffs have not risen to the challenge. Instead, they seek to leverage that narrow opening into an entirely new claim that goes far beyond implementation of the Third Amendment and strikes at the heart of the underlying conservatorships.

Plaintiffs now want an order wiping out the entire preferred stock interests central to funding and viability for Fannie Mae and Freddie Mac in the conservatorships since 2008. That relief would be nothing less than a judicially superintended overhaul of the Enterprises' capital structures and conservatorships and giveaway of the Government's quarter-trillion dollar equity interests for Plaintiffs' private benefit. By usurping the current and future political branches' role in GSE reform, such an injunction would work a far greater offense against the separation of powers than the removal clause issue it is supposed to remedy.

Plaintiffs' new claim is spectacular in its scope and lacks any basis in plausibly alleged facts. Most importantly, it is foreclosed by reasoning in this Court's prior *en banc* opinion on remedy, which the Supreme Court validated in its own pronouncements on the remedial issue. The Court should reject Plaintiffs' request and direct entry of final judgment for Defendants on all counts, other than a declaration that the for-cause removal provision is unconstitutional.

BACKGROUND

1. As recounted in both the Supreme Court's opinion and this Court's prior opinion, in the midst of the housing and economic crisis of 2008, FHFA placed Fannie Mae and Freddie Mac into conservatorships and entered into critical funding agreements with the Treasury Department, known as the Senior Preferred Stock Purchase Agreements. Those agreements became the lifeline through which Treasury would infuse more than $190 billion into the Enterprises in succeeding years and would remain committed to provide hundreds of billions more if necessary, to keep housing and mortgage markets stable and functioning.

Under the stock agreements, Treasury committed to provide capital to the Enterprises as necessary to avoid insolvency. *Collins v. Yellen*, 141 S. Ct. 1761, 1772-73 (2021). In return, Treasury received several entitlements, chief among them a "liquidation preference equal to $1 billion in each company, with a dollar-for-dollar increase every time the company drew on the capital commitment." *Id.* at 1773. "In other words, in the event the FHFA liquidated Fannie Mae or Freddie Mac, Treasury would have the right to be paid back $1 billion, as well as whatever amount the company had already drawn from the capital commitment, before any other investors or shareholders could seek repayment." *Id.* The stock agreements also provided for quarterly dividends calculated as a percentage of the liquidation preference. *Id.*

These liquidation preferences, Treasury's priority claims on the equity of the Enterprises, have been a central feature of Treasury's investments since the Treasury stock agreements were first executed in September 2008 through the present.

The Enterprises drew substantial sums from Treasury, and the liquidation preferences grew accordingly. By mid-2012, the companies had drawn over $187 billion, resulting in combined liquidation preferences of $189 billion. 141 S. Ct. at 1773. All of this predates the Third Amendment, or "Net Worth Sweep," that Plaintiffs challenged in this lawsuit.

In August 2012, FHFA, as Conservator of the Enterprises, and Treasury entered into the Third Amendment. The Third Amendment changed the dividend formula, but left the already $189 billion liquidation preferences untouched.

2. Plaintiffs, junior preferred and common shareholders of the Enterprises, filed this suit in October 2016. They exclusively challenged the Third Amendment or "Net Worth Sweep," including on the constitutional ground that it was "adopted by FHFA when it was headed by a single person who was not removable by the President at will" and therefore "must be vacated and set aside." ROA.89. As this Court previously observed, Plaintiffs "requested that a court invalidate only the Net

Worth Sweep. They never requested a declaratory judgment about the PSPAs as a whole . . . ." *Collins v. Mnuchin*, 938 F.3d 553, 592 (5th Cir. 2019).

Following a district court and panel decision, this Court sitting *en banc* held that while the removal provision was unconstitutional, it had no effect on the validity of the Third Amendment. *Id.* at 591-95. The Court rejected Plaintiffs' position that the unconstitutional removal restriction made the agency's actions "void *ab initio*," emphasizing that officials subject to removal restrictions nevertheless "are duly appointed by the appropriate officials and exercise authority that is properly theirs." *Id.* at 593. The Court proceeded to observe that:

> Perhaps in some instances such an officer's actions should be invalidated. The theory would be that a new President would want to remove the incumbent officer to [install] his own selection, or maybe that an independent officer would act differently than if that officer were removable at will. We have found no cases from either our court or the Supreme Court accepting that theory.
>
> But even if that theory is right, it does not apply here for two reasons. First, the action at issue is the adoption of the Net Worth Sweep, and the President had adequate oversight of that action. The entire PSPAs, including the Third Amendment's Net Worth Sweep, were created between the FHFA and Treasury. During the process, the Treasury was overseen by the Secretary of the Treasury, who was subject to at will removal by the President. The President, thus, had plenary authority to stop the adoption of the Net Worth Sweep. This is thus a unique situation where we need not speculate about whether appropriate presidential oversight would have stopped the Net Worth Sweep. We know that the President, acting through the Secretary of the Treasury, could have stopped it but did not.

Id. at 593-94.

Further, this Court took "judicial notice" of the "reality" of what happened under successive Administrations, *i.e.*, what the FHFA Directors selected by successive Presidents actually did. *Id.* at 594. Specifically, the fact that new Directors appointed by new Presidents did not reverse the action alleged to cause injury belied Plaintiffs' theory that the removal provision caused their injury. Instead, it demonstrated that invalidating such action "would actually erode executive authority rather than reaffirm it." *Id.*

3. The Supreme Court granted certiorari to address both the statutory and constitutional claims. As to the latter, the Court agreed with the Administration and Plaintiffs that the FHFA removal provision violated the separation of powers. 141 S. Ct. at 1783-87. However, the Court also ruled that provision to be inapplicable to FHFA Acting Directors, including the Acting Director who approved the Third Amendment, who was removable at will. *Id.* at 1781-83. That fact alone "defeat[ed]" Plaintiffs' request to set aside the Third Amendment in its entirety. *Id.* at 1787.

That holding did not dispose of a fallback argument by Plaintiffs relating to subsequent implementation of the Third Amendment by confirmed directors who "ordered and approved the payment of Net Worth Sweep dividends" and "directed" its legal defense. Reply Br. of Collins, et al., Nos. 19-422 & 19-563, at 13. However, the Court also largely rejected the fallback argument out of hand, calling Plaintiffs' position that such implementing actions were "void *ab initio*" "neither logical nor supported by precedent." 141 S. Ct. at 1787. An unconstitutional removal provision does not undermine an official's authority, so "there is no reason to regard any of the actions taken by the FHFA in relation to the third amendment as void. " *Id.*[1]

The Supreme Court also emphasized that the for-cause provision was never actually enforceable or binding: "an unconstitutional provision is never really part of the body of governing law" because "the Constitution automatically displaces any conflicting statutory provision from the moment of the provision's enactment." *Id.* at 1788-89; *see also id.* at 1793 (Thomas, J., concurring) ("[R]egardless of whether the removal restriction was lawful or not, the President always had the legal power to remove the Director in a manner consistent with the Constitution.").

The Supreme Court stopped just short, however, of entirely shutting the door on the possibility of relief for implementation of the Third Amendment shown to have been affected by mistaken observance of the unconstitutional removal provision. *Id.* at 1789 ("the possibility that the unconstitutional restriction on the President's power to remove a Director of the FHFA" could "inflict compensable harm" "cannot be ruled out"). The Court explained that such harm could ensue if a

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[1] *See also id.* at 1788 & n.23 ("[T]here is no basis for concluding that any head of the FHFA lacked the authority to carry out the functions of the office," and "the unlawfulness of the removal provision does not strip the Director of the power to undertake the other responsibilities of his office, including implementing the third amendment.").

President was erroneously enjoined from removing a Director, or made a statement expressing a desire to remove the Director because of policy disagreement but for the (invalid) statutory obstacle. *Id.*

While Plaintiffs alleged neither of those fact patterns, the Supreme Court understood Plaintiffs to "suggest" "less clear-cut" situations—that but for mistaken observance of the removal provision, "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.* Because a "misunderstanding about the correct state of the law" does not "make[] an otherwise constitutional action unconstitutional," such a theory would amount to an APA claim that such misunderstanding rendered an agency's action (or inaction) "arbitrary or capricious," which in turn would be subject to "the [Recovery] Act's anti-injunction provision." *Id.* at 1794 & n.7 (Thomas, J., concurring).

The Court also acknowledged Defendants' argument that the removal provision could not have caused any harm because the President "retained the power to supervise" the relevant transactions through "Treasury—an executive department led by a Secretary subject to removal at will by the President." *Id.* at 1789. Rather than finally terminate the claims, the Court directed that these issues be "resolved in the first instance by the lower courts." *Id.*

Justice Kagan, writing for herself and two other Justices, observed that the analysis in this Court's prior *en banc* opinion already effectively disposes of the issue being remanded:

> [T]he lower court proceedings may be brief indeed. As I read the opinion below, the Court of Appeals already considered and decided the issue remanded today. The court noted that all of the FHFA's policies were jointly "created [by] the FHFA and Treasury" and that the Secretary of the Treasury is "subject to at will removal by the President." *Collins v. Mnuchin*, 938 F.3d at 553, 594 (CA5 2019). For that reason, the court concluded, "we need not speculate about whether appropriate presidential oversight would have stopped" the FHFA's actions. *Ibid.* "We know that the President, acting through the Secretary of the Treasury, could have stopped [them] but did not." *Ibid.*, see *ibid.*, n. 6 (noting that the plaintiffs' "allegations show that the President had oversight of the action"). That reasoning seems sufficient to answer the question the Court kicks back, and nothing prevents the Fifth Circuit from reiterating its analysis.

Id. at 1802 (Kagan, J., concurring). Justice Thomas likewise "seriously doubt[ed] that the shareholders can demonstrate that any relevant action by an FHFA Director violated the Constitution," reiterating that "[a]bsent an unlawful act, the shareholders are not entitled to a remedy." *Id.* at 1795 (Thomas, J., concurring).

Undeterred, Plaintiffs now seek to exploit a limited remand to bring what is essentially a whole new case. Their new claim has little to do with "implementation of the Third Amendment." *Id.* at 1789. Rather, Plaintiffs advance a new theory that, but for a mistaken belief in the validity of the removal provision, President Trump would have appointed an FHFA Director sooner than he did, and that Director and the Treasury Secretary would then have collaborated to eliminate the U.S.

Government's approximately $190 billion liquidation preferences, inuring to the benefit of junior preferred shareholders like Plaintiffs.[2]

ARGUMENT

Plaintiffs do not and cannot establish either of the fact patterns comprising what they call the Supreme Court's "critical guidance" on potential sources of compensable harm: that "(1) a lower court enjoined the President from removing FHFA's Director without cause; or (2) the President '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.'" Br. 6 (quoting 141 S. Ct. at 1789). Rather, to support their new effort to dismantle the entire structure of Treasury's investment and funding commitment, Plaintiffs try to cobble together a narrative from misleading quotes from podcasts and news stories, coupled with a heavy dose of speculation. That effort fails.

Indeed, the reasoning in this Court's prior *en banc* opinion on remedy, which the Supreme Court endorsed, applies with full force to Plaintiffs' new theory and forecloses it. The real-world history after President Trump appointed an FHFA Director refutes Plaintiffs' narrative. And Section 4617(f), as interpreted by the

[2] Plaintiffs hypothesize that the FHFA Director and Treasury Secretary either would have directly cancelled the liquidation preferences or would have converted Treasury's preferred stock to common stock. Br. 13. The second option, conversion, would also have ended the liquidation preferences because common stock does not have a liquidation preference.

Supreme Court, precludes Plaintiffs' request for a permanent injunction that would tear up the Treasury preferred stock interests that have been foundational to the conservatorships for the past 13 years.

A. The Court's Analysis Rejecting Plaintiffs' Proposed Remedy in its Prior *En Banc* Decision Applies Equally to Plaintiffs' New Theory

This Court previously ruled *en banc* that Plaintiffs were entitled to a declaration that the removal provision was unconstitutional, but to no further relief. While Plaintiffs have now shifted their attack from the Third Amendment to the underlying preferred stock itself, applying the Court's prior reasoning shows that Plaintiffs' new theory is equally untenable. Under that analysis, it makes no sense to suppose that the President was set on giving up Treasury's approximately $190 billion liquidation preferences and would have fulfilled that goal "but for Director Watt's unconstitutional removal protection." Br. 14.

Assuming for the moment that the President actually had such a goal (despite its implausibility), Plaintiffs fail to explain how the FHFA removal provision could have prevented the President from accomplishing it. Just as the President "had plenary authority to stop the adoption of the Net Worth Sweep," 938 F.3d at 594, he also had plenary control of Treasury's investment. Plaintiffs offer no reason to believe Director Watt would have stood in the way if the President and Treasury Secretary had sought to cede value belonging to Treasury under the stock agreements. Those agreements represent economic transactions between FHFA, as

Conservator for the Enterprises, and Treasury as counterparties. Cancelling the liquidation preference would have given up the claims on the Enterprises that were integral to Treasury's benefit of the bargain, with nothing demanded from the Enterprises in return.

The only alleged support Plaintiffs offer for their premise that Watt stood in the way is a clip from a 2021 podcast interview of a former mid-level Trump Administration official. But Plaintiffs' own quotation skips over statements that directly refute the inference Plaintiffs would have the Court draw:

> [Q]uite honestly, I dealt with [Watt] on a regular basis. I would say his position on [GSE reform] is not terribly different than Director Calabria's; he thought that the conservatorship should be ended. *And he would have actually done almost anything we wanted to do*. In fact, he felt very strongly that this sweep should be ended and they should start building capital just as we had thought.

https://bit.ly/3y4zE4J, at 10:33-10:51 (emphasis added).[3] The speaker explained that the primary reasons GSE reform did not move faster early in the Administration had nothing to do with Watt: higher "priorities" like "tax reform" and "a really important piece of bank legislation" took up "all the oxygen in the room." *Id.* at 9:45-10:09.

[3] In fact, Director Watt joined with the Administration to make amendments to the stock agreements in December 2017 to limit the quarterly sweep dividends to the extent necessary to allow the Enterprises to maintain capital reserves. *See* https://bit.ly/3iOSLKP (Fannie Mae); https://bit.ly/3m5y2Vl (Freddie Mac).

The speaker further clarified that it was in fact the Treasury Secretary—not Director Watt—who hesitated about "strateg[ies]" that would have "helped the shareholders," because he had a "high standard of integrity" and viewed it as a potential "conflict." *Id.* at 13:15-13:38.[4] In short, to the extent podcast interviews of former officials have any value to this analysis at all, simply reviewing content beyond the phrases selectively chosen by Plaintiffs exposes Plaintiffs' theory as the ruse that it is.

The most decisive blow to Plaintiffs' theory comes from the "reality" of what happened after President Trump "picked [his] own FHFA director[]." 938 F.3d at 594. President Trump's chosen Director and the Treasury Secretary did, in fact, negotiate two amendments to the stock agreements, first in September 2019 and again in January 2021.[5] Those amendments did not cancel Treasury's liquidation

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[4] Further, the Treasury Secretary testified to the Senate Banking Committee in May 2017 that he was insisting Treasury continue to be fully compensated for its preferred stock interest in the Enterprises. *See Domestic and International Policy Update: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 115 Cong. 57, at 10 (2017) (statement of Steven T. Mnuchin, Secretary, Department of the Treasury) (Mnuchin: "I did tell [Watt] that it was our expectation at Treasury that they would pay us the dividend, and we hope they continue to do so per the agreement."). That stance would make no sense in Plaintiffs' fictitious world where the Administration desired to cede Treasury's preferred equity interest as soon as possible but was being thwarted by Watt.

[5] *See* https://bit.ly/3CS5mVL (Fannie Mae 2019); https://bit.ly/3iNyIg2 (Freddie Mac 2019); https://bit.ly/3CRWcs9 (Fannie Mae 2021); https://bit.ly/37OyT4s (Freddie Mac 2021).

preferences or convert the preferred stock to common stock. Far from it: they expanded the liquidation preferences by providing that "each company is required to pay Treasury *through increases in the liquidation preference*" each quarter. 141 S. Ct. at 1774 (emphasis added) (describing January 2021 amendments). Plaintiffs complained to the Supreme Court that those increases "only further entrenched Treasury's status as the sole shareholder that can ever receive a return on its investment." Letter to Supreme Court from Pls.'s Counsel dated Mar. 31, 2021 in *Collins v. Yellen*, available at https://bit.ly/3xVblFK. In short, once the Administration "controlled all the relevant levers of power within the Executive Branch," as Plaintiffs put it (Br. 10), it did the opposite of what Plaintiffs' theory presupposes. Following the 2019 and 2021 amendments, Treasury's liquidation preferences currently stand at a combined $243 billion, compared to $199 billion when former Director Watt left office.

This undisputed "reality" confirms that keeping the Treasury liquidation preference, no less than adoption of the Third Amendment, "transcended political affiliations and traversed presidential administrations." 938 F.3d at 594. An injunction nullifying the central terms of Treasury's investment would not only undo the very amendments the prior Administration made after it controlled the "relevant levers of power" (Br. 10), but would hamstring the current FHFA Director and

Treasury Department in efforts at GSE reform going forward. This "would actually erode executive authority rather than reaffirm it." 938 F.3d at 594.

B. Plaintiffs' Theory of Treasury's Agenda Is Wildly Speculative and Unsupported By Their Sources

Even if it were not precluded by this Court's precedent, Plaintiffs' new theory stretches beyond the outer limits of plausibility. It makes little sense to ascribe to Treasury a goal of relinquishing the central benefits of its massive investments to make way for private investors to enjoy first claim on the Enterprises' assets. Not surprisingly, the sources Plaintiffs cite do not support that notion.

Plaintiffs' fictitious narrative starts with a pre-Inauguration remark by soon-to-be Secretary Mnuchin that "we've got to get Fannie and Freddie out of government ownership" and end the conservatorships. Br. at 3, 11. Plaintiffs imply that this comment shows support for cancelling Treasury's liquidation preference, but it does no such thing. Ending the conservatorships is a broad goal that has been supported by many policymakers across the spectrum, not least former FHFA Director Watt himself, *see supra* at 11, and there have been many potential paths to ending the conservatorships that would not require surrendering billions of dollars of taxpayer value for no consideration.

Plaintiffs also cite a former Treasury official's quip that through dividends, "the taxpayer has actually been, in some ways, many ways, repaid from the bailout of Fannie and Freddie." Br. 13. But that confuses return *on* capital (dividends) with return *of* capital (repayment). The stock agreements have always prohibited paying down the liquidation preferences "[p]rior to termination of the [Treasury] Commitment." ROA.240, 249-50.

The primary anchor for Plaintiffs' counterfactual and proposed injunction is Treasury's September 2019 Housing Reform Plan. Br. 5, 11, 12. But that document also fails to support—indeed, totally contradicts—Plaintiffs' characterization of Treasury's objectives. Plaintiffs emphasize language recommending the Enterprises be "recapitalized with significant first-loss private capital," but ignore the very next sentence explaining that "[t]o facilitate recapitalization of the GSEs, Treasury and FHFA should consider adjusting the variable dividend" on the Treasury stock—which is quite different from cancelling the stock altogether. U.S. Dep't of the Treasury, *Housing Reform Plan* at 3 (Sept. 2019), https://bit.ly/2Uyvzre.

The specific actions Plaintiffs now ask the Court to order—eliminating the liquidation preference or converting Treasury's investment to common stock (which would necessarily include eliminating the liquidation preference)—are derived from page 27 of the Treasury Report. But, critically, those two possibilities are listed as part of a wide-ranging menu of "[p]otential approaches," alongside others such as "receivership . . . to facilitate a restructuring of the capital structure" (which would terminate Plaintiffs' shares for no value) or "[a]djusting the variable dividend" to allow the Enterprises to retain more capital (which FHFA and Treasury actually did, *see supra* at 12-13). Even the reference to action on the liquidation preference mentions "[e]liminating all *or a portion of*" it, Treasury Report at 27 (emphasis added), not that it would necessarily have been cut "to zero." Br. 13.

Plaintiffs also rely on public statements by FHFA Director Calabria that the Enterprises "could sell new shares of stock as early as 2021." Br. 12. However, the reference to 2021 in Plaintiffs' source document was clearly aspirational, accompanied by a caution that any stock offering would be "process dependent, not calendar dependent." https://bit.ly/3hXsKJ4. Moreover, Plaintiffs fail to establish how a public offering of new shares of stock would necessarily have required zeroing out Treasury's liquidation preferences or otherwise benefited Plaintiffs as holders of old shares of stock.

As the September 2019 Treasury Report reflects, the reality is that a wide range of concepts and options for GSE reform were on the table, reflecting the complex and multifaceted nature of the issues at stake. An appendix to that Report contains no fewer than 49 recommendations, none of which included extinguishing Treasury's liquidation preference, and many of which required action by Congress. Treasury Report at A-1 to A-6. Indeed, Congress's interest and role in GSE reform cannot be minimized. By a law effective through the first year of the Trump Administration, Congress prohibited Treasury from "relinquish[ing] . . . any outstanding shares of senior preferred stock acquired pursuant to the Senior

Preferred Stock Purchase Agreement." Pub. L. No. 114-113, § 702, 129 Stat. 2242, 3025 (2015). This independent bar to Plaintiffs' counterfactual, as well as the likelihood of further legislative intervention if FHFA and Treasury had proceeded toward a surrender of the $190 billion liquidation preferences, only reinforces why Plaintiffs' farfetched theory is not worthy of further judicial attention.

C. Section 4617(f) Bars Plaintiffs' New Claim and Requested Relief

Section 4617(f) of the Recovery Act also bars the mandatory permanent injunction Plaintiffs seek. That statute prohibits courts taking "any action to restrain or affect the exercise of [the] powers or functions of the Agency as Conservator." 12 U.S.C. § 4617(f). This "anti-injunction clause" "prohibits relief where the FHFA action at issue fell within the scope of the Agency's authority as a conservator," while "relief is allowed if the FHFA exceeded that authority." 141 S. Ct. at 1776.

As Plaintiffs have reinvented their case on remand, the "FHFA action at issue" is apparently now FHFA's *inaction* of not agreeing in 2017-2018 to hypothetical amendments cancelling Treasury's preferred stock. Under the Supreme Court's decision, to take or not to take those hypothesized actions was plainly within FHFA's statutory and constitutional authority. *See id.* at 1777-78 (FHFA had statutory authority to agree to Third Amendment), 1787 & n.23 (explaining that at all relevant times FHFA was headed by directors who "were properly *appointed*" and therefore had constitutional authority to act or not act).

Therefore, Section 4617(f) plainly covers Plaintiffs' newly minted theory and relief. It is difficult to imagine a judicial action that would "restrain or affect" the Conservator's powers or functions more intrusively than a mandatory permanent injunction compelling the Conservator to wipe out the Treasury investment that has served as the foundation of the conservatorships since their inception. Those agreements involve a package deal of complex, interlocking terms, and it is not possible simply to blue-pencil provisions Plaintiffs dislike without triggering a cascade of other issues that would need to be addressed. The supervision of such an injunction would plunge the Court into a thicket of financial and policy issues beyond its purview, which is exactly what Section 4617(f) is designed to avoid.[6]

D. No Burden-Shifting Applies

The Court should reject Plaintiffs' attempt to shift the burden to Defendants to rebut Plaintiffs' wild speculation. The evidence treatises Plaintiffs cite make clear that "the broadest and most accepted idea" regarding burdens of proof "is that the person who seeks court action should justify the request, which means that the

[6] Plaintiffs cannot avoid Section 4617(f) by arguing it does not apply to constitutional claims. Section 4617(f) might not bar injunctive relief against actions "beyond, or contrary to" FHFA's "constitutionally permitted" powers or functions. *Nat'l Trust for Historic Preservation v. FDIC*, 995 F.2d 238, 240 (D.C. Cir. 1993). But *Collins* forecloses any argument that relevant actions or inaction by FHFA were constitutionally unauthorized. 141 S. Ct. at 1787. Plaintiffs' new theory amounts to an APA "arbitrary and capricious" claim, which implicates "the Act's anti-injunction provision." *Id.* at 1794 n.7 (Thomas, J., concurring).

plaintiffs bear the burdens on the elements in their claims." Mueller & Kilpatrick, 1 Federal Evidence § 3.3 (4th ed. 2021); *see* 2 McCormick on Evidence § 337 (8th ed. 2020) (burden is "assigned to the plaintiff who generally seeks to change the present state of affairs"). Nowhere is the fairness of making Plaintiffs "justify the request" more manifest than when the "court action" sought is a mandatory permanent injunction as transformative and consequential as here.

Plaintiffs' analogy to the *McDonnell Douglas* framework for employment discrimination (Br. 17) does not help them either. Even if that framework were applicable here (it is not), and even if Plaintiffs had made out the equivalent of a *McDonnell Douglas prima facie* case here (they have not), a *prima facie* case merely requires a defendant accused of discrimination to identify its legitimate nondiscriminatory reason, while the plaintiff "always has the ultimate burden." *Outley v. Luke & Assocs., Inc.*, 840 F.3d 212, 216 (5th Cir. 2016).

Plaintiffs' analogy to the high standard for "harmless error" in APA rulemaking cases (Br. 17-19) is even more specious. The issue here is not harmless error; it is that Plaintiffs have not come forward with a remotely plausible theory connecting the unenforceable FHFA provision with any injury to them. Plaintiffs rely on cases about whether regulations must be vacated for failure to follow notice-and-comment procedures. But in the context of Plaintiffs' new claim, there is no affirmative action by FHFA to vacate, and thus no "procedures" akin to notice and comment that could have attached.

If anything, Plaintiffs' APA analogy cuts against them. When an agency fails to provide statutorily required notice and comment, the remedy is to remand to the agency for notice and comment rights to be afforded. *Cf. Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). The court does not rewrite the rule itself to dictate a specific substantive outcome. Yet dictating a specific substantive outcome—an overhaul of the capital structures of two congressionally-chartered entities and massive wealth transfers, all to be supervised by a court—is precisely what Plaintiffs seek to accomplish here through a permanent injunction "requir[ing] Defendants to either reduce the liquidation preference to zero or convert Treasury's senior preferred stock to common stock." Br. 14.

CONCLUSION

For the foregoing reasons, the Court should direct entry of final judgment for Defendants on all counts, other than a declaration that the for-cause removal provision is unconstitutional. The Court should reject Plaintiffs' request for a remand for discovery because Plaintiffs' new claim is both legally unsound and beyond the outer limits of plausibility, no amount of discovery would salvage it, and further prolonging this five-year-old litigation would serve no useful purpose.

Dated: August 25, 2021

Respectfully Submitted,

/s/ Robert J. Katerberg
Howard N. Cayne
Asim Varma
Robert J. Katerberg
Ian S. Hoffman
Dirk C. Phillips
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave. NW
Washington, DC 20001
(202) 942-5000

Counsel for FHFA Defendants-Appellees

CERTIFICATE OF COMPLIANCE

This brief complies with the 20-page length limitation set forth in the parties' July 2, 2021 joint letter to this Court regarding supplemental briefing, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 365 in 14-point Times New Roman font.

Dated: August 25, 2021

/s/ Robert J. Katerberg
Robert J. Katerberg

Counsel for FHFA Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Robert J. Katerberg
Robert J. Katerberg

Counsel for FHFA Defendants-Appellees