No. 18-2506

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

ATIF F. BHATTI; TYLER D. WHITNEY; MICHAEL F. CARMODY,

Plaintiffs-Appellants,

v.

FEDERAL HOUSING FINANCE AGENCY; DEPARTMENT OF THE TREASURY; SANDRA L. THOMPSON, in her official capacity as Acting Director of the Federal Housing Finance Agency,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Minnesota, No. 17-cv-2185

SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLEES FEDERAL HOUSING FINANCE AGENCY AND SANDRA L. THOMPSON

Howard N. Cayne
Asim Varma
Robert J. Katerberg
ARNOLD & PORTER KAYE SCHOLER
601 Massachusetts Ave. N.W.
Washington, D.C. 20001-3743
(202) 942-5000

Counsel for Defendants-Appellees Federal Housing Finance Agency and Sandra L. Thompson

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Defendants-Appellees Federal Housing Finance Agency ("FHFA") and its Acting Director Sandra L. Thompson file this supplemental brief to address the impact of *Collins v. Yellen*, 141 S. Ct. 1761 (2021), on this appeal, and to respond to Plaintiffs-Appellants' arguments in their supplemental brief.

INTRODUCTION

Collins involved precisely the same issue as presented by Counts One and Two in this case: whether the Third Amendment to FHFA's stock agreements with Treasury should be invalidated on the ground that the removal provision applicable to confirmed FHFA Directors is unconstitutional. The Supreme Court held that the removal provision violated the separation of powers, but that the Third Amendment could not have been affected because it was approved by an FHFA *Acting* Director not covered by the removal provision. Thus, the Supreme Court rejected the *Collins* plaintiffs' request to invalidate the Third Amendment.

That outcome is consistent with the judgment below in this case dismissing Plaintiffs' claims for vacatur of the Third Amendment due to the unconstitutional removal provision. Thus, *Collins* dictates affirmance of the judgment on Counts One and Two, albeit on different grounds than relied upon by the district court.

The Supreme Court understood the *Collins* plaintiffs also to have made and preserved potential fallback arguments that *implementation* of the Third Amendment by confirmed FHFA Directors covered by the removal provision—as distinguished from its *adoption* by an FHFA Acting Director not so covered—could have harmed them. Despite skepticism, the Supreme Court therefore remanded for the Fifth Circuit to dispose of any such remaining arguments.

Plaintiffs in this case now seek to read that limited remand in *Collins* as license to launch an entirely new, far-reaching claim here that has little to do with implementation of the Third Amendment. Plaintiffs speculate that if President Trump had been able to appoint a new FHFA Director at the outset of his Administration, that hypothetical Director might have collaborated with the Treasury Secretary to relinquish the United States' entire preferred stock interests in the Enterprises. Those interests, however, date back to the inception of the conservatorships in 2008, and accumulated most of their present collective quarter-trillion value before the 2012 Third Amendment that has always been the sole focus of this case. Plaintiffs nevertheless ask this Court to now impose judicially the giveaway they say the removal provision stopped from happening in 2017—relief that would amount to a massive wealth transfer from the taxpayers to junior preferred shareholders like themselves.

Even if deemed properly before the Court (which it is not), Plaintiffs' new claim is spectacular in its scope, lacks any basis in plausibly alleged facts, and is barred by the statutory provision forbidding judicial interference with conservatorship functions and operations. By usurping the current and future political branches' role in GSE reform, the injunction Plaintiffs seek would work a far greater offense against the separation of powers than the removal clause claim it is supposed to remedy.

Plaintiffs' arguments that *Collins* supports their separate Appointments Clause and nondelegation claims also lack merit. The Court should therefore affirm the judgment below in all respects other than the district court's holdings that plaintiffs lacked standing and that the removal provision was constitutional.

BACKGROUND

In this case, Plaintiffs challenged an August 2012 transaction between FHFA, as Conservator for Fannie Mae and Freddie Mac, and the Treasury Department, known as the Third Amendment. The Third Amendment modified certain terms of senior preferred stock purchase agreements FHFA and Treasury had entered into four years earlier to provide billions of dollars of critical funding during the Enterprises' conservatorships.

Under the *original* stock agreements in place since 2008, Treasury held preferred stock interests in the Enterprises that carried *liquidation preferences* "equal to $1 billion in each company, with a dollar-for-dollar increase every time the company drew on [Treasury's] capital commitment." *Collins*, 141 S. Ct. 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.*

By mid-2012, the companies had drawn over $187 billion, resulting in combined liquidation preferences of $189 billion held by Treasury on behalf of the taxpayers of the United States. *Id.* All of this predates the Third Amendment, or "Net Worth Sweep," that has always been the crux of this lawsuit.

In this case, *Collins*, and several other litigations, junior shareholders of the Enterprises sued to challenge the Third Amendment, which modified the formula for Treasury's preferred stock dividend in August 2012 in a way that the junior preferred shareholders claimed injured them. In both *Collins* and this case, shareholders asserted a theory that the Third Amendment was void *ab initio* because of an unconstitutional restriction on the President's ability to remove an FHFA Director.[1] In this case, Plaintiffs also asserted claims under the Appointments Clause and nondelegation doctrine. For each claim, Plaintiffs requested that the Court "vacate the third amendment," JA40, 41, 43, 45, 47, and sought no further relief relating to the stock agreements or any other aspect of the Conservator's economic relationship with Treasury.

Following a decision of the *en banc* Fifth Circuit, the Supreme Court granted

[1] *Collins* also included a statutory claim that the Third Amendment exceeded the Conservator's statutory authority. That claim was not brought in this case and in any event was rejected by the Supreme Court. 141 S. Ct. at 1775-78.

certiorari in *Collins*. That Court held that the shareholders had standing, 141 S. Ct. at 1778-80, and that under its intervening decision in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), FHFA's removal provision was unconstitutional. 141 S. Ct. at 1783-87. However, the Court rejected the *Collins* plaintiffs' request to invalidate the Third Amendment as a remedy because the removal provision was inapplicable to FHFA Acting Directors, including the Acting Director who approved the Third Amendment. *Id.* at 1781-83. That fact alone "defeat[ed]" the request by plaintiffs in that case to set aside the Third Amendment in its entirety. *Id.* at 1787.

That holding did not fully dispose of the *Collins* plaintiffs' claims, because the Court understood them also to have made a fallback argument relating to subsequent implementation of the Third Amendment by confirmed FHFA Directors to whom the removal provision did apply. Reply Br. of Collins, et al., Nos. 19-422 & 19-563, at 13 (complaining about confirmed Directors who "ordered and approved the payment of Net Worth Sweep dividends" and "directed" its legal defense). 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.*[2]

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 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 President was erroneously enjoined from removing a Director, or made a statement expressing a desire to remove the Director because of policy disagreement. *Id.*

While the *Collins* plaintiffs alleged neither of those fact patterns, the Supreme Court understood them 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.*

The Court also acknowledged defendants' argument that the removal provision could not have caused any harm because the President "retained the

[2] *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.").

power to supervise" the relevant transactions through "Treasury—an executive department led by a Secretary subject to removal at will by the President." *Id*. Rather than finally terminate the claims, the Court remanded *Collins* for these issues to be "resolved in the first instance by the lower courts." *Id.*

Justice Kagan, writing for herself and two other Justices, expressed doubt that the *Collins* plaintiffs would be able to sustain any claim that the removal restriction caused any difference in implementation of the Third Amendment. In Justice Kagan's view, the twin facts that (1) "all of the FHFA's policies were jointly 'created [by] the FHFA and Treasury'" and (2) the Treasury Secretary was always "'subject to at will removal by the President'" were "sufficient to answer the question the Court kicks back." *Id.* at 1802 (Kagan, J., concurring) (quoting *Collins v. Mnuchin*, 938 F.3d 553, 594 (5th Cir. 2019) (en banc)). There is no need to "'speculate about whether appropriate presidential oversight would have stopped'" any FHFA implementing actions because "'[w]e know that the President, acting through the Secretary of the Treasury, could have stopped [them] but did not.'" *Id.* (Kagan, J., concurring) (quoting *Collins*, 938 F.3d at 594). Justice Thomas likewise "seriously doubt[ed] that the shareholders can demonstrate that any relevant action by an FHFA Director violated the Constitution." *Id.* at 1795 (Thomas, J., concurring).

* * *

In this appeal, despite *Collins*'s decisive rejection of the only remedy they ever sought in the district court or this Court—invalidation of the Third Amendment—Plaintiffs have now filed a supplemental brief seeking to exploit the narrow opening the Supreme Court gave the *Collins* plaintiffs for claims related to implementation of the Third Amendment. Instead of pursuing any Third Amendment-related theory, however, Plaintiffs now surmise that but for the removal provision, a hypothetical new FHFA Director early in the Administration would have collaborated with the Treasury Secretary to relinquish the United States's preferred stock interests entirely, inuring to the benefit of junior preferred shareholders like Plaintiffs.[3]

ARGUMENT

I. *Collins* Compels Affirmance of the Judgment Rejecting Counts One and Two

The Supreme Court held in *Collins* that although the restriction on the President's ability to remove confirmed FHFA Directors was unconstitutional, that issue had no impact on the Third Amendment because "the Acting Director who

[3] 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. Pls.' Supp. Br. 12. The second option, conversion, would also have ended the liquidation preferences because common stock does not have a liquidation preference.

adopted the third amendment was removable at will." 141 S. Ct. at 1787. "That conclusion defeat[ed] the shareholders' argument for setting aside the third amendment in its entirety." *Id.*

That conclusion applies equally to Counts One and Two here. The relief Plaintiffs sought for those counts was that the Court "vacate the third amendment," JA40, 41, which the Supreme Court has conclusively rejected.[4] By not addressing the issue in their supplemental brief, Plaintiffs effectively concede that their claims seeking invalidation of the Third Amendment are foreclosed. Therefore, while some aspects of the district court's analysis (specifically, its holdings that Plaintiffs lacked standing and that the removal provision was constitutional) do not survive *Collins*, this Court should now affirm the ultimate judgment dismissing Counts One and Two based on *Collins*.[5]

II. The Court Should Reject Plaintiffs' New Claim Seeking to Wipe Out The Entire Value of Treasury's Investments

A. Plaintiffs Cannot Bring a New Claim In Supplemental Briefing

As a threshold matter, Plaintiffs' new claim is not properly before this Court. In four years of litigation up until their supplemental brief, Plaintiffs never offered

[4] Plaintiffs' Complaint also sought certain declaratory relief relating to FHFA's status as an independent agency and related statutes. However, it appears from Plaintiffs' supplemental brief that they no longer pursue such relief, which would be moot anyway, having been addressed by *Collins* itself.

[5] In light of *Collins*, FHFA withdraws its prior arguments that Plaintiffs lack standing and that the removal provision is constitutional.

even a slightest hint at a theory that, absent the removal provision, a difference in leadership of FHFA in 2017 and 2018 would have led to Treasury relinquishing its entire $189 billion liquidation preferences. In Plaintiffs' Statement of Issues, opening brief, reply brief, and oral argument in this Court, they never mentioned such a theory. Rather, their attack always exclusively targeted the 2012 Third Amendment, and the gravamen was always that *that* transaction was void *ab initio* because of the unconstitutional removal restriction.

Now that the Supreme Court has squarely rejected that argument, Plaintiffs have pivoted to an entirely new theory. But this Court has emphasized time and again that arguments an appellant "failed to present . . . to the district court" are "waived on appeal." *United States v. Bull*, --- F.4th ---, 2021 WL 3502056, at *3 n.5 (8th Cir. Aug. 10, 2021). This action was filed six months into the Trump Administration, and the district court did not issue its decision until July 2018, eighteen months in. Plaintiffs never lacked for opportunities to amend their complaint or otherwise bring their present theory to the attention of the district court; they simply failed to do so. If that were not enough, another cardinal principle this Court observes is that "[i]ssues not raised in a party's opening brief are waived." *Garcia v. 3M Co.*, --- F.4th ---, 2021 WL 3625824, at *4 n.4 (8th Cir. Aug. 17, 2021). Here, Plaintiffs failed to raise the issue in their opening brief, their reply, and at oral argument.

Plaintiffs may contend that they should be permitted to insert their new claim here because of the remand in *Collins* for potential further litigation of issues relating to "implementation of the Third Amendment." 141 S. Ct. at 1789. But there is no basis to suspect the *Collins* Court thought it was remanding for anything like the free-wheeling theory Plaintiffs now advance here. Plaintiffs' theory has little to do with implementation of the Third Amendment, and instead seeks relief reaching far beyond that transaction and impermissibly striking at the heart of the underlying conservatorships. Plaintiffs have not offered any reason why the Court should set aside its regular rules on waiver here.

B. Plaintiffs' New Removal-Restriction Claim Is Wholly Implausible

If the Court entertains Plaintiffs' new claim at all, the Court should reject it. Plaintiffs concede they do not and cannot allege either of the fact patterns that the *Collins* Court said exemplify cognizable harm from a removal restriction: no "lower court enjoined the President from removing FHFA's Director," and there was no Presidential "public statement expressing displeasure" with an FHFA Director. Pls.' Supp. Br. 5-6 (quoting 141 S. Ct. at 1789). Rather, Plaintiffs stitch together a far more attenuated narrative from news story fragments, podcast clips from interviews of lower-level officials, and, most of all, a heavy dose of speculation. Not only is this new claim implausible, it is directly refuted by what happened after President Trump installed new leadership at FHFA. Plaintiffs cannot salvage their theory with spurious pleas for burden-shifting. Plaintiffs' new claim would also be squarely barred by 12 U.S.C. § 4617(f), which bars injunctions interfering with conservatorship functions.

1. Plaintiffs' theory is that President Trump had a goal of giving up the taxpayers' approximately $189 billion investment in the Enterprises but was impeded from achieving that goal by a holdover FHFA Director he could not remove. The principal support for that supposed Presidential goal is a pre-Inauguration remark by soon-to-be Treasury Secretary Mnuchin that "we've got to get Fannie and Freddie out of government ownership" (Pls.' Supp. Br. 3, 10), but that comment in no way suggests the Government would simply surrender the entire nearly $200 billion of taxpayer value—the relief Plaintiffs seek here. Nor does a lower-level Treasury official's comment that "the taxpayer has actually been, in some ways, many ways, repaid" through dividends (Pls.' Supp. Br. 12) suggest the Administration was poised to give up the liquidation preferences. Return *on* capital (dividends) is distinct from return *of* capital (repayment), and it has always been clear under the stock agreements that dividend payments do not reduce the liquidation preferences. *See* JA81, 90-91 (generally foreclosing reduction of the liquidation preferences while Treasury's commitment remains outstanding).

Assuming, counterfactually, that the President wished to relinquish

Treasury's preferred ownership interest, Plaintiffs fail to explain how or why any FHFA Director could or would have resisted doing so. Cancelling the liquidation preference would have given up claims on the Enterprises that were integral to Treasury's benefit of the bargain, with nothing demanded from the Enterprises in return. There is no need to "'speculate about whether appropriate presidential oversight'" of FHFA would have changed the nature of Treasury's ownership interest when "'[w]e know that the President, acting through the Secretary of the Treasury,'" had control of that interest all along. 141 S. Ct. at 1802 (Kagan, J., concurring) (quoting *Collins*, 938 F.3d at 594). Plaintiffs' premise that former FHFA Director Watt blocked the way is contradicted by their own source: in quoting a podcast interview clip of a former mid-level Treasury official mentioning former FHFA Director Watt, they use an ellipsis to omit the most salient comment: that Watt "would have actually done almost anything we wanted to do." *Compare* Pls.' Supp. Br. 9, *with* https://bit.ly/3y4zE4J, at 10:33-10:51.

Plaintiffs admit "[t]he steps the Trump Administration took" after FHFA leadership changed in early 2019 "provide important insight into what additional actions the Administration would have taken had it controlled FHFA from the beginning." Pls.' Supp. Br. 9. Rather than help Plaintiffs, however, those insights strike the most decisive blow of all to their flawed hypothesis. In September 2019 and again in January 2021, FHFA and Treasury did, in fact, amend the stock agreements.[6] But far from cancelling Treasury's liquidation preferences, those amendments provided that "each company is required to pay Treasury [dividends] *through increases in the liquidation preference*" each quarter. 141 S. Ct. at 1774 (emphasis added) (describing January 2021 amendments).

In short, what transpired is the opposite of what Plaintiffs' theory presupposes. Following the 2019 and 2021 amendments, Treasury's liquidation preferences now stand at a combined $243 billion, compared to $199 billion when former Director Watt left office. The *Collins* 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.' Counsel dated Mar. 31, 2021 in *Collins v. Yellen*, available at https://bit.ly/3xVblFK.[7] It is not credible for Plaintiffs to suggest that, had the

[6] *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).

[7] Plaintiffs' other sources do not render their theory any more credible. Plaintiffs rely on a remark by FHFA Director Calabria that the Enterprises "could sell new shares of stock as early as 2021." Pls.' Supp. Br. 11. However, 2021 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. Plaintiffs rely on Treasury's 2019 housing reform plan, but far from fixing a path toward the specific economic outcome Plaintiffs now seek to have the Court order by injunction, that plan laid
[Footnote continued on next page]

transition in FHFA leadership that led to these amendments only occurred earlier, the opposite result would have ensued and the liquidation preferences would have been extinguished.

2. The Court should reject Plaintiffs' attempt to shift the burden to Defendants to rebut Plaintiffs' speculation. Plaintiffs' own authorities 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 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 "assigned to the plaintiff who generally seeks to change the present state of affairs"). The analogy to *McDonnell Douglas* (Pls.' Supp. Br. 15-16) fails because that framework is specific to the context of discrimination claims. In any event, nothing resembling a "*prima facie* case" has been established here, and even under *McDonnell Douglas*, "the ultimate burden . . . remains at all times with the plaintiff." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

The standard for "harmless error" in APA rulemaking cases (Pls.' Supp. Br. 16-17) is also irrelevant. The issue here is not harmless error; it is that Plaintiffs

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out a wide-ranging menu of numerous potential reform options and emphasized the integral role of Congress in charting next steps.

have not come forward with a remotely plausible theory connecting the unenforceable removal provision with any injury to them. In any event, Plaintiffs' APA analogy cuts squarely against the relief they seek. If a failure to provide notice and comment rights is not "harmless," the remedy is to remand to the agency for application of the proper procedures, not for the court to rewrite the rule itself or otherwise direct a particular substantive outcome. *Cf. Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Here, the relief Plaintiffs seek could not be more substantive or directive: a mandatory injunction "requir[ing] Defendants to either reduce the liquidation preference to zero or convert Treasury's senior preferred stock to common stock." Pls.' Supp. Br. 13.

3. Indeed, Section 4617(f) of the Recovery Act also bars the mandatory permanent injunction Plaintiffs seek. Courts may not take "any action to restrain or affect the exercise of [the] powers or functions of the Agency as a 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; *accord Saxton v. FHFA*, 901 F.3d 954, 957 (8th Cir. 2018).

As Plaintiffs seek to reinvent their case, the "FHFA action at issue" would apparently be FHFA's *inaction* of not agreeing in 2017-2018 to hypothetical amendments cancelling Treasury's preferred stock. Under *Collins*, to take or not to take those hypothetical actions was plainly within FHFA's statutory and constitutional authority. *See id.* at 1777-78 (FHFA as Conservator 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 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.[8]

[8] 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 any FHFA actions or inaction relating to the Third Amendment or Treasury stock agreements were ever constitutionally unauthorized. 141 S. Ct. at 1778. Instead, Plaintiffs' new theory would amount to an APA "arbitrary and capricious" claim plainly subject to "the Act's anti-injunction provision." *Id.* at 1794 n.7 (Thomas, J., concurring).

III. *Collins* Does Not Support Plaintiffs' Other Counts

Contrary to Plaintiffs' position, *Collins* does not rehabilitate their meritless Appointments Clause or nondelegation claims (Counts Three, Four, and Five).

A. Plaintiffs contend that *Collins* means that if this Court finds that the duration of Acting DeMarco's service violated the Appointments Clause, the Third Amendment must be deemed void. The premise and the conclusion are both wrong. As the district court found, Plaintiffs' claim is non-justiciable, and in any event Acting Director DeMarco did not serve longer than the Appointments Clause permits. FHFA Br. 46-52. But even if this Court were to find an Appointments Clause problem, Plaintiffs badly misread *Collins* when they insist the Third Amendment would need to be declared void *ab initio* in that circumstance.

Collins held that the unconstitutional removal restriction did not render officials' action void because "there was no constitutional defect in the statutorily prescribed method of appointment" and the officials therefore never lacked authority. *Collins*, 141 S. Ct. at 1787. Similarly here, Plaintiffs do not contend there was any defect in the President's original designation of DeMarco as FHFA Acting Director, only that he stayed too long. *See* FHFA Br. 39 n.4. Nothing in *Collins* suggests that an officer who all agree was "properly *appointed*," 141 S. Ct. at 1787, loses authority at some indeterminate point later found by a court to have passed beyond what was "reasonable under the circumstances," Appellants' Br. 40, whatever that means, voiding all of his subsequent actions. Such a rule would sow chaos, *Collins* does not remotely endorse it, and this Court should reject it.

Nor did *Collins* silently overrule the longstanding *de facto* officer doctrine, which was not before the Court. In contrasting invalid appointments (which may deprive an official of authority) with unconstitutional removal provisions (which do not), the Court at no time suggested any Appointments Clause issue means *all* agency actions *must* be treated as void irrespective of the traditional equitable considerations embedded in the *de facto* officer doctrine.

B. Plaintiffs also characterize *Collins* as reviving their nondelegation claim by holding that "FHFA acts in a governmental capacity as conservator of Fannie and Freddie." Pls.' Supp. Br. 19 (citing 141 S. Ct. at 1776). However, the passage they cite did not so hold; it merely refers to FHFA's statutory authority to act in its own best interest as Conservator. Even if the passage had the meaning Plaintiffs attribute to it, that would not aid Plaintiffs' nondelegation claim. To implicate the nondelegation doctrine, it is not enough for the challenged agency action to be merely governmental; non-delegation issues arise only when Congress attempts to "delegate *its legislative power* to another branch of Government." *Touby v. United States*, 500 U.S. 160, 165 (1991) (emphasis added). Plaintiffs thus undercut their own claim by insisting "FHFA clearly exercises *executive* power." Pls.' Supp. Br. 19 (emphasis added; internal quotation marks omitted). In all events, the district court's alternative holding—that even if FHFA as Conservator was acting in a legislative capacity, "HERA provides the requisite 'intelligible principle'"—independently warrants affirmance of the dismissal. Add. 44-46.[9]

CONCLUSION

For the foregoing reasons, the Court should direct entry of final judgment for Defendants on all counts, other than to the extent Plaintiffs seek a declaration consistent with *Collins* that the 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 four-year-old litigation would serve no useful purpose.

[9] The Court need not reach Plaintiffs' argument that *Collins* means the Succession Clause does not bar their Appointments Clause and nondelegation claims because the dismissal of those claims can and should be affirmed on numerous other grounds.

Dated: September 8, 2021

Respectfully submitted,

/s/ Robert J. Katerberg
Howard N. Cayne
Asim Varma
Robert J. Katerberg
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., N.W.
Washington, DC 20001
(202) 942-5000
Howard.Cayne@arnoldporter.com
Asim.Varma@arnoldporter.com
Robert.Katerberg@arnoldporter.com

Counsel for Defendants-Appellees
Federal Housing Finance Agency and
Sandra L. Thompson

CERTIFICATE OF COMPLIANCE

This brief complies with the 20-page length limitation set forth in the Court's July 16, 2021 Order regarding supplemental briefing, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionately spaced typeface in 14-point Times New Roman font.

As required by Eighth Circuit Rule 28A(h), this brief have been scanned for viruses and is virus-free.

/s/ Robert J. Katerberg
Robert J. Katerberg

Counsel for Defendants-Appellees
Federal Housing Finance Agency and
Sandra L. Thompson

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2021, I filed the foregoing Supplemental Brief of Defendants-Appellees Federal Housing Finance Agency and Sandra L. Thompson with the Clerk of the Court using the CM/ECF System. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Robert J. Katerberg
Robert J. Katerberg

Counsel for Defendants-Appellees
Federal Housing Finance Agency and
Sandra L. Thompson