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

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA (No. 17-2185)

SUPPLEMENTAL BRIEF FOR THE TREASURY DEPARTMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities:

INTRODUCTION

In *Collins v. Yellen*, 141 S. Ct. 1761 (2021), the Supreme Court held that a statutory provision that placed limits on the President's authority to remove the Senate-confirmed Director of the Federal Housing Finance Agency (FHFA) was unconstitutional. The Supreme Court further held that the unconstitutional removal provision had no bearing on the adoption of the Third Amendment to the purchase agreements between FHFA as conservator and Treasury because, at the time the parties agreed to the Third Amendment, FHFA was headed by an Acting Director, who was removable at the President's will. The Supreme Court thus refused to set the Third Amendment aside. While recognizing that there was no reason to assume that the removal restriction had any effect on the later implementation of the Third Amendment by confirmed Directors, the Court concluded that it was theoretically possible that the restriction prevented the President from altering the implementation of the Third Amendment in a manner that would have benefited plaintiffs. The Supreme Court therefore remanded the case to the Fifth Circuit to determine whether plaintiffs could establish any such harm, entitling them to further relief.

The Fifth Circuit previously resolved the question presented on remand and correctly determined that the removal restriction did not prevent the President from implementing changes to the Third Amendment that would have benefited plaintiffs. *See Collins v. Mnuchin*, 938 F.3d 553, 593-94 (5th Cir. 2019) (en banc). This Court should follow suit. Plaintiffs speculate that, absent the removal restriction, President

Trump would have required Treasury to reduce to zero its liquidation preference rights in the enterprises or to convert its preferred stock into less valuable common stock. The President at all times had plenary authority over the Secretary of the Treasury and could have directed the Secretary to reduce Treasury's interests in the enterprises. Thus, this is not a situation in which a court has to "speculate" about whether the President had sufficient control over the Third Amendment to bring about the changes plaintiffs hypothesize. *Id.* at 594. He plainly did. Moreover, in asking this Court to enter an injunction dramatically reducing Treasury's rights in the enterprises, plaintiffs ask this Court to take action on the President's purported behalf that the President himself could have taken, but did not. Plaintiffs' request is neither logical nor consistent with fundamental separation-of-powers principles.

Plaintiffs' conjecture about the actions President Trump would have taken absent the removal restriction also cannot be squared with the actions he and the Senate-confirmed Director he selected actually undertook. President Trump's confirmed Director continued to defend the Third Amendment in the years following his appointment. And while the Director twice negotiated alterations to the purchase agreements, he did not negotiate anything resembling the changes to the purchase agreements that plaintiffs claim the President desired. To the contrary, the alterations the Director negotiated (involving an increase in Treasury's liquidation preference) are precisely the opposite of what plaintiffs hypothesize.

As plaintiffs acknowledge, *Colllins* did not address the Appointments Clause and nondelegation claims plaintiffs raise here. Thus, contrary to plaintiffs' contention, the Supreme Court did not hold that vacatur is the required remedy for an Appointments Clause violation. If anything, *Collins* confirms that remedial and equitable principles may preclude relief even where an Appointment Clause violation is established. The Supreme Court likewise did not conclude, as plaintiffs contend, that FHFA's Acting Director was exercising executive power for purposes of the nondelegation doctrine when he agreed to the Third Amendment. Although the Supreme Court noted that FHFA, as conservator, is authorized to take actions in the public's interest, that fact does not distinguish the conservator from the enterprises' private directors, who Congress likewise tasked with pursuing the public's interest when operating the enterprises.

THE SUPREME COURT'S DECISION IN *COLLINS*

In *Collins v. Yellen*, 141 S. Ct. 1761 (2021), the Supreme Court affirmed the validity of the Third Amendment to the Preferred Stock Purchase Agreements entered into by FHFA, as conservator for the enterprises, and Treasury.

The Supreme Court first held that FHFA lawfully exercised its statutory conservatorship authority when it agreed to the Third Amendment and that, as a result, plaintiffs' statutory claim was barred by the Housing and Economic Recovery Act's "anti-injunction" provision. *Collins*, 141 S. Ct. at 1775-78.

The Court then addressed the constitutionality of the statutory restriction on the President's authority to remove FHFA's Senate-confirmed Director. *Collins*, 141

S. Ct. at 1783-89. That provision states that "[t]he Director shall be appointed for a term of 5 years, unless removed before the end of such term for cause by the President." 12 U.S.C. § 4512(b)(2). Agreeing with plaintiffs and the Treasury Department, the Supreme Court held that Congress could not, consistent with the separation of powers, limit the President's authority to remove FHFA's Director, and the restriction was therefore invalid. *Collins*, 141 S. Ct. at 1783-89.

The Court further held, however, that the unconstitutional removal restriction had no bearing on FHFA's agreement in August 2012 to the Third Amendment because FHFA was headed by an Acting Director at the time, and the Acting Director was removable at will by the President. *Collins*, 141 S. Ct. at 1781-83. The Court therefore rejected plaintiffs' request to set the Third Amendment aside. *Id.* at 1788.

The Supreme Court also held that, with respect to the later implementation of the Third Amendment by confirmed Directors, there was "no reason to regard any of the actions taken by the FHFA in relation to the third amendment as void." *Collins*, 141 S. Ct. at 1787. However, because it remained "possible" that the removal restriction inflicted harm on the shareholders during the Third Amendment's implementation, the Supreme Court remanded the case to the court of appeals for it to decide whether the shareholders were entitled to retrospective relief. *Id.* at 1789.

ARGUMENT

In *Collins v. Yellen*, 141 S. Ct. 1761 (2021), the Supreme Court rejected the central claim plaintiffs raise here: namely, that the Third Amendment must be set aside in its entirety in light of the Recovery Act provision limiting the President's authority to remove FHFA's Director. The Court concluded that the provision had no effect on the Third Amendment's adoption because FHFA was headed by an Acting Director at the time and the Acting Director was subject to removal at the President's will.

While expressing skepticism on the matter, the Supreme Court left it to the Fifth Circuit to determine in the first instance whether plaintiffs can establish that the unconstitutional restriction on the President's authority to remove FHFA's confirmed Director harmed plaintiffs by preventing the President from altering the implementation of the Third Amendment in a way that would have benefited them. The Fifth Circuit, sitting en banc, previously addressed the question whether the removal restriction had any impact on the adoption or implementation of the Third Amendment and correctly concluded that it did not. *See Collins v. Mnuchin*, 938 F.3d 553, 593-94 (5th Cir. 2019) (en banc). The President had plenary authority over the Secretary of the Treasury and could have directed the Secretary to cease implementation of the Third Amendment or to renegotiate its terms to the benefit of the enterprises and their shareholders. *Id.* at 594. The President thus had "full oversight," in all relevant ways, over the implementation of the Third Amendment notwithstanding the removal restriction. *Id.*

Moreover, both Presidents Obama and Trump appointed confirmed Directors (President Trump also appointed an Acting Director) who vigorously defended the

Third Amendment and continued to implement it. Had President Trump (the sole focus of plaintiffs' submission) desired a swift end to the Third Amendment or a significant change to the purchase agreements, he could have selected a Director "who would carry out that vision, either in action or in litigation." *Collins*, 938 F.3d at 594. He did not. Nor is there any need to speculate about whether President Trump would have ordered a confirmed Director to renegotiate the Third Amendment in a manner that favored shareholders. President Trump's confirmed Director, in fact, renegotiated the purchase agreements twice. By plaintiffs' own description, those negotiations and resulting alterations to the agreements did "nothing" for shareholders. *See* Pls. Letter, *Collins v. Yellen*, No. 19-422 (U.S. Mar. 31, 2021). That neither the Treasury Secretary nor the Directors President Trump selected renegotiated the agreements in a manner favorable to plaintiffs fatally undermines plaintiffs' conjecture that President Trump would have amended the agreements in favor of plaintiffs, but was prevented by the removal restriction from doing so.

A. Treasury's status as a counterparty to the Third Amendment makes clear that the statutory removal restriction did not preclude the President from directing the implementation of the Third Amendment as he deemed appropriate.

The President's control over the Secretary of the Treasury—FHFA's contractual counterparty—negates any attempt by plaintiffs to show that the Recovery Act's removal restriction prevented the President from altering the implementation of the Third Amendment in a manner that would have benefited the enterprises and their shareholders at Treasury's expense. *See Collins*, 938 F.3d at 594 (concluding that, in light of Treasury's status as a contractual counterparty, "[t]his is thus a unique situation where we need not speculate about whether [there was] appropriate presidential oversight"); *see also Collins v. Yellen* , 141 S. Ct. 1761, 1802 (2021) (Kagan, J., concurring in part and concurring in the judgment) (noting that the Fifth Circuit's reasoning with respect to Treasury's involvement as a counterparty "seems sufficient to answer the question the Court kicks back").

Plaintiffs nevertheless speculate that, absent the removal restriction, President Trump would have removed FHFA's confirmed Director Melvin Watt in January 2017 and replaced him with a different Director. Pls. Supp. Br. 6-7. Plaintiffs further contend that this hypothetical Director would have renegotiated the Third Amendment in a manner that benefited the enterprises and its shareholders by reducing Treasury's interest in the enterprises. *Id.* at 8-13. Specifically, plaintiffs assert that the hypothetical Director would have renegotiated the preferred stock purchase agreements between Treasury and the enterprises to "either: (1) reduce the liquidation preference on Treasury's senior preferred stock to zero and end further increases to the liquidation preference so long as the Companies did not make further draws on Treasury's funding commitment; or (2) convert Treasury's senior preferred stock to common stock." *Id.* at 12. According to plaintiffs, the hypothetical Director would have pursued these options in order to make the enterprises' stock more attractive to new private investors. *Id.* As a remedy, plaintiffs ask this Court to enter an injunction reducing Treasury's liquidation preference to zero or converting Treasury's stock. *Id.* at 20.

Plaintiffs' theory of harm thus turns on the notion that President Trump wanted to dramatically reduce *Treasury*'s interest in the enterprises, thus enabling the enterprises to raise capital from other sources. Even assuming (contrary to all available evidence, *see infra* pp. 8-13) that is what the President desired, the Recovery Act's removal restriction did not impair his ability to pursue that goal. If the President wanted Treasury to forgo or reduce its interest in the enterprises, he could have directed the Secretary of the Treasury to give up Treasury's dividend rights in the enterprises, to eliminate or reduce its liquidation preference, or to trade in its preferred shares for less valuable common shares. In short, the President had "plenary authority" over Treasury's stake in the enterprises and could have reduced that stake if he so desired. *Collins*, 938 F.3d at 594. The removal restriction had no bearing on the President's oversight authority with respect to Treasury's interests.

That President Trump never ordered Treasury to take action to reduce its liquidation preference or convert its shares underscores the absence of any foundation for plaintiffs' theory. Plaintiffs ask this Court to take an action on the President's presumed behalf that the President himself declined to take. For this Court to do so under "the guise of respecting the presidency[,] . . . make[s] [no] sense." *Collins*, 938 F.3d at 594.

With little elaboration, plaintiffs state (Pls. Supp. Br. 8) that it "is not sufficient for the Court to focus narrowly on whether Treasury went along with FHFA's implementation of the Net Worth Sweep during the years when President Trump was inhibited from replacing Director Watt." But plaintiffs' theory of harm is premised on their claim that the President *did not* want Treasury to go along with the implementation of the Third Amendment and instead wanted Treasury to forgo the benefits the Third Amendment and the purchase agreements conferred upon it. Thus, the only question this Court need answer is whether the President had sufficient control over Treasury's actions and Treasury's interests in the enterprises. He plainly did. That the Secretary of the Treasury "went along with" FHFA's implementation of the Third Amendment—never once proposing let alone implementing the dramatic reduction in Treasury's stake in the enterprises that plaintiffs hypothesize President Trump desired—is thus enough to defeat plaintiffs' claim.

Moreover, even assuming that FHFA would have opposed an attempt by Treasury to forgo a contractual benefit, nothing would have prevented Treasury from doing so unilaterally. Indeed, Treasury for years voluntarily waived the periodic commitment fee to which it was entitled under the initial stock purchase agreements. *See Collins*, 141 S. Ct. at 1773 n.4.

And, of course, there is no basis for assuming that Director Watt (or any FHFA Director) would have opposed an amendment that, at no cost to the enterprises, eliminated Treasury's liquidation preference or converted Treasury from a preferred to common shareholder, thus paving the way for the enterprises' recapitalization. As the Seventh Circuit explained and plaintiffs acknowledge, Treasury's rights under the stock purchase agreements and its liquidation preference in particular "place[] real constraints on the companies' future." *Roberts v. FHFA*, 889 F.3d 397, 405 (7th Cir. 2018). Among other things, those rights "limit the companies' ability to raise capital and debt" and "limit the companies' independence." *Id.* Had Treasury proposed significantly reducing its rights voluntarily, there is no reason to believe (and plaintiffs offer none) that Director Watt would have rebuffed that overture. To the contrary, shareholders in other litigation have emphasized that Director Watt described the Third Amendment as "especially irresponsible" because it limited the amount of internal, private capital the enterprises could retain, *see* Pls. Supp. En Banc Br. 31, *Collins v. Yellen*, No. 18-20364 (5th Cir. Dec. 12. 2018) (quoting Melvin L. Watt, Director, FHFA, Statement before the U.S. Senate Committee on Banking, Housing, and Urban Affairs (May 11, 2017)). The notion that Watt, or any FHFA Director serving as conservator, would have objected to an offer to free the enterprises from the constraints imposed by Treasury's interests in the enterprises (at no cost to the enterprises) is fanciful.

B. The actions taken by the Directors President Trump selected provide an independent basis for rejecting plaintiffs' theory of harm.

The actions taken by the Directors President Trump selected provide an independent basis for rejecting plaintiffs' conjecture about what President Trump would have done with respect to the Third Amendment had the removal restriction not existed. *See Collins*, 938 F.3d at 594. President Trump appointed two Directors during his Administration: an Acting Director in January 2019 and a Senate-confirmed Director in April 2019. *Id.* If President Trump had wished to bring about the significant reduction in Treasury's rights that plaintiffs propose, he would have "install[ed] someone who would carry out th[at] policy vision." *Id.* He did not. Instead, the Directors President Trump appointed continued to defend the Third Amendment. Although the Directors, along with Treasury, "consistently reevaluated" the purchase agreements, *Collins*, 141 S. Ct. at 1781, at no point did either Director negotiate a change in Treasury's rights along the lines plaintiffs propose (a change that, in plaintiffs' view, Treasury would have readily accepted). That alone entirely undermines plaintiffs' claim that President Trump would have renegotiated the Third Amendment as plaintiffs propose had he selected a Director earlier in his tenure.

Plaintiffs' suggestion that, absent the removal restriction, President Trump would have implemented a radical reworking of the stock purchase agreements in plaintiffs' favor also cannot be squared with the changes to the agreements that the President's chosen Directors actually undertook. Under the confirmed Director chosen by President Trump (Mark Calabria), FHFA and Treasury twice altered the terms of purchase agreements. First, on September 27, 2019, the parties entered into a letter agreement under which the enterprises' internal capital buffers were increased from $3 billion to $25 billion (for Fannie Mae) and $20 billion (for Freddie Mac).[1] In exchange for allowing the enterprises to retain additional capital, Treasury received a $22 billion increase in its liquidation preference in Fannie Mae and a $17 billion increase in its liquidation preference for Freddie Mac. Thus, far from negotiating a reduction in Treasury's liquidation rights—as plaintiffs argue the President's hypothetical Director would have done—the President's chosen Director agreed to an *increase* in those rights.

The second alteration Director Calabria negotiated likewise undermines plaintiffs' claim that the removal restriction prevented President Trump from renegotiating the purchase agreements in the manner plaintiffs suggest. In January 2021, the parties agreed to amend the purchase agreements by suspending all quarterly cash dividend payments to Treasury until the enterprises build sufficient capital to meet specified thresholds. *Collins*, 141 S. Ct. at 1774. Once those thresholds are met, cash dividend payments to Treasury will resume. *Id.* In the meantime, the dividends that the enterprises would have paid to Treasury in cash under the Third Amendment will be added to Treasury's liquidation preference. *Id.* Thus, rather than taking action to "reduce the liquidation preference on Treasury's senior preferred stock to zero and end further increases to the liquidation preference" or to "convert Treasury's senior

[1] U.S. Dep't of the Treasury, *Treasury Department and FHFA Modify Terms of Preferred Stock Purchase Agreements for Fannie Mae and Freddie Mac* (Sept. 30, 2019), https://go.usa.gov/xF6NS.

preferred stock to common stock," Pls. Supp. Br. 12, President Trump's selected Director did precisely the opposite. He renegotiated the purchase agreements in a way that increases the enterprises' internal, non-Treasury-funded capital in exchange for an *increase* in Treasury's liquidation rights. Moreover, by shareholders' own account, the January 2021 agreement did "nothing" to aid them. *See* Pls. Letter, *Collins v. Yellen*, No. 19-422 (U.S. Mar. 31, 2021). In other words, when given the opportunity, President Trump selected a Director whose approach to the purchase agreements was entirely at odds with the approach plaintiffs claim the President wanted. Plaintiffs' speculation is pure fantasy.

C. Plaintiffs' theory of injury and their proposed remedy fail for additional reasons.

For the reasons explained above, plaintiffs cannot show that the Recovery Act's removal restriction thwarted the President's ability to renegotiate the stock purchase agreements in a manner that would have benefited private shareholders. While either of the grounds discussed suffices to reject plaintiffs' request for further relief on their removal claim, plaintiffs' request also fails for additional reasons.

1. Plaintiffs' theory of injury is premised on the assumption that President Trump would have removed Director Watt had Watt not been protected by the Recovery Act's removal restriction. *See* Pls. Supp. Br. 6-7. There is little basis, however, for assuming that the President felt bound by the Recovery Act's removal restriction during the final two years of Watt's term. To the contrary, the Trump

Administration did not defend the constitutionality of the removal restriction and argued before this Court and the Supreme Court that the provision was invalid and unenforceable. *See, e.g.*, Treasury Resp. Br. 32-37. The Trump Administration also took that position with respect to similar removal restrictions in other statutes. *See, e.g.*, Br. for the U.S. as Amicus Curiae at 5-19, *PHH Corp v. CFPB*, No. 15-1177 (D.C. Cir. Mar. 17, 2017). Thus, the Administration was of the view, later affirmed by the Supreme Court, that the President at all times had plenary authority to remove FHFA's Director if he so desired.

Consistent with that understanding, plaintiffs cite no evidence showing that "the President had attempted to remove [Director Watt] but was prevented from doing so by a lower court decision holding that he did not have 'cause' for removal." *Collins*, 141 S. Ct. at 1789. Nor can plaintiffs muster any "public statement[s]" from the President "expressing displeasure with actions taken by [Watt]" and "assert[ing] that he would remove the Director if the statute did not stand in the way." *Id.* Despite his Administration's belief that he had the authority to do so, President Trump never attempted to remove the Director or order the Director to take specific actions. Nor was he ever prevented from doing so. Those facts negate the underlying premise of plaintiffs' alleged injury.

That the Court should not assume that President Trump felt constrained by the removal restriction is underscored by the actions of his successor, President Biden. On July 9, 2021, President Biden fired the Commissioner of Social Security notwithstanding a statutory provision limiting the President's authority to remove the Commissioner only upon "a finding by the President of neglect of duty or malfeasance in office." 42 U.S.C. § 902(a)(3).

2. Even apart from the many fatal difficulties with plaintiffs' argument, their claim to entitlement to an injunction eliminating Treasury's liquidation preference or converting Treasury's preferred stock to common stock is without legal basis taken on its own terms. Plaintiffs derive their proposed remedy from a 2019 Housing Reform Plan issued by the Treasury Department. *See* Pls. Supp. Br. 10-12 (citing Dep't of the Treasury, *Housing Reform Plan* (Sept. 2019) (Housing Reform Plan)). Even a cursory review of that Plan undermines plaintiffs' suggestion that Treasury would have forgone its liquidation preference or other rights at no cost to enterprises. The Plan identifies "[e]liminating all or a portion" of Treasury's liquidation preference or "exchanging all or a portion of that [liquidation preference] for common stock or other interests in the GSE" as one possible "option[]" among "[p]otential approaches to recapitalizing a GSE." Housing Reform Plan 27. The Plan also identifies other options, including "[a]djusting the variable dividend on Treasury's senior preferred shares" or "[p]lacing the GSE in receivership." *Id.* The Plan does not endorse any of the options or suggest that any of the options is likely, preferred, or even feasible. Instead, the Plan recognizes that each option "poses a host of complex financial and legal considerations" that would require "careful consideration." *Id.* It is thus far from "highly likely" (Pls. Supp. Br. 12) that FHFA and Treasury will ever adopt the option plaintiffs favor, let alone that they would have done so shortly after President Trump took office.

The Plan also makes clear that "protecting taxpayers" from future bailouts and ensuring that "the Federal Government is properly compensated for any explicit or implicit support it provides to the GSEs" should be central components of any reform of the enterprises. Housing Reform Plan 1, 28. Nothing in the Plan suggests Treasury would simply have foregone its interests in the enterprises, notwithstanding its continued commitment of hundreds of billions of dollars of taxpayer funds, and restored the enterprises to the flawed model that necessitated the conservatorships and taxpayer-funded bailouts. Yet that is precisely what plaintiffs ask this Court to do. Moreover, as explained *supra*, if that *was* Treasury's true intent, it could have achieved that result.

3. Plaintiffs cannot overcome the failures in their argument by insisting, Pls. Supp. Br. 13-17, that the government bears the "burden" of proving that a constitutional violation caused no harm "where a plaintiff makes a *prima facie* case that an unconstitutional removal restriction prevented a presidential administration from pursuing policies that would have benefitted the plaintiff." *Id.* at 13. Nor do they advance their argument by urging the Court to "resolve in [their] favor any uncertainty over whether and how the Trump Administration would have amended the purchase agreements but for Director Watt's unconstitutional removal protection." *Id.* at 16.

Plaintiffs' "Hail Mary" request to be relieved of their burden of establishing that they were harmed by the removal provision is inconsistent with the Supreme Court's decision in *Collins*, and does not, in any event, assist them. The Supreme Court emphasized in *Collins* that "there is no reason to regard any of the actions taken by the FHFA in relation to the third amendment[, including actions taken by confirmed Directors,] as void." 141 S. Ct. at 1787; *see also id.* at 1793 (Thomas, J., concurring) (explaining that the "mere existence of an unconstitutional removal provision, too, generally does not automatically taint Government action by an official unlawfully insulated"). Thus, contrary to plaintiffs' suggested approach, the Supreme Court made clear that a validly appointed Director's actions are presumed lawful and thus any uncertainty over the validity of those actions is properly resolved in the government's favor. Plaintiffs' novel burden-shifting approach cannot be squared with those instructions.

In any event, even if this Court were to adopt plaintiffs' proposal, it would be of no help to them. For the reasons explained above, plaintiffs have not established a "*prima facie* case" that the removal restriction prevented President Trump from renegotiating the purchase agreements to the plaintiffs' benefit. Nor is there "any uncertainty over whether and how the Trump Administration would have amended the purchase agreements but for Director Watt's unconstitutional removal protection," Pls. Supp. Br. 16. To establish harm stemming from the removal restriction, plaintiffs would have to show that the removal restriction prevented the

President from reducing Treasury's interest in the enterprises. As explained, plaintiffs cannot do so given that the President had plenary authority over the Secretary of the Treasury and could have directed the Secretary to forgo or reduce Treasury's interests at any time. Moreover, the actions taken by the Directors President Trump chose belie plaintiffs' suggestion that the President would have undertaken the dramatic restructuring of the purchase agreements that plaintiffs propose.

D. *Collins* does not support plaintiffs' other claims.

Plaintiffs raise two additional claims that were not present in *Collins*. They argue that the Acting Director who agreed to the Third Amendment was serving in violation of the Appointments Clause and that FHFA's statutory conservatorship authority violates the nondelegation doctrine. Those claims fail on the merits and on various threshold and remedial grounds. *See* Treasury Resp. Br. 37-42. Among other things, the Appointments Clause does not apply to the appointment of an Acting Director, and Congress has provided ample guidance to FHFA when acting as conservator. *See id.* The Supreme Court's decision in *Collins* provides no support to plaintiffs' arguments to the contrary.

Plaintiffs wrongly contend that *Collins* "confirmed that actions taken by an official in violation of the Appointments Clause are entirely void" and "must be set aside." Pls. Supp. Br. 18-19. The *Collins* Court said no such thing. In rejecting the plaintiffs' request to set aside the Third Amendment, the Supreme Court distinguished cases in which it had held a government action void, explaining that those cases involved Appointments Clause and other challenges, rather than removal-power challenges. *See Collins*, 141 S. Ct. at 1788. But the Court in no way suggested that vacatur is an automatic remedy in Appointments Clause cases, including where vacatur would be inconsistent with equitable and remedial principles. To the contrary, Justice Gorsuch (whose concurring opinion plaintiffs emphasize, Pls. Supp. Br. 19), stated that, where an Appointment Clause violation is established, a court "*normally*" (not always) sets aside the relevant official's actions and that the question whether vacatur is appropriate is subject to "traditional remedial principles such as laches." *Collins*, 141 S. Ct. at 1795 (emphasis added). In one of the Appointments Clause cases cited by the majority, the Court likewise recognized that Appointment Clause claims are subject to traditional remedial principles, such as the principle that such challenges must be timely filed. *See Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018). As Treasury has explained, even assuming plaintiffs have stated a valid Appointments Clause claim, their belated request to set the Third Amendment aside (filed five years after the Amendment) would be barred by the doctrine of laches and other equitable considerations. *See* Treasury Resp. Br. 46-48.

Plaintiffs also miss the mark when they argue that *Collins* supports their nondelegation claim because the Court purportedly held that "FHFA 'clearly exercises executive power' when it acts as conservator." Pls. Supp. Br. 19 (quoting *Collins*, 141 S. Ct. at 1786). "The nondelegation doctrine bars Congress from transferring its *legislative* power to another branch of Government." *Gundy v. United States*, 139 S. Ct.

2116, 2121 (2019) (emphasis added). Thus, even assuming, as plaintiffs contend, that FHFA as conservator is an *executive* agency that exercises *executive* power, that fact would not implicate nondelegation concerns.

In any event, the Supreme Court did not hold that FHFA as conservator at all times exercises executive power. Consistent with the framework set forth in *Freytag v. Commissioner*, 501 U.S. 868 (1991), the Supreme Court merely held that FHFA's Director, as an officer who wields executive power in at least some circumstances, must be removable at the President's will. *Collins*, 141 S. Ct. at 1785-86. Plaintiffs note that FHFA as conservator is authorized to act in the public's interest. Pls. Supp. Br. 19. But that authorization does not distinguish FHFA as conservator from the enterprises' private officers and directors, who Congress likewise authorized to serve the public's interest *See* 12 U.S.C. §§ 1451 note, 1716. That FHFA's authority aligns with that of the enterprises' private directors (whose actions on behalf of the enterprises have always been considered to be nongovernmental, *see, e.g., Herron v. Fannie Mae*, 861 F.3d 160, 167-68 (D.C. Cir. 2017))) underscores that its actions taken on the enterprises' behalf are generally private in character.

CONCLUSION

This Court should affirm the district court's judgment.

Respectfully submitted,

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SEPTEMBER 2021

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I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and with this Court's supplemental briefing order because it contains 20 pages..

/s/ Gerard Sinzdak
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I hereby certify that on September 8, 2021, I electronically filed the foregoing brief with the Clerk of this Court 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/ Gerard Sinzdak
Gerard Sinzdak