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November 30, 2021

Via ECF

Lyle W. Cayce
Clerk of Court
United States Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: *Collins v. Yellen*, No. 17-20364

Dear Mr. Cayce:

The Supreme Court's opinion in this case says that shareholders would "clearly" be entitled to a remedy if "the President had made a public statement expressing displeasure with actions taken by a [FHFA] Director and had asserted that he would remove the Director if the statute did not stand in the way." *Collins v. Yellen*, 141 S. Ct. 1761, 1789 (2021). Former President Trump recently made such a statement in a letter to Senator Rand Paul. *See* Letter from Former President Donald J. Trump to Senator Rand Paul (Nov. 11, 2021), attached as Exhibit A.[1] According to President Trump:

- "[H]ad I controlled FHFA . . . , as the Constitution required," "I would have fired . . . Mel Watt from his position as Director" "from day one of my Administration";

- The Net Worth Sweep is a "scam," "socialism," and "a travesty brought to you by the Obama/Biden administration"; and

[1] The letter was first publicly disclosed in an article from Real Clear Politics and is available on that news organization's website at https://bit.ly/3xCU6KF.

- "My Administration was denied the time it needed to fix this problem because of the unconstitutional restriction on firing Mel Watt."

President Trump also confirmed that, but for the unconstitutional removal restriction, he "would have ordered FHFA to release these companies from conservatorship" and "sold the government's common stock in these companies at a huge profit." For the government's common stock warrants to have any value, Plaintiffs' preferred and common stock would also need to be valuable.

Even without the benefit of President Trump's letter, the Eighth Circuit recently declined to dismiss a shareholder presidential removal claim based upon the same arguments that Defendants have presented to this Court in their supplemental briefs. *See Bhatti v. FHFA*, 15 F.4th 848, 854 (8th Cir. 2021), attached as Exhibit B. President Trump's letter and the Eighth Circuit's ruling support Plaintiffs' argument that they are entitled to a retrospective remedy for the unconstitutional statutory restriction on presidential removal of FHFA's Director. *See* Suppl. Reply of Pls.-Appellants, at 1–8 (Sept. 8, 2021).

Respectfully submitted,

/s/ David H. Thompson
David H. Thompson

Counsel for Plaintiffs-Appellants

cc: Counsel of Record (by ECF)

EXHIBIT A

DONALD J. TRUMP

November 11, 2021

The Honorable Rand Paul
United States Senate
Washington, D.C.

Dear Senator Paul,

Thank you for talking to me about the need to privatize Fannie Mae and Freddie Mac, two great American companies, and about the question the Supreme Court has raised about what I would have been able to accomplish if I had been able to fire the incompetent Mel Watt from day one of my Administration.

Another Obama/Biden scam in legal trouble was when they allowed the Federal Housing Finance Agency (FHFA) to steal the retirement savings of hardworking Americans who had invested in Fannie Mae and Freddie Mac. In a recent ruling, the Supreme Court has recognized that my Administration was denied the ability to oversee the work of FHFA in violation of the Constitution. The Supreme Court's decision asks what I would have done had I controlled FHFA from the beginning of my Administration, as the Constitution required. From the start, I would have fired former Democrat Congressman and political hack Mel Watt from his position as Director and would have ordered FHFA to release these companies from conservatorship. My Administration would have also sold the government's common stock in these companies at a huge profit and fully privatized the companies. The idea that the government can steal money from its citizens is socialism and is a travesty brought to you by the Obama/Biden administration. My Administration was denied the time it needed to fix this problem because of the unconstitutional restriction on firing Mel Watt. It has to come to an end and courts must protect our citizens.

Sincerely,

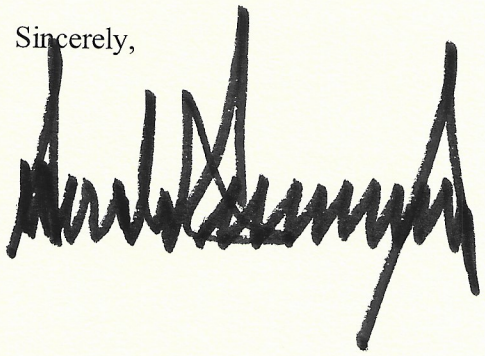

EXHIBIT B

15 F.4th 848
United States Court of Appeals, 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 Defendants - Appellees

No. 18-2506
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Submitted: September 23, 2021
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Filed: October 6, 2021

Synopsis

Background: Shareholders in the Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Corporation (Freddie Mac) brought action against the Federal Housing Finance Agency (FHFA), its director in his official capacity, and the Department of the Treasury, challenging the legality of the FHFA, including its structure under the Housing and Economic Recovery Act (HERA) and its funding, in order to invalidate an amendment to preferred stock agreements between FHFA, as conservator for Fannie Mae and Freddie Mac, and the Department. Shareholders moved for summary judgment, and defendants moved to dismiss for lack of jurisdiction and for failure to state a claim. The United States District Court for the District of Minnesota, Patrick J. Schiltz, J., 332 F.Supp.3d 1206, granted defendants' motion to dismiss based on lack of standing or, alternatively, on the merits, and denied shareholders' motion for summary judgment. Shareholders appealed.

Holdings: The Court of Appeals, Benton, Circuit Judge, held that:

shareholders had standing to seek retrospective, but not prospective, relief;

the de facto officer doctrine barred any relief with respect to actions taken after appointment of the FHFA's Acting Director;

even if the de facto officer doctrine did not apply, shareholders were not entitled to relief on their claims based on an alleged Appointments Clause violation;

HERA's for-cause removal restriction, for the single Director of the FHFA, violates constitutional separation of powers; and

Congress's delegation of authority to the FHFA in the HERA met the low threshold for validation under the nondelegation clause.

Affirmed in part, reversed in part, and remanded.

***851** Appeal from United States District Court for the District of Minnesota

Attorneys and Law Firms

Brian W. Barnes, Charles J. Cooper, Peter A. Patterson, David H. Thompson, Cooper & Kirk, Washington, DC, Scott Gregory Knudson, Taft & Stettinius, Minneapolis, MN, for Plaintiffs-Appellants.

Howard N. Cayne, Robert J. Katerberg, Dirk C. Phillips, Asim Varma, Arnold & Porter, Washington, DC, Mark Alan Jacobson, COZEN & O'Connor, Minneapolis, MN, for Defendants-Appellees Federal Housing Finance Agency, Sandra L. Thompson.

Craig Raymond Baune, Assistant U.S. Attorney, U.S. Attorney's Office, District of Minnesota, Minneapolis, MN, Robert Charles Merritt, U.S. Department of Justice, Federal Programs Branch, Gerard Sinzdak, Mark B. Stern, Abby Wright, U.S. Department of Justice, Civil Division, Appellate Staff, Washington, DC, for Defendant-Appellee Department of the Treasury.

Before SMITH, Chief Judge, GRUENDER and BENTON, Circuit Judges.

Opinion

BENTON, Circuit Judge.

Three shareholders in the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") challenge the structure of the regulatory agency overseeing them, the Federal Housing Finance Agency ("FHFA"). The shareholders allege the FHFA's leadership structure and

appointments violate the Appointments Clause, the separation of powers, ***852** and the nondelegation doctrine. They allege Congress unlawfully delegated authority to the FHFA under the Housing and Economic Recovery Act, 12 U.S.C. § 4617. The district court dismissed for lack of standing, alternatively dismissing on the merits. Having jurisdiction under 28 U.S.C. § 1291, this court affirms in part, and reverses and remands in part.

I.

In August 2009, the original FHFA director resigned. President Obama replaced him with Acting Director Edward J. DeMarco, under 12 U.S.C. § 4512(f). The President nominated a new director, but the nomination stalled. During DeMarco's four years and four months as Acting Director, the FHFA and Treasury Department entered into a third amendment to the agreement governing shareholders, the Preferred Stock Purchase Agreements. The Acting Director signed the amendment for the FHFA, acting as conservator for Freddie Mac and Fannie Mae. Their shareholders allege that one provision of the plan—the Net Worth Sweep—would collapse the value of their holdings.

The shareholders sued the FHFA alleging the third amendment violated three Constitutional doctrines: the Appointments Clause, separation of powers, and the nondelegation doctrine. The district court dismissed.

While this case was pending, the Supreme Court granted certiorari in a nearly identical case, ***Collins v. Mnuchin***, 938 F.3d 553, 586 (5th Cir. 2019) (en banc), *cert. granted,* —— U.S. ——, 141 S. Ct. 193, 207 L.Ed.2d 1118 (2020) (mem op.). The Court recently issued its opinion in ***Collins v. Yellen***, —— U.S. ——, 141 S. Ct. 1761, 210 L.Ed.2d 432 (2021), which resolves most of the issues here.

II.

The shareholders argue the district court improperly dismissed for lack of standing.

The Supreme Court agrees. "To establish Article III standing, a plaintiff must show that it has suffered an 'injury in fact' that is 'fairly traceable' to the defendant's conduct and would likely be 'redressed by a favorable decision.' " ***Collins***, 141 S. Ct. at 1779, *quoting* ***Lujan v. Defs. of Wildlife***, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). "[T]he relevant action in this case is the third amendment, and because the shareholders' concrete injury flows directly from that amendment, the traceability requirement is satisfied." ***Id.*** The Court rejected arguments that the fourth amendment to the governing agreement mooted retrospective relief—although it does moot *prospective* relief. ***Id.*** at 1780. The Court held that the presence of an Acting Director in the chain of leadership did not prevent the shareholders from tracing their injury to the process for appointing a Director. ***Id.*** at 1781. Finally, the Court rejected FHFA's argument that the Recovery Act's "succession clause," 12 U.S.C. § 4617(b)(2)(A)(i), bars relief. ***Id.*** at 1780-81. Since the parties here are similar and allege the same harms, ***Collins*** controls. The shareholders have standing to seek retrospective, but not prospective, relief.

III.

The shareholders argue that the appointment of Acting Director DeMarco was initially valid, but became invalid after two years, which they believe is longer than reasonable under the circumstances. The district court disagreed.

The *de facto* officer doctrine bars any relief here. "The *de facto* officer doctrine confers validity upon acts performed ***853** by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient." ***Ryder v. United States***, 515 U.S. 177, 180, 115 S.Ct. 2031, 132 L.Ed.2d 136 (1995), *citing* ***Norton v. Shelby Cty.***, 118 U.S. 425, 440, 6 S.Ct. 1121, 30 L.Ed. 178 (1886). "The *de facto* doctrine springs from the fear of the chaos that would result from multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question, and seeks to protect the public by insuring the orderly functioning of the government despite technical defects in title to office." ***Id.***, *quoting* 63A **Am. Jur. 2d**, *Public Officers and Employees* § 578, at 1080–81 (1984). Although the *de facto* officer doctrine might not apply to an initially defective *appointment*, see *id.* at 182-83, 115 S.Ct. 2031, the shareholders concede there was no defect here.

Even if the *de facto* officer doctrine did not control here, the shareholders are not entitled to relief. Assuming they are correct that the Acting Director overstayed some limit implied in the Appointments Clause, they would not be entitled to any relief based on that fact. *See* ***Collins***, 141 S. Ct. at

1787-88 (explaining if the director was properly appointed, then "there is no basis for concluding that any head of the FHFA lacked the authority to carry out the functions of the office"). Any defect was resolved when the subsequent FHFA directors—none of whose appointments were challenged—ratified the third amendment. *See* ***id.*** at 1787 ("[T]here was no constitutional defect in the statutorily prescribed method of appointment to that office. As a result, there is no reason to regard any of the actions taken by the FHFA in relation to the third amendment as void."). This court affirms.

IV.

The shareholders argue that the FHFA leadership structure impermissibly limits the President's removal authority, violating the separation of powers.

The Supreme Court agrees. "Congress could not limit the President's power to remove the Director of the Consumer Financial Protection Bureau (CFPB) to instances of 'inefficiency, neglect, or malfeasance.' " ***Collins***, 141 S. Ct. at 1783, *citing* ***Seila Law, LLC v. CFPB***, —— U.S. ——, 140 S. Ct. 2183, 2197, 207 L.Ed.2d 494 (2020). The Court did not " 'revisit our prior decisions allowing certain limitations on the President's removal power,' but we found 'compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director.' " ***Id.***, *quoting* ***Seila Law***, 140 S. Ct. at 2192. "[T]he Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer." ***Id.*** at 1787. "[T]herefore the removal restriction in the Recovery Act violates the separation of powers." ***Id.***

Determining the appropriate remedy for this Constitutional harm, however, is less clear. The shareholders request this court vacate the third amendment. But, "the Acting Director who adopted the third amendment was removable at will," defeating the "argument for setting aside the third amendment in its entirety." ***Id.*** The only question is about remedy "with respect to only the actions that confirmed Directors have taken to *implement* the third amendment during their tenures." ***Id.*** "All the officers who headed the FHFA during the time in question were properly *appointed*.... there was no constitutional defect in the statutorily prescribed method of *appointment* to that office. As a result, there is no reason to regard any of the ***854** actions taken by the FHFA in relation to the third amendment as void." ***Id.***

Still, the shareholders argue they sustained actual, compensable harm. They request that this court "issue an injunction" putting them "in the position they would be in but for the constitutional violation." In ***Collins***, the Court prescribed remand to determine whether the unconstitutional removal restriction caused compensable harm to shareholders. ***Id.*** at 1788-89. This court also reverses the dismissal of the separation-of-powers claim and remands to the district court to determine if the shareholders suffered "compensable harm" and are entitled to "retrospective relief." ***Id.*** at 1789.

V.

The shareholders argue that Congress impermissibly delegated authority to the FHFA in the Recovery Act, 12 U.S.C. § 4617. The district court dismissed.

Congress's delegation here meets the low threshold for validation under the nondelegation doctrine. "[S]tatutory delegation is constitutional as long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.' " ***Gundy v. United States***, —— U.S. ——, 139 S. Ct. 2116, 2123, 204 L.Ed.2d 522 (2019) (plurality op.), *quoting* ***Mistretta v. United States***, 488 U.S. 361, 372, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). "The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion." ***Id.*** "The Court has found an intelligible principle, although admittedly broad, even when an act simply stated that an agency should promulgate regulations encouraging the effective use of radio in the 'public interest, convenience, or necessity,' noting that the meaning of 'public interest' was limited in light of the larger aim of the Act." ***S. Dakota v. U.S. Dep't of Interior***, 423 F.3d 790, 795 (8th Cir. 2005), *quoting* ***Nat'l Broad. Co. v. United States***, 319 U.S. 190, 215–17, 63 S.Ct. 997, 87 L.Ed. 1344 (1943).

Congress's delegation of authority directs the FHFA to act as a "conservator," with clear and recognizable instructions. **12 U.S.C. § 4617(a)**. "[T]he Agency is authorized to take control of a regulated entity's assets and operations, conduct business on its behalf, and transfer or sell any of its assets or liabilities." ***Collins***, 141 S. Ct. at 1776, *citing* **12 U.S.C. §§ 4617(b)(2)(B)-(C), (G)**. "When the FHFA exercises these powers, its actions must be 'necessary to put the regulated entity in a sound and solvent condition' and must be 'appropriate to

carry on the business of the regulated entity and preserve and conserve [its] assets and property.' " ***Id.*** (alteration in original), *quoting* **12 U.S.C. § 4617(b)(2)(D)**. "Thus, when the FHFA acts as a conservator, its mission is rehabilitation, and to that extent, an FHFA conservatorship is like any other." ***Id.*** There is one difference: "when the FHFA acts as a conservator, it may aim to rehabilitate the regulated entity in a way that, while not in the best interests of the regulated entity, is beneficial to the Agency and, by extension, the public it serves." ***Id.*** But this difference clarifies that serving the public is one goal of the FHFA's conservatorship; it does not render the delegation unintelligible. *See* ***id.*** (explaining how the FHFA works to rehabilitate housing in the public interest under the statute). In light of the Court's identification of the principles guiding the FHFA, it is clear those principles are intelligible. *See* ***Saxton v. Fed. Hous. Fin. Agency***, 901 F.3d 954, 960 (8th Cir. 2018) (Stras, J., concurring) ("The provision is broad but not boundless."). Congress's delegation in the Recovery Act was permissible. ***855** ***Id.*** at 963 ("Picking among different ways of preserving and conserving assets, deciding whose interests to pursue while doing so, and determining the best way to do so are all choices that the Housing and Economic Recovery Act clearly assigns to the FHFA, not the courts."). This court affirms dismissal of the nondelegation claim.

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The judgment is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

All Citations

15 F.4th 848

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