No. 20-2071

In the United States Court of Appeals for the Sixth Circuit

MICHAEL ROP, STEWART KNOEPP, and ALVIN WILSON,

Plaintiffs–Appellants,

v.

FEDERAL HOUSING FINANCE AGENCY, MARK A. CALABRIA, in his official capacity as Director of the Federal Housing Finance Agency, and U.S. DEPARTMENT OF THE TREASURY,

Defendants–Appellees.

Appeal from the United States District Court
for the Western District of Michigan
Case No. 1:17-cv-00497-PLM-RSK

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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INTRODUCTION

The Federal Housing Finance Agency's nationalization of Fannie Mae and Freddie Mac violated the Constitution's separation of powers two times over. First, the official who initially authorized this agency action was serving in violation of the Appointments Clause because he indisputably exercised the power of a principal officer for nearly three years without ever receiving Senate confirmation. Below, the district court held that the application of the Appointments Clause to this official's acting service was a nonjusticiable political question. That was error. The Supreme Court has made clear that the Constitution's separation of powers is not left to the whim of the political branches. This Court should reverse the district court's refusal to adjudicate the Appointments Clause challenge and rule that the acting FHFA director's lengthy service without Senate confirmation violated the Constitution.

Second, the Senate-confirmed officials who later headed FHFA were subject to a statutory removal restriction that the Supreme Court has already declared unconstitutional. The only remaining question, the Supreme Court held, was whether the removal restriction harmed the Companies' shareholders by impeding the President's ability to pursue policies that would have benefited them. Specifically, the Court said that a public statement from the President explaining that he disapproved of the actions of FHFA's director and that he would have removed him from office would "clearly" show that the removal restriction harmed the shareholders.

Former President Trump has said precisely that. In direct response to the Supreme Court's decision, the former President has unequivocally stated that, if he had "controlled FHFA from the beginning of [his] Administration, as the Constitution required," he would have removed the FHFA director from office, "ordered FHFA to release the companies from conservatorship," "fully privatized the companies," and ensured that the companies' common stock increased in value. But "because of the unconstitutional restriction," he continued, his "Administration was denied the time it needed to fix this problem." Letter from Donald Trump to Sen. Rand Paul, REAL CLEAR POLITICS (Nov. 11, 2021), https://bit.ly/3ped1sP. Thus, there is nothing left for this Court to do other than to apply the Supreme Court's decision and order the district court to enter an injunction placing Plaintiffs in the position they would be in absent the unconstitutional removal restriction.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs respectfully request oral argument. This appeal has significant implications for the future of Fannie Mae and Freddie Mac (the Companies) and presents important legal questions about the separation of powers.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 2201.

Plaintiffs have standing because the Third Amendment transferred the economic value of their shares in the Companies to the federal government, and a decision in Plaintiffs' favor would remedy that injury. *See Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021). The district court entered final judgment as to all claims in favor of the defendant federal agencies on September 8, 2020, Judgment, RE 68, PageID# 1820, and Plaintiffs filed a timely notice of appeal on October 27, 2020, Notice of Appeal, RE 69, PageID# 1821. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Third Amendment to the Preferred Stock Purchase Agreements (PSPAs) and subsequent government actions taken pursuant to the Third Amendment should be vacated because the acting FHFA director was serving in violation of the Appointments Clause when he authorized the Third Amendment.

2. Whether the FHFA director's unconstitutional removal restriction harmed Plaintiffs when the former President has publicly stated that the removal restriction was the only reason he did not remove the director and implement a policy that would have benefitted Plaintiffs.

STATEMENT OF THE CASE

A. Congress Creates FHFA as an Independent Agency Headed by a Single Director Who Is Insulated from Presidential Removal.

Fannie Mae and Freddie Mac are private, for-profit corporations that insure and securitize mortgages. Plaintiffs' First Amended Complaint, ¶¶ 15–16, RE 17, PageID# 201, (“Compl.”). Since 2008, Fannie and Freddie have been regulated by FHFA, an “independent” agency headed by a single director who serves a 5-year term and by statute may only be removed by the President “for cause.” *See* 12 U.S.C. § 4512. In a lawsuit brought by other shareholders of Fannie and Freddie, the Supreme Court recently held that FHFA’s “novel” structure violates the separation of powers by concentrating power “in a unilateral actor insulated from Presidential control.” *Collins*, 141 S. Ct. at 1784.

Like any other principal officer of the United States, the FHFA director must be nominated by the President and confirmed by the Senate. *See* 12 U.S.C. § 4512(b)(1); U.S. CONST., art. II, § 2, cl. 2. But when the office of FHFA director is vacant, the Housing and Economic Recovery Act (HERA) authorizes the President to appoint an acting official to exercise the Director’s powers during a temporary vacancy in the Director’s office. 12 U.S.C. § 4512(f).

The FHFA director possesses tremendous power over the Nation’s housing finance system. Congress not only gave FHFA supervisory regulatory powers over the Companies, but also empowered FHFA to appoint itself as the Companies’ conservator under certain circumstances. *See* 12 U.S.C. §§ 4511(b), 4617(a); Compl. ¶ 26, RE 17, PageID# 206. The statute provides for no review of the director’s decisions by other executive branch agencies. *See* 12 U.S.C. § 4617(a)(7).

Apart from creating FHFA, HERA also gave power to the Treasury

Department. Specifically, the Act gave Treasury temporary authority to invest in the Companies' securities. Compl. ¶ 41, RE 17, PageID# 212. This authority could only be exercised with the Companies' consent, and it was limited in duration, terminating at the end of 2009. *See* 12 U.S.C. §§ 1455(*l*)(1)(A), 1455(*l*)(4), 1719(g)(1)(A), 1719(g)(4).

B. FHFA Forces the Companies into Conservatorship and Signs the Agreements on Their Behalf.

In September 2008, under the leadership of FHFA's first director, James Lockhart, FHFA exercised its power to place the Companies into conservatorship. *See* Compl. ¶ 37, RE 17, PageID# 211. At the same time, Treasury invoked its temporary authority to invest in the Companies' securities by purchasing equity through the Preferred Stock Purchase Agreements (PSPAs). *Id.* at ¶ 42, 213. These Agreements allowed the Companies to draw up to $100 billion each from Treasury as needed to avoid a negative net worth. *Id.* at ¶ 43, 213. That amount was later increased to allow the Companies to draw unlimited sums from Treasury until the end of 2012. *Id.* at ¶ 54, 218. At that point, the PSPAs provided, the maximum amount available from Treasury would be capped at the sum of the amount drawn during the preceding two years plus $200 billion per company. *See id.*

In return for Treasury's funding commitment, FHFA agreed that the Companies would provide several forms of consideration to Treasury. First, the PSPAs created a new class of securities with very favorable terms to Treasury, known as Senior Preferred Stock ("Government Stock"). *Id.* at ¶ 46, 214. For each Company, the Government Stock had an initial liquidation preference—*i.e.*, the amount Treasury would be repaid if FHFA liquidated the Company—of $1 billion. *Id.* That amount would increase by one dollar for every dollar drawn on Treasury's funding commitment. *Id.* The PSPAs also required the Companies to pay quarterly dividends on the Government Stock's liquidation preference. *Id.* at ¶ 47, 214–15. These dividends could be paid in cash, at an annual rate of 10%, or in kind, by increasing the liquidation preference by an annual amount of 12%. *Id.*

Second, FHFA agreed that the Companies would issue warrants entitling Treasury to buy 79.9% of their common stock at a nominal price. *Id.* at ¶ 45, 213. The warrants were designed to provide upside to taxpayers if the Companies recovered, but this upside would be shared with the Companies' other shareholders. *See id.* at ¶ 45, 213–14. Since the warrants were convertible into common stock and since common stock has the lowest form of priority of any equity, the warrants would have value only if the junior preferred shareholders' economic rights were honored.

Finally, the PSPAs provided for the Companies to pay Treasury a quarterly market-based periodic commitment fee. That fee was never charged and could only be set at a market rate with agreement from the Companies. *Id.* at ¶ 52, 217.

C. Mr. DeMarco Signs the Third Amendment During His Four-Year Tenure as Acting FHFA Director.

In August 2009, Director Lockhart resigned. *Id.* at ¶ 55, 218. In response, President Obama designated Deputy Director Edward DeMarco as the acting FHFA director. *Id.* at ¶ 56, 218. It would be another fifteen months until the President nominated Joseph A. Smith, Jr. to be FHFA director. *Id.* at ¶ 57, 219; *see* 156 CONG. REC. S7911 (Nov. 15, 2010). The Senate did not confirm Mr. Smith, so the nomination was returned to the President on December 22, 2010. *See* 156 CONG. REC. S11070-71 (Dec. 22, 2010). Another two years passed before the President nominated someone else to the office. *See* Compl. ¶ 57, RE 17, PageID# 219.

In the meantime, Mr. DeMarco ran FHFA. Under his supervision, the Companies were forced to dramatically write down the value of their assets and to incur substantial non-cash accounting losses that forced the Companies to make more draws on Treasury's funding commitment—causing the liquidation preference on Treasury's Government Stock to swell to $189 billion. *Id.* at ¶¶ 59, 65, 70, 219–20, 223, 226–27. Based on the Companies' performance in the second quarter of 2012, however, it was apparent the Companies' private shares still had value. *Id.* at ¶ 72, 227.

In August 2012, Mr. DeMarco, acting on the Companies' behalf as their conservator, signed the Third Amendment to the PSPAs. Among other things, this amendment imposed what is known as the "Net Worth Sweep." *Id.* at ¶ 84, 233. The Net Worth Sweep replaced the Government Stock's prior dividend structure with one that requires Fannie and Freddie to pay Treasury their entire net worth on a quarterly basis, leaving only a small capital buffer. *Id.* Effectively, the federal government skims off the Companies' net worth every quarter.[1]

As FHFA expected, the Net Worth Sweep resulted in massive and unprecedented payments to the government. All told, through the third quarter of 2019, the Net Worth Sweep has required the companies to transfer to Treasury over $300 billion in purported dividends—$136 billion more than Treasury could have received under the original agreements. *See* FHFA, TABLE 2: DIVIDENDS ON ENTERPRISE DRAWS FROM TREASURY, https://bit.ly/33Bqlz0. By that time, Treasury had already recouped over $109 billion more than it disbursed to the Companies. *See id.*; FHFA, TABLE 1: QUARTERLY DRAWS ON TREASURY COMMITMENTS TO FANNIE MAE AND FREDDIE MAC PER PSPA, https://bit.ly/3e0AlDK.

D. Director Watt's Confirmation and Removal Protection Permits Him to Thwart President Trump's Housing Finance Policy.

In May 2013—over two years since the Senate had returned President Obama's first nominee for FHFA director—the President nominated Congressman Melvin L. Watt for the job. Compl. ¶ 57, RE 17, PageID# 219; *see* 159 CONG. REC. S8593 (Dec. 10, 2013). Seven months after that, the Senate confirmed Mr. Watt on December 10, 2013. Compl. ¶ 57, RE 17, PageID# 219. Only two Republican

[1] Treasury and FHFA have since modified the quarterly dividend payments to permit the Companies to build up capital to specified thresholds; but as the Supreme Court held, this modification does not moot Plaintiffs' request for retrospective relief. *Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021).

Senators voted in favor of Mr. Watt's confirmation. 159 CONG. REC. S18375 (daily ed. Dec. 10, 2013). Director Watt took office in January 2014. Compl. ¶ 57, RE 17, PageID# 219. As a result, for the first time in over four years, FHFA had a director who had been confirmed by the Senate. *See id.* Now that Director Watt had been confirmed, however, he was insulated from presidential supervision through HERA's removal restriction. During the final two years of the Obama administration, Director Watt continued to implement the Net Worth Sweep that Mr. DeMarco had authorized.

In November 2016, Donald Trump was elected President. With a change of administration came a change of policy. Shortly after the election, President-Elect Trump's nominee to be Secretary of the Treasury, Steven Mnuchin, said "[w]e've got to get Fannie and Freddie out of government ownership." *Mnuchin: Get Fannie Mae, Freddie Mac out of government ownership*, FOX BUSINESS NEWS, at 00:06 to 00:09 (Nov. 30, 2016), https://bit.ly/3iKDZUc.

When the Trump administration took office, however, Director Watt still had two years left on his statutory term as FHFA director. According to Secretary Mnuchin's top advisor on housing-finance issues, although ending the conservatorships of Fannie and Freddie was an early priority for the Trump administration, it determined that it could not work with Director Watt. *Interview with Craig Phillips, Former Counselor to the Secretary of the Treasury*, SITUSAMC—ON THE HILL, at 10:14 to 11:05, https://bit.ly/3sl08yU. As a result, the Trump administration deferred pursuit of these changes until the President could appoint his own director once Director Watt's term expired in January 2019—some two years into the presidential term.

When that date arrived, the President was finally free to begin implementing his housing finance policy. Before Watt's term had even ended, President Trump announced that Joseph M. Otting, the Comptroller of the Currency, would serve as acting director. Kelsey Ramirez, *Trump Taps OCC's Otting to Replace Watt as FHFA Director*, HOUSINGWIRE (Dec. 21, 2018), https://bit.ly/3mdY6wO. This permitted the President to assert control over FHFA as soon as Director Watt's statutory term ended. Otting then served as acting director until the President's nominee, Mark Calabria, was confirmed by the Senate and took office in April 2019. FHFA, *Dr. Mark Calabria Sworn In as Director of the Federal Housing Finance Agency* (Apr. 15, 2019), https://bit.ly/3pXP87.

Within a few months of taking the helm, Director Calabria set forth his plan to return the Companies to private control. *See* FHFA, *Prepared Remarks of Dr. Mark A. Calabria, Director of FHFA at MBA 2019 Annual Convention & Expo* (Oct. 28, 2019), https://bit.ly/3F6A4en. As he recognized, the Companies had to "build capital . . . as a precondition for exiting conservatorship." *Id.* He warned, however, that this process "cannot [happen] overnight" given the Companies' massive capital shortfalls thanks in large part to the additional dividends that had been paid to Treasury through the Net Worth Sweep. *Id.* Moreover, the only way to recapitalize the Companies within a reasonable time was to raise additional capital in the markets by selling new shares of stock in Fannie and Freddie. *See* Andrew Ackerman, *Fannie, Freddie Told to Prepare for Return to Private Sector*, Wall St. J. (Oct. 28, 2019), https://on.wsj.com/3IWctzv (noting the Companies would "need substantially more capital as private companies" and would "eventually turn to the public markets for it"). To facilitate a capital raise, FHFA promulgated a rule governing how much capital the Companies would need once under private control. *See* 85 Fed. Reg. 82,150 (Dec. 17, 2020).

However, it was impossible for the Companies to raise additional capital by selling new shares of stock so long as the Net Worth Sweep remained in place. No shareholder would purchase stock knowing that the federal government was entitled to take a company's entire net worth every quarter. Thus, amending the PSPAs to restore the economic rights of the Companies' other shareholders was an essential step in any process that would involve selling new stock in the Companies to achieve the Trump Administration's stated policy objectives. *See* Dep't of the Treasury, *Housing Finance Reform Plan* at 27 (Sept. 2019), https://bit.ly/2Uyvzre. To that end, Treasury intended to "eliminat[e] all or a portion of the liquidation preference of Treasury's senior preferred shares or exchang[e] all or a portion of that interest for common stock or other interests in [the Companies].” *Id.*

As it turned out, given intervening political and economic events, two years was too little time to accomplish the Administration’s goals. *Interview with Craig Phillips, Former Counselor to the Secretary of the Treasury*, *supra*, at 11:58-12:55. Director Calabria spent much of his roughly two years in office focused on preparing and promulgating the rule governing the Companies’ capital framework. *See* 85 Fed. Reg. 82,150 (Dec. 17, 2020). Despite working to prepare the Companies for an exit from conservatorship, Director Calabria signaled that Fannie and Freddie would not be ready to sell new stock until 2021—roughly two to three years after President Trump’s appointees took over for Director Watt. Ben Lane, *Calabria now expects Fannie Mae and Freddie Mac IPOs in 2021*, HOUSINGWIRE (Feb. 28, 2020), https://bit.ly/3hXsKJ4. As a result, the Trump administration’s inability to implement its housing finance policy until halfway through the presidential term thwarted a policy goal identified before the administration even began. *See* Andrew Ackerman, *Biden to Nominate Sandra Thompson to Lead Fannie and Freddie’s Overseer*, WALL ST. J. (Dec. 14, 2021), https://on.wsj.com/3e0IZSI (observing that Trump administration “pushed to put the companies on a path to exit conservatorship” but “ultimately ran out of time”).

E. After Plaintiffs Challenge FHFA’s Unlawful Actions, the Supreme Court Declares FHFA’s Structure Unconstitutional.

Plaintiffs are Fannie and Freddie shareholders who challenged FHFA’s actions, arguing (among other things) that the agency was unconstitutionally structured and that Mr. DeMarco's lengthy tenure as the acting FHFA director violated the Appointments Clause. Compl. ¶¶ 9–11, RE 17, PageID# 200; *id.* at ¶ 145, 260; *id.* at ¶ 161, 266. On September 8, 2020, the district court dismissed the complaint and entered its final judgment, ruling that Plaintiffs' claims failed as a matter of law. *See Rop v. FHFA*, 485 F. Supp. 3d 900 (2020). Although the district court determined that the director's removal restriction was "probably unconstitutional," it held that Plaintiffs could not "show a causal connection between that defect and their injuries" because Mr. DeMarco was removable at will when he authorized the Net Worth Sweep. *Id.* at 940. The district court also held that the question of how long an acting official may exercise the power of a principal officer in accordance with the Appointments Clause was a "non-justiciable political question." *Id.* at 941. On October 27, 2020, Plaintiffs filed a timely notice of appeal.

While this appeal was held in abeyance for mediation, the Supreme Court decided *Collins*. There, the Court held that the restriction on the President's ability to remove the FHFA director violated the Constitution's separation of powers. 141 S. Ct. at 1783–84. Having determined that the removal restriction violated the Constitution, the Court remanded the case for the lower courts to determine whether the unconstitutional restriction "inflict[ed] compensable harm" on the Companies' shareholders. *Id.* at 1789.

F. President Biden Immediately Fires Director Calabria, and Former President Trump Says He Would Have Fired Director Watt.

Within hours of the Supreme Court's decision in *Collins*, President Biden removed Director Calabria from office to assert control over FHFA. *See* Katy O'Donnell, *Biden Removes FHFA Director After Supreme Court Ruling*, POLITICO (June 23, 2021), https://politi.co/3y1cT1L. As one administration official put it, "Biden was 'moving forward today to replace the current director with an appointee who reflects the administration's values.'" *Id.*

For his part, former President Trump has publicly criticized the Net Worth Sweep as a "scam," "socialism," and "a travesty brought to you by the Obama/Biden administration," and stated that he would have fired Director Watt "from day one of [his] Administration" had the law clearly allowed him to do so. Letter from Donald Trump to Sen. Rand Paul, *supra*.

SUMMARY OF ARGUMENT

1. Mr. DeMarco was serving in violation of the Appointments Clause when he authorized the Net Worth Sweep. Under the Constitution, an official who is not confirmed by the Senate may exercise the powers of a principal officer for a maximum of two years. Mr. DeMarco exercised the power of the FHFA director—indisputably a principal officer—for over four years. By the time he signed the Third Amendment, he had been serving as the "acting" director for nearly three years—

longer than the Constitution permits. For that reason, he lacked the power to authorize the Third Amendment.

2. Separately, the Supreme Court has already held that the restriction on the President's ability to remove the FHFA director was unconstitutional. The only remaining question is whether that restriction harmed Plaintiffs by preventing the President from removing the FHFA director and implementing his policy of restoring the shareholders' value. The Supreme Court held that a public statement from the President expressing his displeasure with the FHFA director and explaining that the restriction prevented him from removing the director from office would "clearly" show that restriction harmed the shareholders. Former President Trump has issued just such a statement—explaining that, were it not for the removal restriction, he would have removed the FHFA director and restored the shareholders' value. Under *Collins*, Plaintiffs are entitled to a remedy.

STANDARD OF REVIEW

The Court reviews de novo the district court's dismissal of a complaint for failure to state a claim. *Lipman v. Budish*, 974 F.3d 726, 740 (6th Cir. 2020).

ARGUMENT

The Constitution's separation of powers "protects individual liberty." *Bond v. United States*, 564 U.S. 211, 223 (2011). The Framers created a constitutional structure where "'[a]mbition'" was made "'to counteract ambition.'" *Free Enter.*

Fund, *v. PCAOB*, 561 U.S. 477, 501 (2010) (quoting The Federalist No. 51, pg. 487 (J. Cooke ed. 1961) (J. Madison)). Although this structure "may sometimes inhibit the smooth functioning of administration," the Framers knew "'that, in the long term, structural protections against abuse of power were critical to preserving liberty.'" *Id.* (quoting *Bowsher v. Synar*, 478 U.S. 714, 730 (1986)). FHFA's nationalization of the Companies violated two aspects of this structural protection. First, the official who signed the Third Amendment was serving in violation of the Appointments Clause because he had been exercising the power of a principal officer for over two years without Senate confirmation. Second, the confirmed directors of FHFA were unconstitutionally insulated from Presidential supervision through a statutory removal restriction.

I. Mr. DeMarco Lacked Authority to Authorize the Third Amendment Because He Was Serving in Violation of the Appointments Clause.

A. Mr. DeMarco Was Serving in Violation of the Appointments Clause When He Signed the Third Amendment.

The Appointments Clause and the Recess Appointments Clause establish a bright-line rule: A person without Senate confirmation may exercise the power of a principal officer for no more than two years. That rule comports with the historical practice of Congress, which traditionally limited acting officials to serving, at most, for six months. And the Supreme Court has only ever authorized an official without Senate confirmation to exercise the power of a principal officer on a "limited" and "temporary" basis under "special" circumstances. None of those adjectives describes Mr. DeMarco's over four years of acting service, which vastly exceeded the time authorized by both the Constitution's text and nearly two centuries' worth of historical practice. Mr. DeMarco was therefore serving in violation of the Appointments Clause when he signed the Third Amendment.

1. Text, history, and precedent show that Mr. DeMarco was serving in violation of the Appointments Clause when he signed the Third Amendment.

The Appointments Clause "is among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997). It requires the President to obtain the Senate's "Advice and Consent" to appoint principal (*i.e.*, non-"inferior") officers. U.S. CONST., art. II, § 2, cl. 2. The Senate's constitutional role in this process is more than a mere technicality or historical accident: "[T]he need to secure Senate approval provides 'an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.'" *NLRB v. Noel Canning*, 573 U.S. 513, 523 (2014) (quoting The Federalist No. 76, p. 510 (J. Cooke ed. 1961) (A. Hamilton)).

Like the separation of powers generally, "[t]he structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic." *Freytag v. Commissioner*, 501 U.S. 868, 880 (1991). Thus, "[n]either Congress nor the Executive can agree to waive this structural protection." *Id.* And courts must "be concerned about protecting the separation-of-powers interests at stake" when a private party raises a violation of the Appointments Clause. *Id.* at 879-80.

While the Appointments Clause creates the general rule, a separate constitutional provision—the Recess Appointments Clause—"creates an exception." *Noel Canning*, 573 U.S. at 518. That provision "gives the President alone the power 'to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next session.'" *Id.* (quoting U.S. CONST., art. II, § 2, cl. 3). The Supreme Court's interpretation of this clause allows an official appointed under the Recess Appointments Clause "to serve for 1 ½ or almost 2 years" depending on when the President makes the appointment within a congressional session. *Id.* at 534.

Apart from the Appointments Clause and the Recess Appointments Clause, the Constitution makes no mention of any other way for the President to appoint principal officers. Therefore, based solely on the Constitution's text, the process created by these two provisions "prescribes the exclusive process by which the President may appoint officers of the United States." *NLRB v. Sw. Gen., Inc.*, 137 S. Ct. 929, 945 (2017) (Thomas, J., concurring) (internal quotation marks omitted).

But this case involves a different process—the appointment of so-called "acting officials" by the President alone. When an office requiring Senate confirmation is vacant, the President may "appoint" an "acting official" to exercise the power of that office on a temporary basis without first obtaining Senate approval. *Sw. Gen.*, 137 S. Ct. at 935. Although the Constitution's text does not support the President's power to appoint acting officials in this manner, *see id.* at 946 (Thomas, J., concurring), Congress has authorized the President to do so since the Founding era, *id.* at 935.

Congressional authorization for the appointment of acting officials has almost always been "limited." *Id.* Beginning in 1792, Congress first permitted the President "to authorize any person" to "perform the duties" of an officer in the Departments of State, Treasury, and War "in case of [that officer's] death, absence from the seat of government, or sickness." *See* Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281. Just three years later, Congress amended the statute to impose a six-month time limit on acting service. *See* Act of Feb. 13, 1795, ch. 21, 1 Stat. 415. In the 1860s, Congress expanded the number of offices for which the President could authorize acting service—but service in an acting capacity was limited to only ten days. *See* Anne O'Connell, *Actings*, 120 COLUM. L. REV. 613, 626 & n.51 (2020) (citing Act of July 23, 1868, ch. 227, 15 Stat. 168 and Act of Feb. 20, 1863, ch. 45, 12 Stat. 656). The ten-day limit was extended to thirty days in 1891. *See id.* at 626 & n.53 (citing Act of Feb. 6, 1891, ch. 113, 26 Stat. 733). These statutes remained until 1988. *Sw. Gen.*, 137 S. Ct. at 935–36. Thus, for most of the first two centuries of the Constitution's history, Congress's customary practice was to impose statutory time limits on the duration of acting officers' tenure—time limits that were never more than six months and often considerably less. Against this established historical practice, a more recent statute like HERA deserves little weight in the separation-of-powers analysis. *See Noel Canning*, 573 U.S. at 524–25 (explaining that only "historical" and "longstanding practice" is entitled to "significant weight" when it comes to the separation of powers).

The Supreme Court has directly addressed the constitutionality of acting officials only once, in *United States v. Eaton*, 169 U.S. 331 (1898). *Eaton* involved the designation of a non-Senate confirmed official to serve as the acting consul general of Bangkok, a principal officer, while the consul general returned to the United States for medical treatment. *Id.* at 331–32. All told, the acting official served for roughly 10 months until a new Senate-confirmed consul general arrived. *Id.* at 332–34 (noting that the official began acting on July 12, 1892, and ceased on May 18, 1893).

The Court rejected an Appointments Clause challenge to the acting official's service. *Id.* at 343. It explained that the acting official was not "transformed into the superior and permanent official"—which would have required Senate confirmation—merely by serving in an acting capacity because he was "charged with the performance of the duty of the superior *for a limited time*, and under *special and temporary conditions*." *Id.* (emphasis added). Those special conditions included the difficulty of communicating with an official on the other side of the planet prior to the invention of modern communications methods and the difficulty of intercontinental travel in the nineteenth century. *Eaton* thus authorizes only "limited" and "temporary" acting service under "special . . . conditions" when an official who is not confirmed by the Senate seeks to exercise the powers of a principal officer.

In sum, constitutional text, history, and precedent offer three principles that bear upon how long an unconfirmed acting official may exercise the powers of a principal officer. First, the Recess Appointments Clause, as interpreted in *Noel Canning*, provides that even when necessitated by the most exigent of circumstances—a recess of the Senate that necessarily prevents appointment "by and with the Advice and Consent of the Senate"—someone who the President unilaterally appoints may serve a maximum of about two years. 573 U.S. at 534. Second, for nearly two full centuries, Congress typically limited acting officials' tenure to six months or less. And third, an acting official who is not confirmed by the Senate may exercise the power of a principal officer only "for a limited time and under special and temporary conditions." *Eaton*, 169 U.S. at 343.

Here, by the time Mr. DeMarco signed the Third Amendment, his acting service had exceeded all the textual and historical limitations on a person exercising the power of a principal officer without Senate confirmation. Everyone agrees the FHFA director is a principal officer. *Rop*, 485 F. Supp. 3d at 940. And as a threshold matter, the Constitution's text does not authorize a person who is not confirmed by the Senate to exercise the powers of a principal officer. *Sw. Gen.*, 137 S. Ct. at 946 (Thomas, J., concurring). When Mr. DeMarco signed the Third Amendment, he had been serving as acting director of FHFA for nearly three years—two years longer than the acting official in *Eaton*, about two-and-a-half years longer than the maximum duration that Congress has generally authorized historically, and a year longer than any recess appointee may serve. By the time he signed the Third Amendment, Mr. DeMarco's tenure was neither "limited" nor "temporary." Nor did it take place under "special" circumstances such as avoiding the shuttering of a consulate in a distant foreign land during the days before air travel. Therefore, the constitutional authority for his continued service was long gone, and he held his position in violation of the Appointments Clause.

2. A functional analysis also shows that Mr. DeMarco was serving in violation of the Appointments Clause when he signed the Third Amendment.

Consistent with the methodology the modern Supreme Court uses in separation of powers cases, this Court ought to decide the merits of Plaintiffs'

Appointments Clause claim based upon the constitutional text, history, and precedent. But to the extent the Court opts for the more functionalist approach advocated by some Supreme Court Justices in dissent, that approach only leads to the same result. *See, e.g.*, *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1996 (2021) (Breyer, J., dissenting); *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2237–38 (2020) (Kagan, J., dissenting). In a 1977 opinion that predated the Supreme Court's more recent text and history-focused separation of powers decisions, President Carter's Office of Legal Counsel identified a number of "pertinent" factors that could inform a functional analysis, such as "the specific functions being performed" by the acting official; "the manner in which the vacancy was created," whether death, resignation, firing, or other reasons; "the time" within the session of the Senate "when the vacancy was created"; whether a nomination is pending; and "particular factors affecting the President's choice" or "ability to devote attention to the matter." *Status of the Acting Director, Office of Management and Budget*, 1 Op. O.L.C. 287, 290 (1977). In the end, OLC viewed the inquiry as one of "reasonable[ness]." *See id.* 289–90. Other considerations might also inform a reasonableness inquiry, such as "the risks inherent in permitting the President to unilaterally select an acting officer without the check of Senate confirmation." Nina Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?*, 72 ADMIN. L. REV. 533, 601 (2020). One scholar's functional analysis concluded that the

Appointments Clause should be interpreted to permit an acting official to exercise the powers of a senior principal officer for *at most* 120 days. *Id.* at 602.

By any measure, Mr. Demarco's service vastly exceeded a reasonable tenure for acting service under the circumstances. He was acting director for *fifteen months* before President Obama nominated Mr. Smith to the post. And once that nomination was returned to the President, another *two years* passed before the President put forth a new nominee. Thus, when Mr. DeMarco signed the Third Amendment, he had served the previous eighteen months as acting director without a nomination even pending. And by that time, whatever might have influenced President Obama's choice when he first designated Mr. DeMarco—such as the need for quick action in response to an ongoing crisis—those factors no longer held: The financial crisis had passed, and the Companies were about to report the largest profits in their history. Under a functional analysis that gives even the slightest weight to the purpose of the Constitution's requirement that the President select principal officers in consultation with the Senate, Mr. DeMarco's acting service was unreasonable.

3. The application of the Appointments Clause to acting officials is justiciable.

The "political question" doctrine is "a narrow exception" to the rule that "the Judiciary has a responsibility to decide cases properly before it." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194–95 (2012). It applies only "where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Id.* at 195 (internal quotation marks omitted). The district court concluded that the constitutional limit on an acting official's ability to exercise the power of a principal officer falls within this narrow doctrine. First, the court dismissed as "arbitrary" Plaintiffs' proposed two-year limit for the exercise of a principal officer's power by an official who is not confirmed by the Senate. *Rop*, 485 F. Supp. 3d at 942. Second, the court held that a functional analysis of whether a particular acting official's tenure was reasonable was not "judicially discoverable and manageable." *Id.* at 942. The court thus concluded that determining whether an acting official's exercise of a principal officer's power violates the Constitution presents "a non-justiciable political question" because it is a "policy determination" that "is better left to the other branches of government." *Id.* at 941, 943.

That conclusion is extraordinary. As an initial matter, the district court had the principle precisely backwards. If the Supreme Court has made one thing clear, it is that the separation of powers is *not* left to the political branches. *See Freytag*, 501 U.S. at 880 ("Neither Congress nor the Executive can agree to waive th[e] structural protection" provided by the separation of powers.); *New York v. United States*, 505 U.S. 144, 182 (1992) ("The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment."). Indeed, *Freytag* expressly *rejected* the argument "that there is no need for th[e] Court to be concerned about protecting the separation-of-powers interest at stake" in an Appointments Clause challenge. *Id.* at 879. That argument failed because "[t]he structural interests protected by the Appointments Clause are not those of any one branch of Government" (or two of them) "but of the entire Republic." *Id.* at 880. "In short, the fact that one institution of Government has mechanisms available to guard against incursions into its power by other governmental institutions does not require that the Judiciary remove itself from the controversy by labeling the issue a political question." *United States v. Munoz-Florez*, 495 U.S. 385, 393 (1990). Here, the district court's conclusion that the Appointments Clause challenge was a non-justiciable political question is irreconcilable with the Supreme Court's understanding of the judicial role in safeguarding the separation of powers.

Moreover, the district court's refusal to adjudicate the Appointments Clause question cannot be squared with the Supreme Court's decision in *Noel Canning*. There, the Court held that a recess of "less than 10 days is presumptively too short to fall within the [Recess Appointments] Clause." *Noel Canning*, 573 U.S. at 538. The Court had no issues drawing a line in the absence of an express numerical threshold in the text of the Constitution. It even suggested that courts might have to adjudicate whether "unusual circumstance[s]" would permit an exception to this rule. *Id.* The types of judgments *Noel Canning* calls for are indistinguishable from the judgment of whether an acting official's tenure violates the Appointments Clause. If anything, the text and history at issue here call for a much more circumscribed analysis than the analysis contemplated by *Noel Canning*.

The consequences of the decision below are significant. The district court's holding effectively nullifies both the Appointments Clause and the Recess Appointments Clause. What President would bother with Senate confirmations (or even recess appointments) when he or she could simply fill out the administration with "acting" principal officers for an unlimited duration? And the Senate may now pass the buck for officials who poorly exercise the powers of a principal officer by saying it had no control over the President's personnel decisions. *Arthrex*, 141 S. Ct. at 1989 ("The Appointments Clause adds a degree of accountability in the Senate, which shares in the public blame for both the making of a bad appointment and the rejection of a good one." (internal quotation marks omitted)). This atextual "acting official" loophole destroys what the Supreme Court has described as one of the "significant structural safeguards of the constitutional scheme." *Edmond*, 520 U.S. at 659. This Court should reverse the district court's judgment and hold that Mr. DeMarco was serving in violation of the Appointments Clause when he signed the Third Amendment.[2]

[2] Because Plaintiffs state viable claims against FHFA and its director, the Court should also vacate the district court's dismissal of Treasury from the case so

B. Vacatur of the Third Amendment and Actions Taken Pursuant to the Third Amendment is the Appropriate Remedy for the Appointments Clause Violation.

1. Vacatur is required because Mr. DeMarco lacked legal authority to sign the Third Amendment.

The acts of an official who serves in violation of the Appointments Clause are "void *ab initio*." *Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013), *aff'd*, 134 S. Ct. 2550 (2014). Put differently, Appointments Clause violations are "structural." *See Freytag*, 501 U.S. at 878–79. Thus, they are "subject to automatic reversal." *Neder v. United States*, 527 U.S. 1, 8 (1999); *see also Bandimere v. SEC*, 844 F.3d 1168, 1181 n.31 (10th Cir. 2016) (Appointments Clause violations are "structural errors" that "are subject to automatic reversal"); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 123 (D.C. Cir. 2015) (Garland, C.J.) ("[A]n Appointments Clause violation is a structural error that warrants reversal regardless of whether prejudice can be shown.").

Moreover, the Supreme Court has stressed that courts must provide remedies that incentivize Appointments Clause challenges. *See Ryder v. United States*, 515 U.S. 177, 183 (1995) (refusing to deny relief because it "would create a disincentive to raise Appointments Clause challenges"). The Court reiterated this principle just a

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that the district court may determine whether Treasury is a proper defendant under Rule 19 of the Federal Rules of Civil Procedure. *See Rop*, 485 F. Supp. 3d at 947 (declining to decide the issue).

few terms ago: "[O]ur Appointments Clause remedies are designed not only to advance th[e] purposes" of the Appointments Clause "directly, but also to create incentives to raise Appointments Clause challenges." *Lucia v. SEC*, 138 S. Ct. 2044, 2055 & n.5 (2018) (brackets and internal quotation marks omitted).

In line with these principles, the Supreme Court has frequently vacated past decisions of officials who served in violation of the Appointments Clause. *See, e.g.*, *id.* at 2055; *Noel Canning*, 573 U.S. at 557 (affirming the D.C. Circuit's vacatur of NLRB orders made by unlawfully appointed officers in *Noel Canning*, 705 F.3d at 515). *Collins* acknowledged this line of precedent—stating that "there [wa]s no reason to regard any of the actions taken by the FHFA . . . as void" only because the Court assumed that FHFA's directors had been lawfully appointed. 141 S. Ct. at 1787. And *Collins* included a string citation of cases where the Court had vacated "a Government actor's exercise of power that the actor did not lawfully possess," including in the context of the Appointments Clause. *Id.* at 1788 (citing *Lucia*, 138 S. Ct. at 2055); *see also id.* at 1793 (Thomas, J., concurring); *id.* at 1799 (Gorsuch, J., concurring).

Consistent with the Supreme Court's requirement that remedies must provide incentives for Appointments Clause challenges and its practice of vacating agency action taken in violation of the Appointments Clause, this Court should vacate the provisions of the PSPAs that were added to those agreements by the Third Amendment.

In addition to vacating the Third Amendment itself, the Court should also order vacatur of the official acts taken pursuant to that constitutionally invalid change to the PSPAs—namely, the excess dividend payments the Companies were ordered to make to Treasury under the Net Worth Sweep. To accomplish this, the Court could order Defendants to treat the excess dividends as having paid down a portion of the liquidation preference on Treasury's senior preferred stock at the time each payment was made. *Cf. Am.'s Cmty. Bankers v. FDIC*, 200 F.3d 822, 831 (D.C. Cir. 2000) (recognizing court's authority to order FDIC to treat past excess payments by banks as offsetting subsequent government assessments). Under this approach, both Companies would have fully paid down the liquidation preference on Treasury's senior preferred stock by the end of the third quarter of 2018. This remedy would only require accounting entries on the books of Treasury and the Companies; no money would change hands. Furthermore, even after this remedy, Treasury would still hold warrants to purchase 79.9% of the Companies' common stock at a nominal price—warrants that Treasury acquired as part of the original PSPAs.

2. The *de facto* officer doctrine cannot salvage the Third Amendment.

Below, Defendants suggested that the *de facto* officer doctrine excuses any Appointments Clause violation. The *de facto* officer doctrine "confers validity upon acts performed 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*, 515 U.S. at 180. This judge-made common law doctrine typically applies only "when there is a merely technical defect of statutory authority." *Nguyen v. United States*, 539 U.S. 69, 77 (2003). Accordingly, it does not apply "when the challenge is based upon nonfrivolous constitutional grounds." *Glidden Co. v. Zdanok*, 370 U.S. 530, 535–36 (1962) (plurality).

Here, the Appointments Clause challenge is anything but "frivolous." Constitutional text, history, and precedent confirm that an acting official without Senate confirmation may not exercise the powers of a principal officer for more than two years. Nor is a violation of the Appointments Clause a "merely technical defect of statutory authority." The Appointments Clause is a bulwark against the ability of the President to pack the executive branch with incompetent, corrupt, or otherwise unfit officials. The Framers deemed this structural mechanism for protecting liberty so important they enshrined it in the Constitution's text. That is why neither the Supreme Court nor this Court has *ever* applied the *de facto* officer doctrine to excuse an Appointments Clause violation and deny relief to a party who challenges that violation directly.

Indeed, the Supreme Court rejected this application of the doctrine in *Ryder.* There, a Coast Guard servicemember argued that some members of the Court of

Military Review had served in violation of the Appointments Clause. *Id.* at 179. The United States Court of Military Appeals agreed but held that "the actions of th[e] judges were valid *de facto*." *Id.* at 180. The Supreme Court reversed, holding that the petitioner's "challenge to the constitutional validity of the appointment of an officer" was not barred by the *de facto* officer doctrine. *Id.* at 182–83. Consistent with the Court's understanding of Appointments Clause remedies today, *see Lucia*, 138 S. Ct. at 2055 n.5, the Court refused to apply the *de facto* officer doctrine because "[a]ny other rule would create a disincentive to raise Appointments Clause challenges," *Ryder*, 515 U.S. at 183.

Instead, the *de facto* officer doctrine is limited to two circumstances. First, it applies to limit relief for harm resulting from "merely technical" statutory defects in an officer's appointment. *See Nguyen*, 539 U.S. at 77. Second, the Court has applied the doctrine when a party collaterally attacks the judgment of a court through, for example, a habeas petition or a post-trial motion. *See Ex parte Ward*, 173 U.S. 452, 456 (1899); *see also Ball v. United States*, 140 U.S. 118, 128-29 (1891) (applying *de facto* officer doctrine to prevent a "collateral attack" on a judge's appointment). This case presents neither circumstance. Thus, the *de facto* officer doctrine does not apply.

With one paragraph of analysis, the Eighth Circuit reached a contrary conclusion, holding that the *de facto* officer doctrine "bars any relief" from the Third

Amendment even if Mr. DeMarco was serving in violation of the Appointments Clause. *Bhatti v. FHFA*, 15 F.4th 848, 852–53 (8th Cir. 2021). The opinion's four sentences on the topic do not even mention—let alone engage with—the fact that the doctrine is limited to two circumstances not present here, that the Supreme Court has never once applied the doctrine to deny relief to a timely raised Appointments Clause challenge, or that the violation of the Appointments Clause is a structural error requiring reversal. *Bhatti*'s breezy analysis is not persuasive, and this Court should not hesitate to reject that opinion's unsupported conclusion.[3]

Defendants' contrary arguments fail. In the district court, FHFA contended that the doctrine applies because Plaintiffs "waited" to bring this challenge. FHFA Mot. to Dismiss, RE 25, PageID# 418. The agency principally relied on a test set forth in a 1984 D.C. Circuit opinion, which stated that plaintiffs can avoid the *de facto* officer doctrine if they bring their action "at or around the time that the challenged government action is taken" and "show that the agency or department involved has had reasonable notice under all the circumstances of the claimed defect

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[3] *Bhatti* alternatively held (in a similarly conclusory analysis) that, even if the *de facto* officer doctrine did not apply, the Net Worth Sweep was "ratified" by "the subsequent FHFA directors." 15 F.4th at 853. But this lone paragraph points to no particular act of ratification and provides no explanation for how officers who are unconstitutionally insulated from removal may themselves ratify the decision of an official unconstitutionally serving in violation of the Appointments Clause. In any event, defendants here made no mention of the ratification doctrine below, so any ratification argument is forfeited. *See Guyan Int'l, Inc. v. Pro. Benefits Adm'rs, Inc.*, 689 F.3d 793, 799 (6th Cir. 2012).

in the official's title to office." *Andrade v. Lauer*, 729 F.2d 1475, 1499 (D.C. Cir. 1984). This Court has never adopted that test, and it should not do so for at least two reasons.

First, the holding and rationale underlying *Andrade*'s rule has been undermined by the Supreme Court. In *Nguyen*, two defendants waited until petitioning for certiorari to challenge the affirmance of their criminal convictions on the basis that a non-Article III judge sat on their appellate panel. 539 U.S. at 76. Despite this late challenge—which surely would not satisfy *Andrade*'s requirements—the Court refused to apply the *de facto* officer doctrine and vacated the affirmance of the defendants' criminal convictions. *Id.* at 77–78, 83. Similarly, in *Carr v. Saul*, 141 S. Ct. 1352, 1362 (2021), the Court rejected an argument that litigants had "failed to make 'timely challenges'" to agency officials' "appointments" because the litigants did not raise those challenges until the case reached federal court. The Court held that, absent some statutory exhaustion requirement, "claimants who raise" Appointments Clause challenges "for the first time in federal court are not untimely in doing so." *Id.* Thus, under *Carr*, unless a statute says otherwise, parties do not forfeit as untimely an Appointments Clause challenge to agency action before they reach court. That conclusion effectively abrogates the D.C. Circuit's rule that the *de facto* officer doctrine applies if a litigant does not raise an Appointments Clause challenge "at or around the time" the action is taken and fails to give the agency "notice." Here, Plaintiffs' challenge is timely under the only measure that matters: they filed suit within the six-year statute of limitations. *See* 28 U.S.C. § 2401.

Second, *Andrade* represents judicial policymaking at its zenith. Rather than accept the law as the court found it, *Andrade* candidly admitted it was remaking the *de facto* officer doctrine. After the court described its understanding of the doctrine, it stated that the procedure required by the doctrine was "cumbersome and could easily operate to deprive a plaintiff with an otherwise legitimate claim of the opportunity to have his case heard." *Andrade*, 729 F.2d at 1498. The court thus settled on its test to serve "[t]he core purposes of the doctrine." *Id.* at 1499. This Court recently recognized that the D.C. Circuit applies a "modified" version of the doctrine. *Radke v. Monroe Cnty*, Nos. 19-2331, 2340, 2021 WL 4523703, at *4 n.8 (6th Cir. Oct. 4, 2021) (per curiam). There is no basis for importing the D.C. Circuit's judicial ingenuity into this Court. Indeed, it would be perverse if judicial policymaking were permitted to displace the policy enshrined in the Constitution—that principal officers must be confirmed by the Senate.

Separately, the defendants' reliance below on *Buckley v. Valeo*, 424 U.S. 1 (1976), was misplaced. FHFA Joint Mot. to Dismiss Reply and Br. in Opp. to Summ. J., RE 36, PageID# 964. As *Ryder* explained, "the declaratory and injunctive relief [the plaintiffs] sought" in *Buckley* "was awarded to them." *Ryder*, 515 U.S. at 183.

Thus, the *Buckley* Court's decision to validate the past acts of public officials serving in violation of the Appointments Clause did not deprive the plaintiffs of any remedy they requested. Moreover, *Ryder* held that, to the extent *Buckley* could be seen as applying some form of the *de facto* officer doctrine, that decision was confined to its facts. *Id.* at 184.

In sum, application of the *de facto* officer doctrine here would not only be unprecedented in this Circuit, but also in conflict with the Supreme Court's refusal to apply the doctrine in *Ryder*. This Court should follow *Ryder* and refuse to apply the *de facto* officer doctrine to deny Plaintiffs relief from a violation of the Appointments Clause.

II. The Unconstitutional Removal Restriction Harmed Plaintiffs.

In *Collins*, the Supreme Court held that the structure of FHFA violated the separation of powers. 141 S. Ct. at 1783. Although the unconstitutional statutory provision was "automatically displace[d]" by the Constitution, the Court further held that the removal restriction could nevertheless "inflict compensable harm." *Id.* at 1788–89. And specifically in the context of litigation over the Net Worth Sweep, the Court said "the possibility that the unconstitutional restriction on the President's power to remove a Director of the FHFA could have such an effect cannot be ruled out." *Id.* at 1789.

To determine whether there was such an effect, the Court instructed lower courts to decide whether the President *wanted* to remove the Director but deemed himself unable to do so given the removal restriction. *Id.* For example, the Court explained, "suppose that the President had 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." *Id.* In "th[at] situation[], the statutory provision would clearly cause harm." *Id.* Thus, the Court sent the case back to the lower courts to determine whether evidence supported a conclusion that the President desired to remove the director but did not do so because of the removal restriction.

This case presents the same question the Supreme Court remanded in *Collins*. In light of *Collins* and a recent statement by former President Trump, Plaintiffs clearly suffered compensable harm caused by the unconstitutional removal restriction. To remedy that injury, Plaintiffs are entitled to an injunction that places them in the position they would be in but for the unconstitutional statute.

A. Former President Trump's Statement Conclusively Shows that the Unconstitutional Removal Restriction Harmed Plaintiffs.

The publicly available evidence conclusively shows that President Trump wanted to remove Director Watt but did not do so because of the unconstitutional removal restriction. As *Collins* held, the presidential removal challenge to the Net Worth Sweep now turns on whether the President would have removed FHFA's

Director but for the unconstitutional statute. And former President Trump has issued a public statement articulating precisely what *Collins* stated would "clearly" show that the removal restriction "cause[d] harm"—that the President would have fired Director Watt and returned the Companies to private ownership but for the unlawful removal restriction. *Id.* Former President Trump could not have been clearer:

> 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.

Ex. A.

That should be the end of any dispute over whether Plaintiffs are entitled to a retrospective remedy based upon their presidential removal claim. *Collins* states that "a public statement" by the President "expressing displeasure with actions taken by a Director" and "assert[ing] that he would remove the Director if the statute did not stand in the way" would "clearly" show that the removal restriction harmed shareholders. 141 S. Ct. at 1789. In other words, that public statement would be dispositive. Here, the former President has provided just such a statement in direct response to the Supreme Court's decision.

Moreover, public statements from other officials confirm that Director Watt stood in the way of the President's policy goals. Although Secretary Mnuchin identified returning Fannie and Freddie to private control as a priority before the administration even began, his top advisor on housing finance issues stated in an interview before *Collins* came down that the administration decided to defer pursuing that priority until it could appoint its own director:

> There then was a sentiment [of], 'well, we need to wait for Director Watt's term to end and to have our appointee.' And it was very interesting. I would go to White House meetings, and I would hear sort of the tales [and] legends of what Mel Watt was like, and what he would or wouldn't do, and how liberal he was. . . . The decision was made to wait for a nominee, which was ultimately Director Calabria, to get nominated and confirmed. And that was another big hiatus of time that went by.

Interview with Craig Phillips, *supra*, at 10:14 to 11:01.

By the time Director Watt's term expired in January 2019, he was "the last remaining Obama-appointed regulator" leading a federal agency. Katy O'Donnell, *Housing Regulator Settles Sexual Harassment Suit tied to Mel Watt*, POLITICO (Sept. 27, 2019), https://politi.co/36UJR7U. Little else other than the President's understanding that he was bound by the removal restriction could explain Mr. Watt's extended time in the Trump administration. And as soon as Director Watt's statutory term ended, President Trump wasted no time in installing officials who would finally start the process of implementing his longstanding policy goals—immediately designating Mr. Otting as acting director and submitting Mr. Calabria's nomination to the Senate rather than allowing Director Watt to continue at the agency in a holdover capacity. *See* 12 U.S.C. § 4512(b)(4) (permitting Senate-confirmed FHFA Director to remain in office as holdover beyond 5-year statutory term).

Taking this evidence together, the removal restriction "clearly cause[d] harm." *Collins*, 141 S. Ct. at 1789. Indeed, Plaintiffs present *precisely* what the Supreme Court labeled as sufficient to show harm—a public statement from the President stating that he would have removed Director Watt and implemented his own policy if the removal restriction had not stood in the way. In addition, all other relevant evidence demonstrates that the President would have removed Director Watt if he thought he could have done so. Thus, Plaintiffs have demonstrated "compensable harm" and are entitled "to retrospective relief." *Id.* at 1788-89.

B. The Court Should Order an Injunction that Restores Plaintiffs to a Meaningful Place in the Companies' Capital Structure.

In addition to demonstrating that Plaintiffs suffered compensable harm caused by the unconstitutional statute, the public statements of former President Trump, former Secretary Mnuchin, and other administration officials also reveal what position the Plaintiffs would be in but for the removal restriction. Even before the administration began, as President-elect Trump's nominee for Treasury Secretary, Mr. Mnuchin publicly stated his goal "to get Fannie and Freddie out of government ownership." Fox Business News, *supra*, at 00:06 to 00:16. Shortly after Director Watt's term ended, a presidential memorandum directed Treasury to consult with FHFA and develop a plan for, among other things, "[e]nding the conservatorships of [Fannie and Freddie] upon the completion of specified reforms." 84 Fed. Reg. 12,479 (Mar. 27, 2019). In response to that presidential memorandum, Treasury published a plan that called for both Companies to be "recapitalized with significant first-loss private capital so that Treasury's ongoing commitment under [the Agreements] could be drawn upon only in exigent circumstances." *See Housing Finance Reform Plan*, *supra*, at 3.

In the months that followed the release of Treasury's plan for recapitalization, Director Calabria set about pursuing the administration's goal of releasing Fannie and Freddie from conservatorship. In a departure from similar documents prepared by his Democratic-appointed predecessors, Director Calabria issued a scorecard that directed the Companies to "undertake those activities necessary to support an exit from conservatorship." FHFA, 2020 Scorecard for Fannie Mae, Freddie Mac, and Common Securitization Solutions 2 (Oct. 2019), https://bit.ly/32fqWFW.

The "activities necessary" to recapitalize the companies were essentially five steps—the first four of which Director Calabria and Treasury actually took. First, the PSPAs had to be modified so that the Companies would be permitted to retain net worth rather than being forced to hand it over to Treasury. This step is significant because it allows the Companies to build capital in two ways: the companies could retain earnings and add to their net worth; and the companies could raise additional capital through the issuance of new stock. (So long as the Companies were required to pay Treasury their entire net worth every quarter, the proceeds from the sale of any new stock would have been immediately swept to Treasury, resulting in no increase in the Companies' capital levels.) To that end, Director Calabria and Treasury amended the PSPAs to substantially increase the maximum amount of net worth each Company was permitted to retain. U.S. Dep't of the Treasury, Treasury Department and FHFA Modify Terms of Preferred Stock Purchase Agreements for Fannie Mae and Freddie Mac, https://go.usa.gov/xF6NS.

Second, the Companies had to cease paying Treasury quarterly cash dividends. Director Calabria implemented this change within months of coming into office in April 2019. *See* FHFA, TABLE 2: DIVIDENDS ON ENTERPRISE DRAWS FROM TREASURY, https://bit.ly/3tmDbKa.

Third, the Companies needed a regulatory framework for determining the amount of capital that would be required once they were under private control. Director Calabria issued a rule adopting such a framework. *See* 85 Fed. Reg. 82,150 (Dec. 17, 2020). The rule addressed a number of complex, highly technical issues and did not become final until December 17, 2020, leaving the Trump administration only a few short weeks to meet its objective of returning the companies to private ownership. There simply was not enough time left for the Administration to do the necessary legwork to complete its plan to raise new capital for the Companies through a major issuance of new stock.

Fourth, the Companies needed to hire investment bankers to prepare a new stock offering. Director Calabria directed the Companies to do just that. *See* Fannie Mae Hires Financial Advisor (June 15, 2020), https://bit.ly/3kQGuHa; Freddie Mac Announces J.P. Morgan as Financial Advisor (June 15, 2020), https://bit.ly/3zUxR32.

Fifth, the Companies' capital structures needed to change so that their earnings would not go exclusively to Treasury—otherwise, as a matter of simple market mechanics, no one would buy the new stock the Companies planned to issue. *See* Prepared Remarks of Dr. Mark A. Calabria, Director of FHFA, at Mortg. Banker Ass'n Nat'l Secondary Mkt. Conf. & Expo 2019 (May 20, 2019), https://bit.ly/2Wa2u5D (acknowledging that an "important step on the path to building the necessary capital will be to address the Net Worth Sweep"); James Kleimann, Calabria: We need another round of PSPA amendments, HOUSING WIRE (Apr. 20, 2021), https://bit.ly/38RxU40 (quoting Director Calabria as saying that the PSPAs should be further amended "to deal with the capital stack" and that "given the structure of the balance sheets as they are today, it will be very difficult if not impossible to raise outside capital"). Treasury, for its part, had contemplated "eliminating all or a portion of the liquidation preference of Treasury's senior preferred shares or exchanging all or a portion of that interest for common stock or other interests in [the Companies]." *Id.* at 27. With only this final step remaining, Director Calabria publicly stated that he anticipated the Companies could sell new shares of stock in 2021. Ben Lane, *Calabria Now Expects Fannie Mae and Freddie Mac IPOs in 2021*, HOUSINGWIRE (Feb. 28, 2020), https://bit.ly/3hXsKJ4.

Thus, if President Trump had been able to direct FHFA to pursue his policy goals from the beginning of his administration, as the Constitution required, FHFA would have collaborated with Treasury to amend the PSPAs in one of two ways: (1) to 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) to convert Treasury's senior preferred stock to common stock. In either event, Treasury's entitlement to 100% of the Companies' net worth would be gone, and the Companies' other shareholders could share in the upside.

All of this publicly available information is confirmed by former President Trump's statement. He stressed that he would have "sold the government's *common* stock in these companies at a huge profit." Letter from Donald Trump to Sen. Rand Paul, *supra* (emphasis added). President Trump's reference to the government profiting from *common* stock reveals how his administration planned to change the Companies' capital structures; if Treasury's senior preferred shares remained outstanding with a multi-billion-dollar liquidation preference, no economic value could ever be realized by Treasury through the sale of *common* stock it obtained after exercising its warrants. Thus, this reference necessarily implies that the Net Worth Sweep would be ended and the liquidation preference on the Treasury's senior preferred stock would be reduced to zero.

President Trump's reference to the government profiting from the sale of common stock is also important for a second reason: If common stock owned by Treasury is valuable and can be sold for a "huge profit," then the junior preferred and common stock owned by Plaintiffs must *also* be valuable because the junior preferred has a higher priority in the capital structure and other common stock has equal priority to the stock President Trump has indicated the government would have sold. Indeed, the only way for *any* of the Companies' common stock to have value is if the terms of Treasury's senior preferred shares are changed so that they no longer entitle the government to all the Companies' net worth forever. Thus, the former President's statement leaves no doubt: Were it not for the removal restriction, he would have fired Director Watt and had two additional years to pursue policy goals that included overturning the Net Worth Sweep, which he has described as a "scam," "socialism," and "a travesty brought to you by the Obama/Biden administration." *Id.* Instead, the Trump administration "was denied the time it needed to fix this problem because of the unconstitutional restriction on firing Mel Watt." *Id.*

Because HERA's unconstitutional removal restriction violated the Constitution and clearly harmed Plaintiffs, the Court should direct the district court to issue an injunction that puts Plaintiffs in the position they would be in if the President had the ability to implement his policy of either zeroing out Treasury's liquidation preference or converting Treasury's senior preferred stock to common stock. At the very least, the Court must reverse the district court's judgment that Plaintiffs' removal argument failed because the insulated directors merely implemented, rather than approved, the Net Worth Sweep. *Rop*, 485 F. Supp. 3d at 935. *Collins* forecloses that conclusion because it held that Plaintiffs could show harm if the President would "have replaced one of the confirmed directors who supervised the implementation of the third amendment." 141 S. Ct. at 1789.

C. Even If the Former President's Statement Is Not Dispositive, Any Remaining Uncertainty Should Be Resolved in Plaintiffs' Favor.

If the Court decides that former President Trump's statement—the precise hypothetical evidence *Collins* said would "clearly" show harm—is not dispositive, the Court should hold that Defendants may avoid Plaintiffs' requested remedy only by making a clear showing that the removal restriction did *not*, in fact, harm Plaintiffs. Several doctrines support this conclusion.

For example, the "presumption of regularity" counsels that courts should take the official statements of public officials at face value. *United States v. Chem. Found.*, 272 U.S. 1, 14–15 (1926). As the United States represented to the Supreme Court on behalf of then-President Trump, that presumption "carries the utmost force with respect to the President himself." Brief for the United States at 78, *Trump v. Int'l Refugee Assistance Project*, Nos. 16-1436, 16-1540 (U.S. Aug. 10, 2017). Only "clear evidence to the contrary" may overcome the presumption of regularity and permit a court to reject the reasons given by a public official regarding an official act. *Chem. Found.*, 272 U.S. at 14–15; *see also Nat'l Archives and Recs. Admin. v. Favish*, 541 U.S. 157, 174 (2004) ("[W]here the presumption is applicable, clear evidence is usually required to displace it."). If the Court determines the presidential statement is not dispositive, it should require Defendants to come forward with—as the United States previously put it—"the clearest showing to the contrary." Brief for the United States, *supra*, at 78. Absent that showing, the Court should not second-guess the statement of a former President of the United States describing the President's own thought process.

Although the presumption of regularity "is less a rule of evidence than a general working principle," *Favish*, 541 U.S. at 174, actual rules of evidence support the same conclusion. Specifically, "where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue." 2 McCormick on Evidence § 337 (8th ed. 2020); *see Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 626 (1993) (observing that it is "entirely sensible to burden the party more likely to have information relevant to the facts about [the matter at issue] with the obligation to demonstrate [those] facts").

Here, we already know what the former President thinks, and any non-public facts relevant to this issue are in the exclusive possession of Defendants and their other former officers and employees. Under these circumstances, Defendants should bear the burden. *See First Nat. Bank of Louisville v. Hurricane Elkhorn Coal Corp. II*, 763 F.2d 188, 190 (6th Cir. 1985) ("A guiding principle is to assign the burden to the 'party who presumably has peculiar means of knowledge enabling him to prove its falsity if it is false.'" (quoting 9 J. Wigmore, Evidence in Trials at Common Law § 2486 at 290 (rev. 1981))); *see also Gomez v. Toledo*, 446 U.S. 635, 641 (1980) (Defendant bears burden of establishing entitlement to qualified immunity because it "depends on facts peculiarly within the knowledge and control of the defendant" and "will frequently turn on factors which a plaintiff cannot reasonably be expected to know."). Just as courts shift the burden of persuasion once a plaintiff makes a *prima facie* case of employment discrimination, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), or a violation of the Equal Protection Clause, *see Alexander v. Louisiana*, 405 U.S. 625 (1972), the Court should hold that Plaintiffs have made (at the very least) a *prima facie* showing that the unconstitutional removal restriction inflicted compensable harm. The burden should thus shift to Defendants to disprove harm.

Burden shifting also takes into account "substantive policy." Mueller & Kilpatrick, 1 Federal Evidence § 3.3 (4th ed. 2021); *see First Nat. Bank of Louisville*, 763 F.2d at 190 ("Burden of proof allocations are governed by principles of fairness, common sense, and logic."); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 209 (1973) (allocation of burden of proof is "a question of policy and fairness based on experience"). The Constitution itself sets forth the policy interest here—the separation of powers "protects individual liberty." *Bond*, 564 U.S. at 223. To ensure that policy is not illusory, the Court should place the burden on the government to show that an unconstitutional removal restriction did not cause harm given the former President's unequivocal statement.

Moreover, the treatment of an agency that fails to follow the APA's notice-and-comment procedures also supports placing the burden on the government. When an agency fails to satisfy the notice-and-comment requirement, courts find harmless error only if it is clear the failure did not affect the agency's decision; "if there is any uncertainty at all as to the effect of that failure," the error cannot be deemed harmless. *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002). Otherwise, the agency could simply ignore notice and comment and then evade judicial review by stating that the process would not have affected the agency's decision anyway. *Id.* 96–97.

The same principle suggests the burden should be placed on the government. The dangers highlighted by *Sugar Cane Growers* are especially concerning where, as here, the government has changed hands from one political party to another that has little interest in vindicating the prior administration's policy goals. For two years, Democratic appointee Mel Watt stymied a Republican administration's policy goals in violation of the Constitution, harming Plaintiffs in the process. And now, a Democratic administration is back in power and seeks to argue that Director Watt's tenure made no difference. In this way, holding the constitutional error harmless would permit one political party to evade judicial review of a separation-of-powers violation that has injured Plaintiffs. The Court should reject this all's-fair-in-politics understanding of the separation of powers and require a clear showing from Defendants before concluding that the removal restriction did not harm Plaintiffs.

D. Treasury's Role Does Not Dispel the Harm from the Constitutional Violation.

In *Collins*, Justice Kagan wrote a separate opinion, joined only by Justices Breyer and Sotomayor, contending that the removal restriction did not harm the *Collins* plaintiffs because "FHFA's policies were jointly created by the FHFA and Treasury and . . . the Secretary of the Treasury is subject to at will removal by the President." *Collins*, 141 S. Ct. at 1802 (Kagan, J., concurring in part and dissenting in part) (internal quotation marks and brackets omitted). The President's ability to remove the Treasury Secretary at will, Justice Kagan reasoned, "seems sufficient" to show the removal restriction did not harm the plaintiffs. *Id.*

Respectfully, that contention misses the point. As an initial matter, the Third Amendment was an agreement between FHFA and Treasury; as the district court found, it could not be amended unilaterally by Treasury. *Rop*, 485 F. Supp. 3d at 919. More significantly, the constitutional problem is that the President of the United States wanted to return the Companies to private control *in a particular way* that required FHFA's cooperation and would have benefitted Plaintiffs. Under our constitutional structure, the President was entitled to pursue that policy rather than being put to the choice of either sitting idly by until Director Watt's term ended or attempting to address the situation through whatever second-best alternatives he could carry out through Treasury acting alone.

The President had a policy he wanted to implement; but as the President himself has made clear, the removal restriction prevented him from implementing that policy during his administration. The restriction thus violated the Constitution and harmed Plaintiffs.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's judgment.

Date: December 20, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 12,359 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure and 6 Cir. R. 32(b)(1).

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 using the 2016 version of Microsoft Word in 14-point Times New Roman font.

/s/ David H. Thompson
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DOCUMENTS TO BE DESIGNATED

Record Entry No.	Description	PageID Nos.
17	Amended Complaint	196–272
25	FHFA Brief in Support of Motion to Dismiss	386–424
36	FHFA Joint Motion to Dismiss Reply and Brief in Opposition to Summary Judgment	946–977
66	Memorandum Opinion	1758-1818
67	Order	1819
68	Judgment	1820
69	Notice of Appeal	1821

RELEVANT STATUTES, REGULATIONS, AND RULES

U.S. Const., Art. II, § 1

The executive Power shall be vested in a President of the United States of America.

U.S. Const., Art. II, § 2, cl. 2

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone[.]

U.S. Const., Art. II, § 3

[The President] shall take Care that the Laws be faithfully executed[.]"

12 U.S.C. § 4512

§ 4512. Director

(a) Establishment of position

There is established the position of the Director of the Agency, who shall be the head of the Agency.

(b) Appointment; term

(1) Appointment

The Director shall be appointed by the President, by and with the advice and consent of the Senate[.]

(2) Term

The Director shall be appointed for a term of 5 years, unless removed before the end of such term for cause by the President.

(3) Vacancy

A vacancy in the position of Director that occurs before the expiration of the term for which a Director was appointed shall be filled in the manner established under paragraph (1), and the Director appointed to fill such vacancy shall be appointed only for the remainder of such term.

(4) Service after end of term

An individual may serve as the Director after the expiration of the term for which appointed until a successor has been appointed.

(5) Transitional provision

Notwithstanding paragraphs (1) and (2), during the period beginning on the effective date of the Federal Housing Finance Regulatory Reform Act of 2008, and ending on the date on which the Director is appointed and confirmed, the person serving as the Director of the Office of Federal Housing Enterprise Oversight of the Department of Housing and Urban Development on that effective date shall act for all purposes as, and with the full powers of, the Director.

. . .

(f) Acting Director

In the event of the death, resignation, sickness, or absence of the Director, the President shall designate either the Deputy Director of the Division of Enterprise Regulation, the Deputy Director of the Division of Federal Home Loan Bank Regulation, or the Deputy Director for Housing Mission and Goals, to serve as acting Director until the return of the Director, or the appointment of a successor pursuant to subsection (b).

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2021, I filed the foregoing Opening Brief of Plaintiff-Appellants Michael Rop, Stewart Knoepp, and Alvin Wilson with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered users:

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