UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

ATIF F. BHATTI, *et al.*, Plaintiffs, v. THE FEDERAL HOUSING FINANCE AGENCY, *et al.*, Defendants.	Case No. 0:17-cv-02185 (PJS/HB)

MEMORANDUM OF LAW IN SUPPORT OF
FHFA DEFENDANTS' MOTION TO DISMISS
SECOND AMENDED COMPLAINT

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INTRODUCTION

In their Second Amended Complaint, private shareholders of Fannie Mae and Freddie Mac (the "Enterprises"), seek to eliminate the U.S. Treasury Department's senior preferred stock interests in those Enterprises. Those interests constitute consideration for Treasury's infusions of hundreds of billions of dollars into the Enterprises during and after the 2008 financial crisis, and are the vehicle through which Treasury maintains an ongoing commitment to infuse hundreds of billions more as needed.

Plaintiffs' original claims in this case raised constitutional issues regarding the structure and authority of Defendant Federal Housing Finance Agency ("FHFA"), Conservator of the Enterprises, in an effort to unwind one discrete aspect of that relationship—a 2012 amendment changing the formula for the dividends on Treasury's preferred stock. This Court dismissed those claims and plaintiffs appealed.

In the meantime, in parallel shareholder litigation challenging the 2012 amendment, the U.S. Supreme Court ruled that while a statutory limitation on the President's power to remove FHFA Directors was unconstitutional, that issue did not provide a basis for invalidating the 2012 amendment or otherwise deprive any FHFA official of authority to take any act at any time. *Collins v. Yellen*, 141 S. Ct. 1761, 1778-88 (2021). However, because it could not be "ruled out" that past FHFA Directors' insulation from removal may have influenced how they chose to implement the 2012 amendment, the Court remanded to give the plaintiffs a chance to pursue narrow "retrospective" relief. *Id.* at 1788-89. After *Collins*, the Eighth Circuit upheld this

Court's dismissal of all of plaintiffs' claims as originally pleaded, but remanded to give them a chance to pursue the narrow retrospective relief *Collins* left open.

In their Second Amended Complaint, plaintiffs seek to leverage that narrow opening into an entirely new set of claims requesting sweeping new relief. They no longer target the 2012 amendment, its implementation, or a particular formula for Treasury's dividends, but instead seek to eliminate Treasury's underlying preferred stock interests entirely. The effect of that relief would be to shift tens of billions of dollars of shareholder value from Treasury to junior preferred shareholders like plaintiffs.

Plaintiffs seek to force this windfall through an attenuated, after-the-fact theory that former President Trump wished to renounce Treasury's investments in the Enterprises to facilitate their transition out of conservatorship, but former FHFA Director Watt blocked that agenda during the first half of the Trump Administration. Plaintiffs claim entitlement to an injunction forcing the current Administration to carry out what they claim was former President Trump's policy vision.

That theory and request are meritless. They stray far outside the discrete matters *Collins* authorized for potential consideration on remand, are barred by the Housing and Economic Recovery Act's anti-injunction provision forbidding interference with conservator powers and functions, and run afoul of longstanding limitations on suing agencies for failure to act and seeking to compel them to take affirmative actions. Ironically for a case purportedly seeking to vindicate the separation of powers, a judicial order requiring the current Administration to carry out a former Administration's alleged policy would create grave Article II problems of its own.

Plaintiffs' allegations are also rife with speculation and implausible. Their allegations and cited sources support neither that the Trump Administration actually had the objective they ascribe to it, nor that any FHFA Director stymied such an objective. The most glaring flaw is that after President Trump chose FHFA's leadership at the beginning of 2019, FHFA and Treasury jointly took actions opposite of those that plaintiffs' new theory would predict.

Five Justices expressed skepticism about the shareholders' prospects even in the far more limited remand ordered in *Collins*, related to discrete acts implementing the 2012 amendment. *See id.* at 1795 (Thomas, J., concurring); *id.* at 1802 (Kagan, J., concurring in part, joined by two other Justices); *id.* at 1799 (Gorsuch, J., concurring in part). The much more audacious theory plaintiffs now assert cannot overcome the obstacles identified in those concurrences. The Court should dismiss the Second Amended Complaint with prejudice.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Conservatorships and the Preferred Stock Agreements

The Enterprises are chartered by Congress to provide liquidity to the mortgage market by purchasing residential loans. Second Amended Complaint ("SAC"), ECF No. 87, ¶¶ 12-14. On the brink of the Great Recession, motivated by concern that the Enterprises' "troubling financial condition would imperil the national economy," *Collins*, 141 S. Ct. at 1770, Congress enacted the Housing and Economic Recovery Act of 2008,

Pub. L. No. 110-289, 122 Stat. 2654, 2661 (codified at 12 U.S.C. § 4511 *et seq*.) ("HERA").

HERA created a new agency, FHFA, to supervise and regulate the Enterprises. 12 U.S.C. § 4511. Congress provided that FHFA would be headed by a Director appointed by the President and confirmed by the Senate to serve a term of five years. *Id.* § 4512(b). Although HERA provided that the Director could be removed prior to the expiration of that term only for cause, the Supreme Court held in *Collins* that the "for cause" limitation was unconstitutional and unenforceable. 141 S. Ct. at 1783-87. The Court also found, however, that the for-cause removal restriction did not apply to FHFA acting directors. *Id.* at 1781-83.

Congress authorized FHFA to place the Enterprises in conservatorships "for the purpose of reorganizing, rehabilitating, or winding up [their] affairs." 12 U.S.C. § 4617(a)(2). Consistent with other financial institution conservatorship and receivership statutes, "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver." *Id.* § 4617(f). HERA further authorized the U.S. Department of the Treasury ("Treasury") to purchase securities from the Enterprises to "provide stability to the financial markets," "prevent disruptions in the availability of mortgage finance," and "protect the taxpayer." *Id.* §§ 1455(*l*), 1719(g).

In September 2008, FHFA's Director placed the Enterprises into conservatorships. SAC ¶ 20. Simultaneously, Treasury entered into Senior Preferred Stock Purchase Agreements ("PSPAs") with the Enterprises, committing to advance funds to each Enterprise for each quarter in which that Enterprise's liabilities exceeded its assets, up to

a cumulative amount of $100 billion per Enterprise. *Id.* ¶¶ 20, 21.[1] In exchange, Treasury received newly issued shares of Enterprise senior preferred stock with "four key entitlements." *Collins*, 141 S. Ct. at 1773.

The first "key entitlement" was "a senior liquidation preference equal to $1 billion in each company, with a dollar-for-dollar increase every time the company drew on the capital commitment." *Id.*; SAC ¶ 25. If new Enterprise stock is ever issued to the public in the future, at least some of the proceeds must be used to pay down the liquidation preferences. *See* Certificates of Designation ¶ 4, "Mandatory Pay Down of Liquidation Preferences Upon Issuance of Capital Stock."[2]

A second entitlement consisted of quarterly cash dividends at an annual rate of 10% of Treasury's outstanding liquidation preference. SAC ¶ 26. The third and fourth entitlements were a warrant to purchase 79.9% of the Enterprises' common stock, and a periodic commitment fee. *Collins*, 141 S. Ct. at 1773.

In the ensuing years, Treasury provided the Enterprises with nearly $187 billion under this arrangement to keep them afloat and U.S. housing markets functioning. SAC

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[1] The PSPAs were later amended to raise the cap to $200 billion and then to substitute an even higher cap to be calculated by a formula. SAC ¶ 29.

[2] The preferred stock certificates of designation were attached as Exhibit B to Treasury's prior motion to dismiss and are in the record at ECF No. 37-2. In addition, the preferred stock purchase agreements themselves were attached as Exhibit A to Treasury's 2017 motion to dismiss and are in the record at ECF No. 37-1. The Court considered these instruments as "embraced by the complaint" in its prior decision, and should do so again now. ECF No. 70 at 10; *see also Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 697 n.4 (8th Cir. 2003). The preferred stock instruments remain integral to the Second Amended Complaint, as they are repeatedly referenced in it and are the source of the liquidation preference rights that plaintiffs seek to negate.

¶ 31. Since those draws resulted in dollar-for-dollar increases in the liquidation preferences, Treasury's liquidation preferences in the Enterprises stood at $189 billion as of the summer of 2012. *Id.*

At that point, Treasury and FHFA as Conservator engaged in the transaction that was the focus of *Collins* and of plaintiffs' claims in the earlier phase of this case—the 2012 amendment to the PSPAs, known as the "Third Amendment." The Third Amendment changed the formula for Treasury's dividends on the senior preferred stock. SAC ¶ 34. It did not address the liquidation preferences, which as noted already stood at $189 billion as consideration for funds infused by Treasury in 2008-2012. FHFA then-Acting Director Edward DeMarco approved and signed the Third Amendment on behalf of the Conservator. *Id.* ¶ 40.

In January 2014, a new FHFA Director appointed by President Obama, Melvin L. Watt, took office to serve a five-year term expiring in January 2019. *Id.* ¶¶ 40, 42, 73.

B. Relevant FHFA and Treasury Actions During the Trump Administration

President Trump took office in January 2017 and immediately appointed his Treasury Secretary, Steven Mnuchin, as well as various other officials. SAC ¶ 46. President Trump did not remove or seek to remove FHFA Director Watt. Plaintiffs allege no criticism by President Trump of Director Watt while President Trump was in office.

The Treasury Secretary and others in the Trump Administration expressed a goal of ending the conservatorships. *E.g.*, *id.* ¶¶ 50, 64. FHFA Director Watt also repeatedly

stressed that conservatorship "should not be a permanent state." *Id.* ¶ 44; *see also id.* ¶ 45 (2016 FHFA report: "FHFA continues to believe that conservatorship is not a desirable end state"). Director Watt also believed Congress would have an important role in the complex housing policy considerations involved in charting a path out of conservatorship. *E.g.*, *id.* ¶¶ 44, 45, 62, 63, 67, 68, 72.

Under Director Watt, FHFA took steps toward preparing the Enterprises for a post-conservatorship world. In December 2017, he executed a letter amendment to the PSPAs to reduce Treasury's dividend and provide for the Enterprises to maintain capital reserves. *See Collins*, 141 S. Ct. at 1774 n.8. In July 2018, Director Watt issued the first iteration of a regulatory framework to govern the amount of capital the Enterprises would need to maintain upon exit from conservatorship. *See* Enterprise Capital Requirements, 83 Fed. Reg. 33,312 (July 17, 2018).

Plaintiffs quote from a 2021 podcast interview in which a former mid-level Trump Administration Treasury official said that in 2017 the Administration felt it needed to "wait really for Director Watt's term to end and to have our appointee" before pursuing housing reform. SAC ¶ 69 (quoting Interview with Craig Phillips, SitusAMC-On the Hill, https://bit.ly/3sl08yU, at 10:14-11:05). The quote in the complaint is truncated to omit the speaker's comment (at 10:32-10:45) that "quite honestly, I dealt with [Watt] on a regular basis. I would say his position on this issue is not terribly different than

Director Calabria's; he thought that the conservatorship should be ended. And he would have actually done almost anything we wanted to do."[3]

In late 2019, Treasury Secretary Mnuchin mentioned the possibility of eventually "rais[ing] third-party capital" from the private sector in connection with ending the conservatorships. SAC ¶ 53. Plaintiffs do not identify any mention of raising capital from the private sector by Secretary Mnuchin or any other Trump Administration official in 2017 or 2018, despite the SAC being replete with public statements and congressional testimony during that time period. Plaintiffs do not allege that Director Watt ever took a position on raising capital from the private sector or interfered with any steps by Secretary Mnuchin in that direction.

When FHFA Director Watt's term ended in January 2019, President Trump chose FHFA's new leadership—first, Acting Director Joseph Otting, who served from January 2019 through April 2019, and then Director Mark Calabria. *Id.* ¶¶ 48, 73, 74. Thus, it is undisputed that President Trump, in addition to having plenary control of the Treasury Department at all times, controlled the leadership of FHFA for the second half of his Administration.

In early 2019, President Trump directed Treasury to "develop a plan for administrative and legislative reforms" toward various goals, including "[e]nding the

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[3] If the Court considers plaintiffs' selective quotation from the podcast, it should also consider this adjacent context. *See Waters v. Madson*, 2017 WL 6403099, at *1 n.1 (D. Minn. Dec. 14, 2017) (where complaint attached "highly edited video," motion to dismiss could rely on full video), *aff'd*, 921 F.3d 725 (8th Cir. 2019); *Knievel v. ESPN*, 393 F.3d 1068, 1076-77 (9th Cir. 2005) (considering content surrounding selective cut of webpage attached to plaintiff's complaint).

conservatorships of the GSEs upon the completion of specified reforms" while "[p]roviding that the Federal Government is properly compensated for any explicit or implicit support it provides to the GSEs or the secondary housing finance market." Presidential Memorandum, Housing Finance Reform, 84 Fed. Reg. 12,479 (Apr. 1, 2019); *see* SAC ¶ 50(f). The Presidential Memorandum listed over ten specific housing policy goals. Those goals did not include any capital-raising activities or elimination of Treasury's preferred stock investment. To the contrary, the Presidential Memorandum emphasized that an essential condition for ending the conservatorships would be to ensure "the Federal Government is fully compensated" for its support. 84 Fed. Reg. at 12,480.

In September 2019, Treasury issued the report called for by the President's Memorandum. *See* U.S. Dep't of the Treas., Housing Reform Plan (Sept. 2019) (attached as Ex. A to Treasury's motion to dismiss).[4] The report outlined a number of potential legislative and administrative housing finance policy reforms. While the report referred to "recapitaliz[ing]" the GSEs "with significant first-loss capital," it also conveyed Treasury's expectation of "leaving the PSPA commitment in place after the conservatorships." *Id.* at 3; *see also id.* at 13 ("keeping each PSPA in place would have the benefit of preserving a mechanism for recouping any funds that might be extended by Treasury to a GSE in the future while ensuring taxpayers are compensated for continuing

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[4] The Court should consider the Treasury report as a document "embraced by the complaint." ECF No. 70 at 10; *see Mattes*, 323 F.3d at 697 n.4; SAC ¶¶ 50(h), 59, 60, 61.

to provide that support."). Treasury identified five specific PSPA amendments that would be "preconditions for ending the conservatorships," none of which included eliminating the liquidation preferences. *Id.* at 26.

Plaintiffs focus on a bullet on page 27 of the report referring to "[e]liminating 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 GSE" as one of a number of "[p]otential approaches to recapitalizing a GSE." *Id.* at 27; *see* SAC ¶ 59. Other approaches included "[a]djusting the variable dividends on Treasury's senior preferred shares so as to allow the GSE to retain [more] earnings," "[n]egotiating exchange offers for one or more classes of the GSE's existing junior preferred stock," and "[p]lacing the GSE in receivership, to the extent permitted by law, to facilitate a restructuring of the capital structure." Treasury Housing Reform Plan at 27. The list concludes with the admonition that "[e]ach of these options poses a host of complex financial and legal considerations that will merit careful consideration," and stipulation that "appropriate compensation to Treasury" be provided as part of reforms. *Id.* at 27-28.

FHFA and Treasury consummated one of the "[p]otential approaches" in the list: amending the PSPAs to adjust Treasury's variable dividend so the Enterprises could retain more earnings. Specifically, in September 2019 and again in January 2021, FHFA as Conservator and Treasury entered into further letter agreements to amend the PSPAs to allow the Enterprises to build-up capital. SAC ¶ 77; *see Collins*, 141 S. Ct. at 1774 n.8 (describing December 2017 and September 2019 amendments), 1774-75 (describing

January 2021 amendments).[5] These amendments built on the December 2017 amendments providing for capital reserves. *See Collins*, 141 S. Ct. at 1774 n.8; *supra* at 7. They retained the liquidation preferences and established that for the foreseeable future, dividends to Treasury would be paid "through increases in the liquidation preference." *Collins*, 141 S. Ct. at 1774. Both amendments also retained the provision for "Mandatory Pay Down of Liquidation Preferences Upon Issuance of Capital Stock," though the January 2021 amendments modified it to require that only a portion of the proceeds of a stock offering be used to pay Treasury. *See supra* at 5.

The January 2021 amendments also added a new, further precondition for issuing capital stock or exiting conservatorship: the end of all litigation "arising out of or in connection with the placement of Seller into conservatorship and/or the Third Amendment." 2021 Agreements at 3, 7.[6] And they reiterated the parties' conviction that any exit from conservatorship must "ensure a path for Treasury to resolve its investment

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[5] Copies of these amendments are attached as Exhibits 1-4 and are available in the public record at https://bit.ly/3CS5mVL (Fannie Mae 2019); https://bit.ly/3iNyIg2 (Freddie Mac 2019); https://bit.ly/3CRWcs9 (Fannie Mae 2021); and https://bit.ly/37OyT4s (Freddie Mac 2021). The Court should consider them as "embraced by the complaint." *Mattes*, 323 F.3d at 697 n.4.

[6] The Court can take judicial notice that numerous litigations relating to the Enterprise conservatorships and/or the Third Amendment have been pending at all relevant times and remain so today. *See*, *e.g.*, *In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigs.*, No. 13-MC-1288 (D.D.C.) (scheduled for trial July 2022); *Fairholme Funds, Inc. v. United States*, -- Fed. 4th ---, 2022 WL 518222, at *19-20 (Fed. Cir. Feb. 22, 2022); *Collins v. Yellen*, No. 17-30364, 2022 WL 628645 (5th Cir. Mar. 4, 2022) (remanding to district court); *Rop v. FHFA*, No. 20-2017 (6th Cir.) (appeal pending).

in the Enterprise in a manner that fairly compensates taxpayers for the support they have provided and continue to provide." *Id.* at 10.

Other than the September 2019 and January 2021 preferred stock amendments, which resulted in *increases* in the Treasury liquidation preferences, there is no allegation in the Second Amended Complaint that Treasury or FHFA followed up on any of the other "[p]otential approach[es] to recapitalizing" the Enterprises listed in the Treasury Housing Reform Plan. And there is no allegation that Treasury and FHFA ever moved toward eliminating Treasury's liquidation preferences.

In December 2020, FHFA issued a final rule adopting a regulatory framework governing the amount of capital the Enterprises must retain out of conservatorships. 85 Fed. Reg. 82,150 (Dec. 17, 2020); SAC ¶ 79. As noted, FHFA had previously promulgated a proposed rule on the same subject in 2018 under Director Watt's leadership. *See supra* at 7. The 2020 final rule credited Director Watt's proposed rule as its "foundation." 85 Fed. Reg. at 82,150.

In January 2021, President Biden took office. Plaintiffs allege that the Biden Administration's policy objectives regarding the Enterprises and conservatorships differ from those of the Trump Administration. SAC ¶¶ 88-92. FHFA Director Calabria left office in June 2021, and President Biden designated then Deputy Director Sandra Thompson as Acting Director of FHFA, as she remains today. *Id.* ¶ 92.

Plaintiffs attach to their complaint, and rely heavily on, a purported November 11, 2021 letter signed by former President Trump ten months after he left office. *Id.* ¶¶ 1, 47,

50(a), 57(a), 58, 60, 66, 89, Ex. A.[7] The letter states that President Trump would have removed Director Watt at the beginning of his Administration, but does not express any disagreement with any action by former Director Watt. The letter also states that President Trump would have "ordered FHFA to release these companies from conservatorship" and "would have also sold the government's common stock in these companies at a huge profit." SAC Ex. A. There is no allegation in the Second Amended Complaint that President Trump gave such an order at any time in his Administration, and the Government did not own common stock in the Enterprises. The letter does not mention Treasury's preferred stock or any potential action with respect to the liquidation preferences.

C. This Litigation and *Collins*

1. Initial Phase of This Case

Plaintiffs filed this suit in June 2017. Plaintiffs' original and First Amended Complaints solely targeted the 2012 Third Amendment, which, as noted, changed the formula for the dividend on Treasury's senior preferred stock. Plaintiffs brought claims based on the separation of powers, the Appointments Clause, and the nondelegation doctrine. In 2018, this Court dismissed all of plaintiffs' claims. ECF No. 70. Plaintiffs appealed.

[7] The FHFA Defendants do not concede the admissibility or veracity of this document.

2. *Collins* Decision

While plaintiffs' appeal was pending, the U.S. Supreme Court decided *Collins*, a parallel case in which other Enterprise shareholders challenged the Third Amendment and its implementation on several grounds, including the same removal-restriction theory advanced in this case. The Court held that HERA's anti-injunction provision, 12 U.S.C. § 4617(f), required dismissal of the plaintiffs' claims challenging the Third Amendment under the Administrative Procedure Act ("APA"). As to the separation-of-powers claim, the Court held that FHFA's removal provision was unconstitutional, but declined to grant the requested remedy of invalidating the Third Amendment. *Collins*, 141 S. Ct. at 1781-87. Because the Third Amendment was approved by an Acting Director to whom the removal provision did not apply, that fact alone "defeat[ed]" the request to set aside the Third Amendment in its entirety. *Id.* at 1787.

Thus, the Court "consider[ed] the shareholders' contention about remedy with respect to only the actions that confirmed Directors have taken to *implement* the third amendment during their tenures." *Id.*[8] The Court mostly rejected those contentions as well, calling the argument that the implementing actions were "void *ab initio*" "neither logical nor supported by precedent." *Id.* An unconstitutional removal provision does not undermine an official's authority, so "there is no reason to regard any of the actions taken

[8] The *Collins* plaintiffs had sought "an order enjoining the FHFA and Treasury from taking any further action to implement the third amendment," *id.* at 1775, and they argued to the Supreme Court that regardless of whether the Acting Director was covered by the removal provision, confirmed Directors who were so covered still "ordered and approved the payment of Net Worth Sweep dividends" and "directed" its legal defense. Reply Br. 13, *Collins v. Yellen*, No. 19-422 (U.S. S. Ct.).

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

The Supreme Court stopped just short, however, of shutting the door entirely on retrospective relief relating to the Third Amendment's implementation. The Court held that, while the removal limitation never deprived any FHFA official of authority to act, and was never enforceable, "[t]hat does not necessarily mean, however, that the shareholders have no entitlement to retrospective relief." *Id.* at 1788. The "possibility" of the removal provision inflicting harm by affecting Third Amendment implementation "cannot be ruled out," the Court explained. *Id.* at 1789. Such harm could occur if "the President had attempted to remove a Director but was prevented from doing so by a lower court decision holding that he did not have 'cause' for removal," or if "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 his way." *Id.* While finding the situation in this case "less clear-cut," and acknowledging countervailing arguments that the President's undisputed plenary control over Treasury gave him control of all relevant matters, the Court gave the *Collins* plaintiffs the benefit of the doubt by allowing such remaining issues to be "resolved in the first instance by the lower courts." *Id.*

A majority of the Justices doubted plaintiffs' prospects on remand. *See id.* at 1795 (Thomas, J., concurring) ("I seriously doubt that the shareholders can demonstrate that any relevant action by an FHFA Director violated the Constitution. And, absent an unlawful act, the shareholders are not entitled to a remedy."); *id.* at 1802 (Kagan, J., concurring in part, joined by two other Justices) ("the lower court proceedings may be brief indeed" because the President's undisputed plenary control over Treasury "seems sufficient to answer the question the Court kicks back").[9] Among other obstacles, Justice Thomas explained that because an unconstitutional removal restriction does not render an agency's *actions* unconstitutional, a shareholder challenge to FHFA actions would have to be brought as an APA claim, which would implicate HERA's "anti-injunction provision." *Id.* at 1794 n.7 (Thomas, J., concurring).

3. Eighth Circuit Decision, Remand, and Second Amended Complaint

After *Collins*, the Eighth Circuit affirmed the dismissal of all of plaintiffs' claims except the removal-restriction claim. *Bhatti v. FHFA*, 15 F.4th 848 (8th Cir. 2021). As to that claim, the Eighth Circuit took note of *Collins*' holdings, including that the shareholders' request to vacate the Third Amendment lacked merit and that "[t]he 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.* at 853 (quoting

[9] Justice Gorsuch, who believed the Court should have directly granted more substantial relief to the shareholders, for his part criticized the limited remand as a "speculative enterprise" expected to "go nowhere." 141 S. Ct. at 1799 (Gorsuch, J., concurring in part).

Collins, 141 S. Ct. at 1787). Ultimately, the Eighth Circuit followed *Collins*' lead: just as the Supreme Court "prescribed remand to determine whether the unconstitutional removal restriction caused compensable harm to shareholders," the Eighth Circuit remanded to this Court "to determine if the shareholders suffered 'compensable harm' and are entitled to 'retrospective relief.'" *Id.* at 854 (quoting *Collins*, 141 S. Ct. at 1789).

On remand, plaintiffs filed their Second Amended Complaint in January 2022. The new complaint abandons challenges to the 2012 Third Amendment or its implementation. Instead, it launches a new theory: that in 2017 and 2018, FHFA Director Watt, who was covered by the unconstitutional for-cause removal provision, thwarted an alleged Presidential objective of "elimination of the 'liquidation preference' on the Treasury Department's senior preferred stock in the Companies." SAC ¶ 2. Plaintiffs bring three counts under the APA and one directly under the Constitution, claiming entitlement to an injunction requiring Defendants to "restore" them "to the position they would have been in were it not for the unconstitutional removal restriction." *Id.* at Prayer for Relief ¶ 2. This relief includes, "[a]t a minimum," an injunction ordering Defendants to "reduce the liquidation preference … to zero" or "convert Treasury's senior preferred stock to common stock." *Id.*[10]

[10] As plaintiffs effectively acknowledge, SAC ¶ 2, converting the senior preferred stock to common stock would necessarily include elimination of the liquidation preferences since common stock does not have a liquidation preference. Thus, under either form of injunction, the liquidation preferences would be wiped out.

ARGUMENT

I. Multiple Threshold Legal Bars Preclude Plaintiffs' Claims

A. HERA's Anti-Injunction Provision Bars Judicial Supervision of Conservatorship Operations and Contracts

The sole relief sought in plaintiffs' Second Amended Complaint is an injunction compelling the Conservator to make radical, involuntary amendments to the PSPAs that have served as the foundations of the conservatorships for over a decade. However, in creating the legal regime for conservatorships, Congress "sharply circumscribed judicial review of any action that the FHFA takes as a conservator or receiver." *Collins*, 141 S. Ct. at 1775. Specifically, following identical language in other financial regulatory statutes, Congress legislated that "no court may take any action to restrain or affect the exercise of [the] powers or functions of the Agency as a conservator." 12 U.S.C. § 4617(f); *see Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 606 (D.C. Cir. 2017) (explaining that this provision "draws a sharp line in the sand against litigative interference—through judicial injunctions, declaratory judgments, or other equitable relief—with FHFA's statutorily permitted actions as conservator or receiver"). The anti-injunction provision bars the sole relief plaintiffs now seek and requires dismissal of all of their claims.

Section 4617(f) covers any situation "where the FHFA action at issue fell within the scope of the Agency's authority as a conservator." *Collins*, 141 S. Ct. at 1776. "[R]elief is allowed" *only* "if the FHFA exceeded that authority." *Id.*; *accord Saxton v. FHFA*, 901 F.3d 954, 957 (8th Cir. 2018).

The matters implicated by the Second Amended Complaint—the terms of the preferred stock investments that serve as the vehicles for Treasury's ongoing support of the Enterprises—are plainly within FHFA's authority as Conservator. Both the Supreme Court and the Eighth Circuit have held that the Third Amendment, which pertained to one aspect of the preferred stock, was within the Conservator's authority. *Collins*, 141 S. Ct. at 1775-78; *Saxton*, 901 F.3d at 959. It necessarily follows that determining whether to adopt a much more consequential amendment, effectively ending the entire preferred stock relationship in its current form, also would be within the Conservator's powers and functions.

Moreover, *Collins* makes clear that the existence of the unconstitutional removal restriction never detracted from FHFA's authority as Conservator. In contrast to issues caused by "a Government actor's exercise of power that the actor did not lawfully possess" in certain other separation-of-powers cases, "there is no basis for concluding that any head of the FHFA lacked the authority to carry out the functions of the office." *Collins*, 141 S. Ct. at 1788; *see also id.* at 1788 n.23 ("[s]ettled precedent" confirms "the unlawfulness of the removal provision does not strip" FHFA's Director of statutory or constitutional authority to perform the "responsibilities of his office"); *id.* at 1793 (Thomas, J., concurring) (removal-restriction issue posed "no barrier" to FHFA Directors "exercising power").

Plaintiffs are likely to take the position that § 4617(f) does not apply because they challenged the removal restriction under the Constitution. Section 4617(f) did not preclude the challenge to the removal restriction; that claim was adjudicated in *Collins*,

resulting in the restriction's invalidity. Further, § 4617(f) might not bar injunctive relief against actions "beyond, or contrary to" FHFA's "constitutionally permitted" powers or functions. *Nat'l Tr. for Historic Pres. v. FDIC*, 995 F.2d 238, 240 (D.C. Cir. 1993). Again, however, *Collins* sharply distinguishes between the removal provision and FHFA's actions: the unconstitutional removal provision never diminished FHFA's constitutional or statutory authority to act. Therefore, § 4617(f) applies with full force to the injunction directed to conservatorship operations that plaintiffs now seek.

Nor does the fact that the Supreme Court held that § 4617(f) barred the *Collins* plaintiffs' statutory claims, while remanding to allow pursuit of potential retrospective relief based on the removal provision, suggest that *plaintiffs' claims here* are outside the reach of § 4617(f). The applicability of § 4617(f) to claims seeking relief based on the removal provision was not before the Court. Even in the much narrower remand it ordered, relating to Third Amendment implementation, the Court left open all issues and defenses for resolution "in the first instance by the lower courts." 141 S. Ct. at 1789 & n.26.

Indeed, Justice Thomas specifically observed that the *Collins* plaintiffs' remedy arguments functionally amounted to APA claims, requiring consideration of "interaction … [with] the Act's anti-injunction provision." *Id.* at 1794 n.7 (Thomas, J., concurring). Here, three of the four counts in the SAC (Counts II, III, and IV) are pleaded as APA claims, and plaintiffs even cite the same footnote in which Justice Thomas highlights § 4617(f)'s applicability. SAC ¶ 110.

In short, plaintiffs cannot avoid confronting § 4617(f). The extraordinary relief they seek is an archetype of the litigative interference the statute was designed to prevent. The Court should hold that the anti-injunction statute bars the requested injunctive relief and requires dismissal.

B. Plaintiffs Do Not Meet Requirements for Failure-to-Act Claims

While § 4617(f) alone is fatal to plaintiffs' claims, they also flout more general equitable and APA limitations on *failure*-to-act claims and on judicial direction of agency policy and operations. Unlike plaintiffs' original complaint in this case challenging the Third Amendment, the SAC now solely challenges *inaction*—the Conservator's failure to overhaul Treasury's preferred stock by wiping out its value to supposedly facilitate future stock sales to others. Supreme Court jurisprudence and longstanding equitable principles, however, limit such failure-to-act claims to very narrow circumstances not present here.

Under *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), a claim to compel agency action "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Id.* at 64. The "limitation to discrete agency action" precludes using the APA to launch "the kind of broad programmatic attack" that is better left to "'the offices of the [agency] or the halls of Congress, where programmatic improvements are normally made.'" *Id.* (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990)). The limitation to action the agency is "required to take," in tandem, "rules out judicial direction of even discrete agency action that is not demanded by law." *Id.* at 65; *see Ali v. Frazier*, 575 F. Supp. 2d 1084, 1094

(D. Minn. 2008) (dismissing agency failure-to-act claim because "no statute 'demands'" the action sought to be compelled).

While *Norton* involved a suit to "compel agency action unlawfully withheld" under § 706(1) of the APA, these principles are not endemic to § 706(1) claims or even the APA more generally. Rather, "the APA carried forward the traditional practice prior to its passage, when judicial review was achieved through use of the so-called prerogative writs—principally writs of mandamus under the All Writs Act[.]" *Norton*, 542 U.S. at 63. "The mandamus remedy was normally limited to enforcement of a specific, unequivocal command," that is, "the ordering of a precise, definite act about which an official had no discretion whatever." *Id.* (cleaned up). *See also Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 613 (1838) (mandamus to compel federal action allowed only where "[t]here is no room for the exercise of any discretion, official or otherwise: all that is shut out by the direct and positive command of the law, and the act required to be done is, in every just sense, a mere ministerial act").

These limitations "protect agencies from undue judicial interference with their lawful discretion" and "avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Norton*, 542 U.S. at 66. "If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved—which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management." *Id.* at 66-67.

Plaintiffs' claims here do not pass muster under these principles. They fail the first *Norton* condition because the action that plaintiffs say the agencies should have taken—a drastic overhaul of the preferred stock to eliminate Treasury's value in favor of private shareholders—is far from ministerial and the opposite of discrete. They fail the second *Norton* condition because no constitutional or statutory provision or other source of law "demanded" that FHFA or Treasury take such actions. On the contrary, throughout the first year of the Trump Administration it was illegal to "sell, transfer, relinquish, liquidate, divest, or otherwise dispose" of any part of Treasury's preferred stock interests absent authorizing legislation. Pub. L. No. 114-113, § 702(b), 129 Stat. 2242, 3025 (2015); *see also id.* § 702(c) (expressing "sense of Congress" that agencies should refrain from such actions even after 2018 sunset).

Plaintiffs may take the position that the *Norton* analysis applies only to Count IV, which is expressly denominated as an APA § 706(1) claim to compel "agency action unlawfully withheld." However, plaintiffs cannot so compartmentalize the analysis. As discussed, the Court was clear in *Norton* that these limitations are not specific to any particular subsection of the APA but rather stem from deeply rooted equitable principles. *See supra* at 22. Further, all four counts of the Second Amended Complaint seek to compel agency action not taken, repeating *in haec verba* the same core substantive allegations—relating not to actions FHFA actually took, but to actions plaintiffs contend "would have occurred" and should have occurred under different leadership. SAC ¶¶ 97, 103, 109, 118. While Counts II and III trail off with inconsistent boilerplate about seeking "an order setting aside the agency action maintaining Treasury's liquidation

preference," SAC ¶¶ 104, 112, no antecedent is given for "*the agency action*" and it goes against everything else alleged in the complaint. If not functionally treated as failure-to-act claims, these counts would be defective for lack of an adequately pleaded final agency action. *See Sierra Club v. U.S. Army Corps of Eng.*, 446 F.3d 808, 813 (8th Cir. 2006) (final agency action must (1) "mark the consummation of the agency's decisionmaking process" and (2) constitute action "by which rights or obligations have been determined, or from which legal consequences will flow"). "Plaintiffs have the burden of identifying specific federal conduct and explaining how it is 'final agency action' within the meaning of section 551(13)." *Colo. Farm Bureau Fed'n v. U.S. Forest Serv.*, 220 F.3d 1171, 1173 (10th Cir. 2000).[11]

Similarly, while Count I does not expressly invoke the APA, that does not overcome the equitable remedial principles in *Norton* either. On the contrary, the authority cited as the basis for Count I, *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), rejected requests for "broad injunctive relief" and confined the remedy to severing the unconstitutional removal provision to conform the agency to constitutional

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[11] Count II, alleging agency action "contrary to constitutional right, power, privilege, or immunity" under § 706(2)(B), also fails because, under *Collins*, the unconstitutionality of the removal restriction did not make FHFA actions themselves unconstitutional. *See supra* at 19. Count III, alleging agency action "without observance of procedure required by law" under § 706(2)(D), also fails because the existence of an unconstitutional removal restriction does not mean FHFA failed to observe any procedure required for agency action. *See Collins*, 141 S. Ct. at 1787-88; *cf. Children's Health Care v. CMS*, 900 F.3d 1022, 1025 (8th Cir. 2018) (failure to provide notice and comment opportunity in rulemaking cognizable under § 706(2)(D)); *Smalley v. Comm'r of Soc. Sec.*, 2021 WL 4026783, at *4 (6th Cir. Sept. 3, 2021) (failure to adhere to agency's own procedural rules cognizable under § 706(2)(D)).

requirements. *See* 561 U.S. at 508-10, 513. Plaintiffs argued earlier in this litigation that because "vacatur was not needed" in *Free Enterprise Fund*, it was altogether irrelevant to remedies in this case. ECF No. 43, at 22-23; *accord* Brief of Patrick J. Collins, et al., *Collins v. Mnuchin*, No. 19-422 (U.S. S. Ct.), at 65. *Free Enterprise Fund* does not support any remedy beyond that which the Supreme Court already granted in *Collins*—striking the removal restriction so as to recognize the full extent of the President's removal authority going forward.

The limitations embodied in *Norton* dovetail with how remedies have been handled in other key separation-of-powers cases. While courts have sometimes been called upon to invalidate discrete past actions directed to particular parties, typically adjudicatory outcomes, *see*, *e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *NLRB v. Noel Canning*, 573 U.S. 513 (2014), or investigative demands, *e.g.*, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), no case suggests that an agency could be compelled to take new actions or shift policy in a way that the court finds might have occurred absent the constitutional issue. Nearly two years after *Seila Law*, for example, there has been no effort to conform CFPB enforcement policies to those the CFPB allegedly would have instituted if the CFPB director had always been removable at will.

Nor do the Supreme Court's narrowly tailored remand instructions in *Collins* depart from *Norton*. There was no failure-to-act claim in *Collins*; the Court considered remedy "with respect to only the actions that confirmed Directors have taken to *implement* the third amendment during their tenures," *i.e.*, affirmative actions. 141 S. Ct. at 1787. Therefore, the Court's comments cannot be understood as sanctioning some

new, open-ended cause of action to compel implementation of policies not pursued. *See* 141 S. Ct. at 1794 (Thomas, J., concurring) (emphasizing that "our watchword should be caution" when asked to create or expand private rights of action with separation-of-powers implications). "[A]bsent an unlawful *act*, the shareholders are not entitled to a remedy." *Id.* at 1795 (emphasis added).

II. Plaintiffs Fail to State a Claim Because Their Allegations are Implausible and Speculative

Even if the legal bars discussed above were not fatal to plaintiffs' claims, the Second Amended Complaint would still fail to plausibly plead a claim because it is speculative, attenuated, and lacks any well-pleaded factual foundation.

To pass muster under Rule 12(b)(6), plaintiffs' allegations must "be enough to raise a right to relief above the speculative level" and to "state a claim to relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007), rather than a "mere possibility," *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Determining whether a complaint states a plausible claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* Plaintiff is entitled only to "reasonable inferences," defined as those "which may be drawn from the evidence *without resort to speculation.*" *Potocnik v. City of Minneapolis*, 2014 WL 4829454, at *2 (D. Minn. Sept. 29, 2014) (quotation marks omitted), *aff'd sub nom. Tichich v. City of Bloomington*, 835 F.3d 856 (8th Cir. 2016). By contrast, the Court "need not make unreasonable inferences or accept unrealistic assertions." *M-I Drilling Fluids UK Ltd. v. Dynamic Air Inc.*, 99 F. Supp. 3d 969, 973 (D. Minn. 2015) (citing

Brown v. Medtronic, Inc., 628 F.3d 451, 461 (8th Cir. 2010)). As shown below, unreasonable inferences and unrealistic assertions are all that plaintiffs have to offer here.

A. The Premise That the Trump Administration Wished to Renounce the Liquidation Preferences is Unreasonable and Unrealistic

Plaintiffs' theory defies basic economics. Holders of multi-billion dollar investments do not renounce their "key entitlements" associated with those investments, *Collins*, 141 S. Ct. at 1773, so that others can profit instead. Even less when (1) the investor is the Government; (2) the investment represents accrued compensation for infusions of taxpayer funds by the Government into financial institutions; and (3) the investor's decision-makers are accountable to the taxpayers.

Not surprisingly, the complaint is devoid of any allegation that the Trump Administration pursued a reduction of Treasury's liquidation preferences at any time, let alone during Director Watt's 2017-2018 tenure. Out of the many sources plaintiffs quote in their lengthy complaint, the sole mention of reduction or conversion is a fragment of a bullet in Treasury's September 2019 Housing Reform Plan. Even there, as further described below, it is included merely as a *possible* component of a complex recapitalization, with many alternative options, subject to many contingencies, and requiring significant further study.

B. Plaintiffs Offer No Plausible Explanation of How Director Watt Thwarted Any Administration Plans for Disposition of the Liquidation Preferences

Assuming, against all logic, that the Trump Administration and Treasury wished to give up the liquidation preferences, plaintiffs do not and cannot coherently explain

how Director Watt's for-cause removal protection stood in the way. Treasury—not FHFA or Director Watt—was in charge of its investment, and the Treasury Secretary was always removable at will. Plaintiffs cannot blame the removal restriction for matters over which "the President had oversight" all along through his plenary control over Treasury. *See Collins*, 141 S. Ct. at 1802 (Kagan, J., concurring); *accord Fairholme Funds, Inc. v. United States*, -- Fed. 4th ---, 2022 WL 518222, at *19-20 (Fed. Cir. Feb. 22, 2022) (holding post-*Collins* that the "extremely limited" potential for cognizable harm to shareholders from the FHFA removal restriction was negated by the consistency of relevant policies across Administrations as well as the necessary participation of the Treasury Secretary in all relevant matters).

Plaintiffs rely heavily on the purported November 2021 letter from former President Trump claiming that he would have removed Director Watt. But the salient issue is not whether, in a vacuum, Director Watt would have been removed, but whether the former President's ability to have his policies carried out was impeded. There is no allegation that President Trump ever asked Director Watt to take any relevant action, let alone that Director Watt refused. In any event, the President's undisputed control of the United States' investment through the Treasury Secretary breaks any possible causal link between the FHFA removal restriction and the disposition of that investment that plaintiffs contend should have been made.

Even aside from the former President's independent control through the Treasury Secretary, the notion that Director Watt stood in the way of any presidential goals is makeweight. Several of the "steps" that plaintiffs claim "President Trump's own

appointee … relentlessly pursued … to achieve the President's objectives" (SAC ¶ 2)—a regulatory capital rule, and PSPA amendments to cut Treasury's cash dividends and allow the Enterprises to build capital—are similar in kind to precursor steps FHFA had taken under Director Watt. *See supra* at 7. One of the primary sources cited in the complaint states that Director Watt "would have actually done almost anything [the Administration] wanted to do." *Supra* at 7-8.

C. Exiting Conservatorship and Raising Capital Did Not Depend on Preemptively Wiping Out the Liquidation Preferences

Plaintiffs emphasize the Trump Administration's interest in getting the Enterprises out of conservatorship and preparing for potential public stock offerings, and portray those objectives as necessarily requiring the self-interested result they desired: writing Treasury's preferred stock down to zero. However, that is a fallacy belied by plaintiffs' own principal sources cited in the complaint.

Both exiting conservatorship and new stock offerings not only *could* coexist, but according to plaintiffs' own sources were *expected* to coexist, with Treasury's preferred stock and liquidation preferences. Treasury's Housing Reform Plan stressed the importance of "leaving the PSPA commitment in place after the conservatorships," Treasury Housing Reform Plan at 3 (Ex. A to Treasury's motion), and the preferred stock certificates required that the proceeds of any new stock offering be used, at least in part, to *redeem* Treasury's preferred stock, Certificates of Designation ¶ 4 (ECF No. 37-2). That requirement cannot be squared with plaintiffs' thesis that a new stock offering would be impossible without having written off the liquidation preferences in advance.

Indeed, the Treasury document identifies changing the liquidation preferences as just one item in a menu of "[p]otential approaches to recapitalizing a GSE," among others such as receivership or negotiated exchange offers. Treasury Housing Reform Plan at 27. Plaintiffs' assertion that "[n]one of the public statements … suggest they were even considering taking the Companies into receivership" (SAC ¶ 60) should be given no weight in light of the inclusion of receivership in this public document side by side with the option plaintiffs prefer. In all events, if the prior Administration was already set in January 2017 on zeroing out or converting its preferred stock, as plaintiffs' theory necessarily presupposes, it would make no sense for Treasury to list this much broader array of diverse options in its Housing Reform Plan nearly three years later. As plaintiffs are forced to concede, moreover, to the extent some modification of the liquidation preferences might ultimately be selected over the many alternatives, the Report contemplates only "a portion of" the liquidation preferences might be reduced, or only "a portion of" the senior preferred stock might be converted. *Compare* SAC ¶ 59 (correctly quoting "or a portion of" language), *with* SAC Prayer for Relief ¶ 2 (solely seeking injunction reducing liquidation preferences "to zero").

Plaintiffs' depiction of four steps taken in 2019-2020 supposedly pointing toward writing off Treasury's liquidation preferences, *id.* ¶¶ 75-80, ignores that all four actions are equally compatible with other policy goals. As already discussed, the first and second steps (modifying the net worth dividend to allow the Enterprises to retain more earnings to build capital, *id.* ¶¶ 76-78), and the third step (a regulatory capital framework, *id.* ¶ 79), follow in the footsteps of similar actions Director Watt had instituted in 2017 and

2018, the period when plaintiffs contend he "stymied" (*id.* at p. 25) the administration's policy goals. The fourth step, retention of investment bankers, *id.* ¶ 80, is one that would be appropriate for any form of corporate restructuring, not uniquely associated with one in which Treasury's interest would be cancelled in advance.

D. Plaintiffs' Theory Cannot be Squared with Real-World Events After Former President Trump's Chosen Director Led FHFA

Most importantly, plaintiffs' narrative collides with the stark reality of what happened in the real world after the former President replaced Director Watt in January 2019. While FHFA continued laying the groundwork for eventual exits from conservatorship and explored potential recapitalization of the Enterprises, nothing FHFA and Treasury did in the ensuing two years is consistent with an agenda of writing off the liquidation preferences. Rather, in their two subsequent amendments to the stock agreements, one in September 2019 and the other in January 2021, the parties not only retained the liquidation preferences as a critical component of Treasury's consideration, but also established that for the foreseeable future, dividends to Treasury would be paid "through *increases* in the liquidation preference." *Collins*, 141 S. Ct. at 1774 (emphasis added); *see also id.* at 1774 nn. 8, 10.

Both amendments also continued to require that any future stock offering proceeds be used to pay down Treasury's liquidation preferences. The January 2021 amendments, which modified that provision to make it apply only to proceeds exceeding $70 billion but left it otherwise operative, can only be seen as a deliberate reaffirmation of the concept. They also added a significant new contingency standing in the way of the

outcome plaintiffs hypothesize—the end of all litigation relating to the conservatorships and/or Third Amendment—and restated the imperative to "compensate taxpayers for the support they have provided and continue to provide." *See supra* at 11-12.

The shareholder plaintiffs considered these amendments, by far the clearest reflection of the former Administration's actual position, as devastating to their interests, denouncing them as "only further entrench[ing] Treasury's status as the sole shareholder that can ever receive a return on its investment." Letter in Response of Patrick J. Collins, et al., *Collins v. Yellen*, No. 19-422 (U.S. S. Ct. Mar. 31, 2021).

In sum, the policies of the Trump Administration as reflected by the specific actions taken in the real world by former "President Trump's own appointee[s]" (SAC ¶ 2) —as opposed to self-serving speculation, or general statements in a purported *post hoc* letter by the former President—embody the following:

- Increases in the liquidation preferences from $199 billion when Director Watt stepped down to over $260 billion today;
- Additional contingencies blocking the path to the public offerings that are an integral link in plaintiffs' narrative;
- Reaffirmation that if there are public offerings, the proceeds will be used in part to pay down the liquidation preferences; and
- Unwavering commitment to realizing full value for Treasury's investments.

All of this is the opposite of what one would expect to happen under plenary Trump Administration control in 2019-2020 if, as plaintiffs' speculative theory presupposes, the former Administration's agenda was to unilaterally relinquish the liquidation preferences. While the Court takes well-pleaded allegations as true on a

motion to dismiss, the Court need not and should not indulge a narrative that is so rife with flaws, contradictions, unwarranted inferences, and speculation as to be beyond outer limits of plausibility.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Second Amended Complaint with prejudice.

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Respectfully submitted,

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