UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

ATIF F. BHATTI, *et al.*,

Plaintiffs,

v.

FEDERAL HOUSING FINANCE AGENCY, *et al.*,

Defendants.

Case No. 0:17-cv-02185 (PJS/HB)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

Scott G. Knudson
Taft, Stettinius & Hollister LLP
2200 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
(612) 977-8400

David H. Thompson
Charles J. Cooper
Peter A. Patterson
Brian W. Barnes
Cooper & Kirk, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600

Attorneys for Plaintiffs

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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. During the first two years of the Trump administration, the FHFA's director implemented actions to continue this nationalization while subject to a statutory removal restriction that the Supreme Court declared unconstitutional in *Collins v. Yellen*, 141 S. Ct. 1761 (2021). The only remaining question, the Supreme Court held, is whether the Companies' shareholders suffered compensable harm and are entitled to retrospective relief. Specifically, the Court said that a public statement from the President explaining that he disapproved of the FHFA director's actions and that he would have removed him from office would "clearly" show that the shareholders were harmed by the removal restriction and were entitled to a remedy.

Former President Trump has said precisely that. In direct response to the *Collins* decision, the former President unequivocally stated that, were it not for the removal restriction, he would have removed the FHFA Director. He also explained that, if his Administration had controlled FHFA as the Constitution required, he would have released the companies from conservatorship, fully privatized them, and ensured that their common stock increased in value.

His statement is supported by the actions of his administration when it finally gained control of FHFA. But the two-year delay caused by the removal restriction prevented the administration from returning value to the shareholders. Under *Collins*, Plaintiffs are entitled to an injunction placing them in the position they would be in absent the unconstitutional removal restriction.

Defendants' arguments to the contrary primarily attempt to relitigate issues conclusively resolved by the Supreme Court and the Eighth Circuit's remand. For example, Defendants suggest Plaintiffs lack standing. But the Eighth Circuit already held that they do. Defendants argue that Plaintiffs do not challenge agency action. But the Supreme Court and the Eighth Circuit held that Plaintiffs are challenging FHFA's actions to implement the nationalization of Fannie Mae and Freddie Mac. Defendants argue that Plaintiffs' requested relief is barred either by statute or equitable principles. But the Supreme Court and Eighth Circuit have already held that Plaintiffs would be entitled to retrospective relief if the removal restriction caused harm. And the Supreme Court has held repeatedly that remedies for constitutional violations should place plaintiffs in the position they would be in absent the violation. Finally, Defendants resort to doubting the facts alleged in the complaint and asking the Court to draw inferences in their favor. But those arguments are contrary to the standard for dismissal. The Court should deny their motions.

BACKGROUND

A. FHFA Forces the Companies into Conservatorship, Signs the PSPAs, and Implements the Net Worth Sweep While Its Directors Are Insulated from Removal.

In 2008, Congress enacted the Housing and Economic Recovery Act (HERA), which created FHFA as the new regulator of Fannie Mae and Freddie Mac, two privately owned companies that sell mortgage-backed securities. Second Am. Compl., Doc. 87, ¶¶ 12-14, 17 (Jan. 26, 2022) ("Compl."). Under HERA, FHFA was led by a single director who could be removed only for cause. Compl. ¶ 17. HERA also gave FHFA the authority

to take the Companies into conservatorship, which the agency did in September 2008. Compl. ¶¶ 18, 20.

At the same time, FHFA entered into two agreements with the Treasury Department on behalf of the Companies as their conservator. Compl. ¶¶ 20-21. These agreements—known as the Preferred Share Purchase Agreements or "PSPAs"—established an arrangement where Treasury agreed to provide the Companies with funding to permit them to maintain a positive net worth each quarter. *Id.*

In return, Treasury received several forms of consideration. First, it received senior preferred stock that carried an initial "liquidation preference." Compl. ¶¶ 24-25. A shareholder with a "liquidation preference" has the right to receive funds before any other shareholder in the event the company is ever liquidated. Compl. ¶ 25. Treasury's initial liquidation preference was $1 billion. *Id.* The liquidation preference increased by one dollar for every dollar the Companies drew on Treasury's funding commitment. *Id.* In addition, because Treasury's shares were "senior preferred stock"—as opposed to "junior preferred" or "common" stock—Treasury was entitled to quarterly dividends before all other shareholders. Compl. ¶¶ 26-27. Second, FHFA agreed that the Companies would issue warrants entitling Treasury to buy 79.9% of their common stock at a nominal price. Compl. ¶ 22. Finally, the PSPAs provided for the Companies to pay Treasury a quarterly market-based periodic commitment fee, but that fee was never charged and had to be mutually agreed upon. Compl. ¶ 28.

In August 2012, FHFA and Treasury entered into the "third amendment" to the PSPAs. Compl. ¶ 34. Among other things, this amendment imposed what is known as the

"Net Worth Sweep," which replaced the PSPAs' prior dividend structure. *Id.* Rather than a dividend paid as a percentage of the liquidation preference, the Companies would now pay Treasury their entire net worth every quarter, leaving only a small capital buffer. *Id.* This new structure resulted in massive payments to Treasury, totaling $300 billion—approximately $109 billion *more* than the Companies received from Treasury. Compl. ¶ 39.

B. The Removal Restriction Prevents President Trump from Removing President Obama's FHFA Director, Who Obstructs the Trump Administration's Housing Finance Reform Plans.

In 2013, the Senate confirmed President Obama's nominee to lead FHFA, Democratic congressman Mel Watt. Compl. ¶ 40-42. Two years later, Donald Trump was elected President. Compl. ¶ 46. Were it not for the removal restriction, President Trump would have removed Director Watt and installed his own director on "day one" of his administration. Compl. ¶ 47.

The Trump administration had the intention of leading the Companies out of conservatorship and returning them to private control by selling off Treasury's stake at a large profit. Compl. ¶ 49. These goals were to be accomplished primarily by recapitalizing the Companies through a public sale of common stock. Compl. ¶ 53.

For the Companies' common stock to trade successfully, however, two things had to occur. First, the Net Worth Sweep had to be eliminated so that the Companies could retain profits because no private investors would purchase stock in a company that has its net worth shipped to the government every quarter. Compl. ¶¶ 36, 76. Second, and relatedly, Treasury's liquidation preference had to be eliminated because no private

investors would purchase stock if Treasury's massive liquidation preference entitled it to billions of dollars before other shareholders. Compl. ¶¶ 56, 59, 97. The Trump administration planned to eliminate the liquidation preference by either writing it down to zero or converting its senior preferred shares (which carried the liquidation preference) to common stock. Compl. ¶¶ 56, 59, 97. Either approach would allow Treasury to sell its stake in the Companies for a large profit as part of the recapitalization. Compl. ¶¶ 56, 59, 97.

The administration's steps to increase the value of Treasury's common stock would necessarily increase the value of Plaintiffs' stock. They own shares of the Companies' common stock and junior preferred stock. Compl. ¶¶ 5-7. With the end of the Net Worth Sweep and the elimination of Treasury's liquidation preference, Plaintiffs would again have the opportunity to receive either dividend payments or payments in liquidation. *See* Compl. ¶¶ 15, 27, 36. Indeed, for any common shares held by Treasury to have significant value (whether from exercising Treasury's warrants, converting the senior preferred stock to common, or both), Plaintiffs' junior preferred shares necessarily would have to have full value. Plaintiffs would have thus directly benefited from the Trump administration's plan.

That plan required multiple, and often sequential, steps that Treasury and FHFA had to mutually agree upon. Compl. ¶¶ 75, 82-83. When President Trump took office, however, Director Watt still had two years left on his statutory term and was subject to HERA's removal protection. Compl. ¶¶ 47-48. The Trump administration and Director Watt disagreed on at least two critical issues. First, they disagreed about implementing the Net Worth Sweep. Compl. ¶¶ 65-66. Second, they disagreed about whether the executive branch should lead the Companies out of conservatorship without congressional action.

Compl. ¶¶ 62-64. Director Watt thought that any effort to release the Companies from conservatorship should only occur after the enactment of further legislation; the Trump administration thought it both lawful and desirable for the executive branch to act alone. Compl. ¶¶ 62-64, 68, 72. Indeed, President Trump's eventual pick to lead FHFA repeatedly said that HERA *legally obligated* him to take the Companies out of conservatorship. Compl. ¶ 64.

These fundamental disagreements prevented the Trump administration from pursuing its goals for the Companies during the first two years of the administration. Compl. ¶¶ 69-70. As a result, the administration was denied the time to complete the multistep process required to raise capital. Compl. ¶¶ 84, 89. Although it completed four of the five necessary steps, the delay caused by Director Watt's tenure prevented the administration from accomplishing the final step of eliminating Treasury's liquidation preference. Compl. ¶¶ 84-86.

C. The Supreme Court Declares the Removal Restriction Unlawful, and the Eighth Circuit Remands for This Court to Determine the Remedy.

Plaintiffs here are shareholders of Fannie Mae and Freddie Mac who sued, arguing (among other things) that the FHFA director's for-cause removal restriction was unconstitutional. The Court dismissed their complaint. Order, Doc. 70 (July 6, 2018). While this case was pending on appeal, the Supreme Court decided *Collins* and held that the for-cause removal restriction was unconstitutional. 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. Pursuant to *Collins*, the Eighth Circuit remanded this case for this Court to make the same determination. *Bhatti v. FHFA*, 15 F.4th 848 (8th Cir. 2021).

LEGAL STANDARD

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). The Court must "accept the well-pled allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor." *Meardon v. Register*, 994 F.3d 927, 934 (8th Cir. 2021).

ARGUMENT

I. Plaintiffs' Complaint Follows Directly from *Collins* and the Eighth Circuit's Remand.

Plaintiffs own the same types of shares in the Companies, raise the same constitutional claim, and challenge the same agency action as the plaintiffs in *Collins*. *See Bhatti*, 15 F.4th at 852. After *Collins*, there are only two issues left to be decided by this Court with respect to the removal claim: (1) whether the unconstitutional removal restriction harmed Plaintiffs; and (2) what remedy is appropriate to redress any injuries Plaintiffs sustained. *Id.* at 854 (remanding "to the district court to determine if the shareholders suffered 'compensable harm' and are entitled to 'retrospective relief'").

Collins held that the FHFA director's for-cause removal restriction violated the Constitution. 141 S. Ct. at 1783-84. Although the unconstitutional provision did not require

automatically setting aside actions taken to implement the third amendment, the Court held that "it is still possible for an unconstitutional provision to inflict compensable harm." *Id.* at 1787-89. "And 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.* Specifically, the Court described two examples where "the statutory provision would clearly cause harm." *Id.* First, it provided the example of a President attempting to remove a director only to be stopped by a court's application of the removal restriction. *Id.* Second, it provided the example of a President making "a public statement expressing displeasure with actions taken by a Director" and asserting "that he would remove the Director if the statute did not stand in the way." *Id.*

With this guidance, the Court remanded the shareholders' removal claim to determine whether "the unconstitutional removal provision inflicted harm." *Id.* at 1789. It acknowledged that the shareholders argued that, "[w]ere it not for" the "unconstitutional removal restriction," the President "might have replaced one of the confirmed Directors who supervised the implementation of the third amendment, or a confirmed Director might have altered his behavior in a way that would have benefited the shareholders." *Id.* But the Court determined that this argument should be resolved in the first instance by the lower courts. The Eighth Circuit, in turn, determined that this argument should be resolved by this Court in the first instance. *Bhatti*, 15 F.4th at 852.

Here, Plaintiffs allege the precise facts *Collins* held would show that the unconstitutional removal restriction caused harm. "But for the statutory removal restriction, President Trump would have fired Director Watt in January 2017 and

nominated someone else to serve as FHFA Director." Compl. ¶ 47. "Former President Trump confirmed this in a November 2021 letter to Senator Rand Paul, stating that he would have fired Director Watt on 'day one of [his] Administration' if the law had allowed him to do so." *Id.*

Plaintiffs also allege facts showing the position they would have been in were it not for the unconstitutional removal restriction. The Trump administration sought to end the Companies' conservatorships by recapitalizing them in part through the sale of new shares of common stock to private investors. Compl. ¶ 53. To attract private investors, however, the government had "to eliminate the liquidation preference on Treasury's senior preferred stock" because "investors would not purchase a new issuance of common stock in the Companies so long as the liquidation preference remained." Compl. ¶ 55. In addition, "the Trump administration intended to end government ownership of the Companies by having Treasury exercise its common stock warrants and sell the resulting 79.9% stake in the Companies' common stock to private investors." Compl. ¶ 58. But "Director Watt prevented the Trump administration from accomplishing its goals." Compl. ¶ 71.

If "President Trump had fired Director Watt and installed his own FHFA director in January 2017, the administration would have been able to start pursuing its policy objectives for Fannie and Freddie two years sooner." Compl. ¶ 86. As a result, "the Companies would have raised capital by selling new shares of common stock in 2019." *Id.* And before doing so, "FHFA and Treasury would have taken the actions necessary from a business perspective to remove the liquidation preference on Treasury's senior preferred

stock because the liquidation preference impeded the Companies' ability to sell new stock and Treasury's ability to monetize its warrants in subsequent stock offerings." *Id.*

Thus, the facts alleged in Plaintiffs' complaint answer both questions remanded by *Collins* and the Eighth Circuit. First, the unconstitutional removal restriction inflicted harm because it made a real-world difference in who was leading the agency for the first two years of the Trump administration. Second, the complaint demonstrates the position Plaintiffs would be in were it not for the constitutional violation. Under *Collins*, these facts entitle Plaintiffs to retrospective relief.

II. Defendants Attempt to Relitigate Issues Decided by *Collins* and the Eighth Circuit.

A. The Eighth Circuit already held that Plaintiffs have standing.

To establish Article III standing, Plaintiffs must show that they have suffered an "injury in fact" that is "fairly traceable" to Defendants' conduct and would likely be "redressed by a favorable decision." *Bhatti*, 15 F.4th at 852 (internal quotation marks omitted). The Eighth Circuit already held that Plaintiffs have standing. *See id.* As the Court of Appeals recognized, *Collins* held that identically situated shareholders had standing to bring the same constitutional claim challenging the same agency action: "Since the parties here are similar and allege the same harms, *Collins* controls." *Id.*

Despite the Eighth Circuit's holding, Treasury nevertheless contends that Plaintiffs lack standing, arguing that no agency action "caused them any concrete harm." Mem. In Supp. of the Treas. Defs.' Mot. to Dismiss Pls.' Second Am. Compl., Doc. 93 at13-14 (Mar. 11, 2022) ("Treas. Br."). But that argument is foreclosed by the Eighth Circuit's decision that "the parties here are similar and allege the same harms." *Bhatti*, 15 F.4th at

852. Like the plaintiffs in *Collins*, Plaintiffs contend that "FHFA transferred the value of their property rights in Fannie Mae and Freddie Mac to Treasury, and that sort of pocketbook injury is the prototypical form of injury in fact." *Collins*, 141 S. Ct. at 1779; *see* Compl. ¶ 36 ("The Net Worth Sweep stripped the Companies' junior preferred and common stock of all economic value."). And as the Eighth Circuit recognized, like the plaintiffs in *Collins*, Plaintiffs' "injury is traceable to the FHFA's adoption and implementation of the third amendment, which is responsible for the variable dividend formula that swept the companies' net worth to Treasury and left nothing for their private shareholders." *Collins*, 141 S. Ct. at 1779; *see also* Compl. ¶¶ 56, 76, 81, 86. In addition, each dollar added to the liquidation preference harmed Plaintiffs by lengthening the road back to positive value for their shares. *See* Compl. ¶¶ 36, 55, 58. Under the Eighth Circuit's decision in this case, Plaintiffs have standing.

B. As the Eighth Circuit held, Plaintiffs challenge the same agency action at issue in *Collins*.

Plaintiffs are identically situated to the shareholders in *Collins*: They own the same types of shares, brought the same constitutional claim, and challenge the same agency action. As *Collins* made clear, because "the removal restriction violates the Constitution," all that is left to be determined is "the shareholders' request for relief." *Collins*, 141 S. Ct. at 1787.

Despite the resolution of everything except "the only remaining remedial question concern[ing] retrospective relief," *id.*, Defendants contend that Plaintiffs somehow do not even challenge agency action in the first place. That contention is foreclosed by both

Collins and the Eighth Circuit's decision. *Collins* held that the challengers could seek retrospective relief for "the actions that confirmed Directors" (as distinct from *acting* directors who were not subject to the removal restriction) "have taken to *implement* the third amendment." *Id.* "The harm," the Supreme Court explained, "is alleged to have continued after the Acting Director was replaced by a succession of confirmed Directors, and it appears that any one of those officers could have renegotiated the companies' dividend formula with Treasury." *Id.* at 1781. "Accordingly, continuing to implement the third amendment was a decision that each confirmed Director has made since 2012." *Id.* It was this "subset of actions" for which the challengers could seek "retrospective relief." *Id.* at 1787.

Here, the Eighth Circuit already recognized that Plaintiffs challenge the same agency action as the plaintiffs in *Collins*. *See Bhatti*, 15 F.4th at 853-54. "The only question" remaining, the Court of Appeals explained, "is about remedy with respect to only the actions that confirmed Directors have taken to *implement* the third amendment during their tenures." *Id.* (internal quotation marks omitted). Thus, the Court of Appeals remanded to this Court "to determine if the shareholders suffered 'compensable harm' and are entitled to 'retrospective relief.'" *Id.* at 854.

Both decisions thus explain that Plaintiffs may seek a remedy for "'actions that confirmed Directors have taken to *implement* the third amendment.'" *Id.* at 853-54 (quoting *Collins*, 141 S. Ct. at 1787). Here, Plaintiffs do precisely that, alleging that the "third amendment imposed the Net Worth Sweep, under which the Companies were required to pay Treasury a quarterly dividend starting in 2013 and continuing forever that is equal to

their entire net worth." Compl. ¶ 34. "The Net Worth Sweep stripped the Companies' junior preferred and common stock of all economic value" by "guaranteeing that any profits the Companies generate for equity investors will ultimately go to Treasury, either in the form of dividend payments or payments in liquidation." *Id.* ¶ 36. And specifically, Plaintiffs challenge the actions taken by Director Watt "to implement the third amendment" while "the unconstitutional removal restriction inflicted harm." *See Collins*, 141 S. Ct. at 1788-89; *see also* Compl. ¶¶ 65-66, 76.

As the former President's statement makes clear, the unconstitutional provision inflicted harm from "day one of [his] administration." Compl. ¶ 47. During that time, FHFA continued to implement the PSPA provisions that deprived Plaintiffs of their shares' economic value —including the provisions entitling Treasury to senior preferred stock, implementing the third amendment's Net Worth Sweep, and providing for Treasury's liquidation preference. Compl. ¶¶ 1, 66, 76. Thus, Plaintiffs challenge the precise actions that *Collins* and the Eighth Circuit held could be challenged for retrospective relief.

Defendants say they do not know what agency action is at issue here. *See* Treas. Br. 13. This contention makes little sense after *Collins* and the Eighth Circuit's decision in this case. Defendants simply assert that Plaintiffs "abandon[]" their challenge to the "implementation" of the third amendment. Mem. of Law in Supp. of FHFA Defs.' Mot. of Dismiss Second Am. Compl., at 17 (Mar. 14, 2022) ("FHFA Br."). But as explained, the actions Director Watt took to implement the third amendment while the unconstitutional removal restriction inflicted harm—*i.e.*, his implementation of the PSPA provisions that

the Trump administration wanted to eliminate (*e.g.*, continuing to sweep the profits of the companies to the Treasury)—are precisely what Plaintiffs challenge.

This transfer of value from the Companies' shareholders to Treasury through both quarterly dividends and increases in the liquidation preference are each "conduct" and "action" that repeatedly harmed Plaintiffs each time they occurred. *See Collins*, 141 S. Ct. at 1789. Those actions easily fall within the APA's definition of agency "action," "which is meant to cover comprehensively every manner in which an agency may exercise its power." *Whitman v. Am. Trucking Assoc.*, 531 U.S. 457, 478 (2001). Likewise, Defendants' failure to return that ill-gotten value to the shareholders is not only "unlawful conduct" that harmed Plaintiffs under Article III, but also agency action under the APA, which defines the term "agency action" to include an agency's "failure to act," 5 U.S.C. § 551(13). And even apart from the APA, Defendants' actions and omissions are "unlawful conduct" that has harmed Plaintiffs within the meaning of Article III, 141 S. Ct. at 1789, thus providing basis for suit under the equitable power of the Court invoked in Count I.

Defendants primarily take issue with the fact that some of Plaintiffs' requested relief is phrased in mandatory rather than prohibitive terms, and they argue that, because of this phrasing, Plaintiffs solely challenge agency *inaction*. *See* FHFA Br. 21. But the phrasing of Plaintiffs' requested *remedy* does not alter the particular agency *action* they challenge: the implementation of the PSPA provisions that swept the Companies' dividends to Treasury and increased Treasury's liquidation preference while the Trump administration was in office. For example, a court might enter an order "setting aside" an agency action or, alternatively, a substantively identical order "directing the elimination of" the same

agency action. That one order is phrased in affirmative language and the other negative does not change the fact that both apply to agency *action*. Indeed, Plaintiffs' complaint uses that same language, requesting "an order *setting aside* the agency action maintaining Treasury's liquidation preference," Compl. ¶¶ 104, 112—*i.e.*, the PSPA provisions granting Treasury a liquidation preference—or, alternatively, an order directing Defendants to "eliminate Treasury's liquidation preference," Compl.¶ 120. The distinction between an order "setting aside" agency action and one "requiring the elimination of" agency action, however, is a distinction without a difference and certainly has no effect on whether Plaintiffs challenge agency "action" in the first place. *See* 33 WRIGHT & MILLER, FED. PRAC. & PROC. JUDICIAL REVIEW § 8307 (2d ed. Apr. 2021 update) (APA § 706(2)'s instruction "to 'set aside' illegal agency action" is one example of statutes that, "even if they do not use the term 'injunction' as such, create remedies that are functionally similar"). Nothing about the language in Plaintiffs' requested relief casts doubt on the fact that they challenge agency action, as *Collins* and the Eighth Circuit already made clear.

Moreover, even if the Court were to view Plaintiffs as seeking to compel agency action unlawfully withheld, they have alleged such a claim in Count IV under 5 U.S.C. § 706(1). FHFA's argument that this claim would not satisfy the requirements of § 706(1) fails. In *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62-64 (2004) (*Norton v. SUWA*), the Supreme Court explained the scope of the § 706(1) cause of action to "compel agency action unlawfully withheld or unreasonably delayed." The APA defines "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, *or failure to act*." 5 U.S.C. § 551(13) (emphasis

added). The Supreme Court held that "a 'failure to act' is properly understood to be limited, as are the other items in § 551(13), to a *discrete* action." 542 U.S. at 63. In addition, "the only agency action that can be compelled under the APA is action *legally required*." *Id.* at 63. In sum, "a claim under § 706(1) 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.

As the Supreme Court explained, these "limitations rule out several kinds of challenges." *Id.* For example, the "limitation to discrete agency action precludes the kind of broad programmatic attack" the Court had previously rejected in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), where an environmental group tried to challenge the Bureau of Land Management's entire "land withdrawal review program"—thus seeking "*wholesale* improvement of this program," which was not a discrete action within the meaning of § 551(13). *Norton v. SUWA*, 542 U.S. at 64 (internal quotation marks omitted). In *Norton v. SUWA* itself, another environmental organization sought a court order directing the Bureau of Land Management to comply with a statutory directive "to manage" particular lands "so as not to impair the suitability of such areas for preservation as wilderness." *See id.* at 65-66 (internal quotation marks omitted). The Court held that "a general order compelling compliance" with the duty to "manage" lands so as not to "impair" them was not sufficiently discrete because an open-ended order like that would "inject[] the judge into day-to-day agency management." *Id.* at 66-67. The Court gave other examples, such as statutory mandates to "manage wild free-roaming horses and burros in a manner that is designed to achieve and maintain a thriving natural ecological balance" or to "manage the New Orleans Jazz National Historical Park in such a manner as will

preserve and perpetuate knowledge and understanding of the history of jazz." *Id.* at 67 (cleaned up).

Here, the agency action sought to be compelled could not be more different from a broad statutory mandate "to manage wild burros in a manner designed to achieve ecological balance." The requested relief is much more straightforward: The liquidation preference is either zero or it is not. *See* Compl. ¶ 120. Similarly, an order compelling Treasury to convert its preferred stock to common stock is binary: The stock is either senior to other preferred shareholders in receiving dividends or it is not. There would be no "day-to-day agency management." *Norton v. SUWA*, 542 U.S. at 67.

As *Norton v. SUWA* explained, the limitation that agency action may be compelled only if it is legally required "rules out judicial direction of even discrete agency action that is not demanded by law." *Id.* at 65. Specifically, when "the manner of" an agency's "action is left to the agency's discretion" by statute, a court "has no power to specify what the action must be." *Id.* Here, if Plaintiffs prove they suffered harm from the unconstitutional removal restriction, Defendants would be "legally required" to remedy that harm. They do not have *discretion* to decide whether Plaintiffs are "entitled to retrospective relief" because *Collins* explained that Plaintiffs would be entitled to a remedy. Thus, if the Court decides that Plaintiffs claims are best understood as seeking to compel agency action unlawfully withheld, Plaintiffs state a claim under § 706(1).

C. As *Collins* implicitly recognized, Section 4617(f) does not bar Plaintiffs' constitutional claim.

Congress must clearly state its intent to bar all remedies for a constitutional violation. *See Webster v. Doe*, 486 U.S. 592, 603 (1988). "The Supreme Court has long held that a statutory bar to judicial review precludes review of constitutional claims only if there is 'clear and convincing' evidence that Congress so intended." *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 308 (D.C. Cir. 2014) (citation omitted); *see also Chong Toua Vue v. Barr*, 953 F.3d 1054, 1057 (8th Cir. 2020) (quoting *Webster v. Doe* for creating "the rule 'that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear'").

Defendants contend that § 4617(f) bars Plaintiffs' constitutional claims. FHFA Br. 19-20. That provision states that "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." 12 U.S.C. § 4617(f). But this statute lacks the clear statement necessary to conclude that Congress intended to bar all remedies for constitutional violations. To hold that § 4617(f) "den[ies] a judicial forum for constitutional claims" would raise a "serious constitutional question." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986); *see also id.* ("All agree that Congress cannot bar all remedies for enforcing federal constitutional rights" (brackets and internal quotation marks omitted)). Indeed, Defendants' reading of § 4617(f) would render that provision unconstitutional. *See Bartlett v. Bowen*, 816 F.2d 695, 705 (D.C. Cir. 1987). Because Congress did not clearly bar a remedy for constitutional violations in § 4617(f), that provision does not defeat Plaintiffs' constitutional claims.

Collins implicitly recognized this principle. The challengers in *Collins* initially raised both a statutory challenge and a constitutional challenge to the Net Worth Sweep. The Supreme Court held that § 4617(f) barred the statutory claim. After spending pages analyzing and applying that provision to bar the statutory claim, however, the Court made no mention of it with respect to the challengers' constitutional claim. Indeed, the entire second half of the Court's opinion would have been pointless if, all along, § 4617(f) barred the removal claim.

Defendants make no attempt to argue that § 4617(f) contains a clear statement. Instead, they assert that Plaintiffs do not actually raise a constitutional claim in the first place. *See* FHFA Br. 19-20. That assertion relies on Defendants' misunderstanding of *Collins*. They say that § 4617(f) "did not preclude the challenge to the removal restriction; that claim was adjudicated in *Collins*, *resulting in the restriction's invalidity*." FHFA Br. 19-20 (emphasis added). But *Collins*, by its own terms, did not "result" in the removal restriction's "invalidity." At no point did the Court purport to declare the provision "invalid" or to "sever" the provision from the rest of the statute. To the contrary, the Court explained that the "unconstitutional provision" was "never really part of the body of governing law (because the Constitution *automatically* displaces any conflicting statutory provision from the moment of the provision's enactment)." *Collins*, 141 S. Ct. at 1788-89 (emphasis added). In other words, the removal restriction was *never* valid. Nevertheless, the Court explained, the "unconstitutional provision" could still "inflict compensable harm" on individuals—*i.e.*, they could suffer "harm" due to a constitutional violation and would have an "entitlement to retrospective relief." *See Collins*, 141 S. Ct. at 1788-89.

Thus, the application of § 4617(f) here would deny Plaintiffs a remedy for "harm" inflicted by an "unconstitutional provision" without a clear statement from Congress. This result would contradict the principle of *Bowen* and *Webster v. Doe*.

FHFA appears to suggest this principle does not apply to Plaintiffs' "APA claims." *See* FHFA Br. 20. That contention is meritless: *Webster v. Doe* itself involved constitutional violations challenged "under the APA." *See* 486 U.S. at 601-03; *see also United States v. White Plume*, 447 F.3d 1067, 1074 (8th Cir. 2006) (holding that plaintiffs raised a claim "under the Administrative Procedure Act (APA) for 'violation of the[ir] constitutional rights'"). Moreover, the APA provides causes of action to raise constitutional claims—as Plaintiffs' complaint demonstrates. For example, Count II challenges agency action "'contrary to constitutional right, power, privilege, or immunity.'" Compl. ¶ 100 (quoting 5 U.S.C. § 706(2)(B)). Count III challenges agency action that is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,'" and is "'without observance of procedure required by law,'" where the relevant "law" is the Constitution of the United States. *See* Compl. ¶¶ 106, 110-11 (quoting 5 U.S.C. §§ 706(2)(A), 706(2)(D)).[1] And Count IV challenges agency action "'unlawfully withheld'"—where, again, the relevant law for determining whether the action was "unlawfully withheld" is the Constitution. *See* Compl. ¶¶ 115, 119 (quoting 5 U.S.C.

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[1] Contrary to an argument FHFA relegates to a footnote, FHFA Br. 24 n.11, *Collins* held that, although a removal restriction does not *automatically* make agency action unconstitutional, agency action violates the Constitution when the restriction inflicts harm. Similarly, when the restriction inflicts harm and agency action is taken in violation of Article II, that action is taken "without observance of procedure required by law." *See* Compl. ¶ 111.

§ 706(1)). Thus, although Plaintiffs rely on the APA for a cause of action in Counts II through IV, those claims are still constitutional claims and subject to the clear-statement rule in *Bowen* and *Webster v. Doe*. Lastly, even if Defendants were correct, Plaintiffs also bring an equitable cause of action directly under the Constitution. Compl. ¶¶ 93-98 (Count I).

III. The Complaint Plausibly Alleges Facts that Would Entitle Plaintiffs To Their Requested Relief.

Plaintiffs allege facts showing that the removal restriction caused harm by impeding the Trump administration from implementing its policy and that Plaintiffs are entitled to retrospective relief under *Collins*. Defendants mainly ask the Court to disbelieve the factual allegations in the complaint. But a motion to dismiss is the wrong vehicle for adjudicating fact disputes. Defendants will have an opportunity to try to disprove the alleged facts, but the Court must accept those allegations as true in ruling on Defendants' motions to dismiss. Under the proper standard, Defendants' motions should be denied.

A. Former President Trump's public statement conclusively shows that the unconstitutional removal restriction harmed Plaintiffs.

Collins held that the removal restriction was unconstitutional. 141 S. Ct. at 1787. The Court's analysis regarding the interaction between the Constitution and the unconstitutional statutory provision, however, was framed differently from prior cases. For example, the Court did not purport to "sever" by judicial decree the removal restriction as a "remedy." *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2207-11 (2020) ("find[ing] the Director's removal protection severable" as "the appropriate remedy"). Instead, *Collins* explained that the unconstitutional removal restriction was "automatically displac[ed]" by

the Constitution, meaning that the provision was "never really part of the body of governing law." 141 S. Ct. at 1788-89. Under this theory, there had *never been* an enforceable removal restriction in HERA.

The Court held that this *theoretical legal* absence of the removal restriction did not deprive the shareholders of "retrospective relief." *Id.* at 1788. Even though the removal restriction was never legally enforceable, "it is still possible for an unconstitutional provision to inflict compensable harm." *Id.* at 1789. For example, if the President made a public statement "expressing displeasure" with the Director and asserting that "he would remove the director if the statute did not stand in the way," then "the statutory provision would clearly cause harm." *Id.*

Former President Trump has issued a public statement articulating precisely that. *Id.* His statement could not have been clearer that he would have fired Director Watt and returned the Companies to private ownership were it not for the unlawful removal restriction. *See* Compl., Ex. A, Doc. 87-1 (Jan. 26, 2022). This public statement is dispositive under *Collins*.

Defendants effectively ask this Court, at the motion-to-dismiss stage, to second-guess the former President's public statement about his own decision-making process. *See* Treas. Br. 18 (arguing that the Court should "not defer to" the former President's letter). They have it precisely backwards.

If the Court decides that the former President's statement (and the other allegations in the complaint marshaling confirmatory evidence)—the precise hypothetical evidence *Collins* said would "clearly" show harm—are 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" and only "the clearest showing to the contrary" may overcome it. Br. for the United States at 78, *Trump v. Int'l Refugee Assistance Project*, Nos. 16-1436, 16-1540 (U.S. Aug. 10, 2017), *available at* https://bit.ly/37ikH6N; *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."). Absent that showing, the Court should not second-guess the former President's statement describing his 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, "[w]here the facts with regard to an issue lie peculiarly in the knowledge of a party, that party is best situated to bear the burden of proof." *United States v. Webster*, 797 F.3d 531, 536 (8th Cir. 2015) (internal quotation marks omitted)).

Here, we already know what the former President thinks, and any non-public facts relevant to this question are in the exclusive possession of Defendants and their former officers and employees. Under these circumstances, Defendants should bear the burden. In addition, burden shifting takes into account substantive policy. *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"). Here, the Constitution sets forth the policy interest: The separation of powers "protects individual liberty." *Bond v. United States*, 564 U.S. 211, 223 (2011). Just as courts shift the burden of production 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 the President's letter (at the very least) constitutes a *prima facie* showing that the unconstitutional removal restriction inflicted compensable harm, and the burden shifts to Defendants.

To support its argument that the Court should make a credibility determination at the motion to dismiss stage and disbelieve a former President, Treasury cites two cases where a court declined to adopt one agency official's statement as establishing an *entire agency's* formal position. Neither case applies to the inquiry *Collins* articulated. For example, in *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698, 737 (D. Or. 1997)—a decision abrogated by the Ninth Circuit, *see Miller v. California Speedway Corp.*, 536 F.3d 1020, 1024 (9th Cir. 2008)—the court declined to accept a former Assistant Attorney General's affidavit as establishing the *Department of Justice*'s formal interpretation of a regulation. As the court explained, agencies adopt official interpretations "by issuing interpretive regulations" or "asserting a position in litigation." 982 F. Supp. at 737. Similarly, Treasury relies on the Supreme Court's DACA decision in *DHS v. Regents of the University of California*, 140 S. Ct. 1891, 1907-10 (2020), where

the Court declined to accept an agency official's *new* explanation for an agency's action that was different from the agency's *earlier* explanation.

As *Collins* made clear, however, the inquiry here is different. The question is whether one person, the President of the United States, considered himself bound by the removal restriction. And here, that one person—the only individual whose opinion matters—has written a letter declaring that he *did* consider himself bound by the removal restriction. Thus, former President Trump's statement does not purport to represent the reasoning of someone else like in *Independent Living Resources*. Nor does his statement contradict some earlier explanation for why he did not remove Director Watt.

Defendants also ask the Court to ignore the former President's statement because his administration argued in court that the removal restriction was unconstitutional. Treas. Br. 20. But that merely reveals the President considered himself bound by the statute until *a court* declared it unlawful *Cf. United States v. Windsor*, 570 U.S. 744, 754 (2013) (Obama administration declined to defend the Defense of Marriage Act but continued enforcing it "to recognize the judiciary as the final arbiter of the constitutional claims" (cleaned up)). The Trump administration's legal filings cast no doubt on the veracity of President Trump's letter.

Next, Defendants contend the Court should ignore the former President's letter because it was written after he left office. Treas. Br. 19. Nothing in *Collins* turns on that distinction. Instead, the Court laid down a general principle: A removal restriction caused harm if it made a real-world difference in who was leading the agency. The former

President's letter conclusively establishes that fact. And, as detailed below, the President's letter simply confirms the contemporaneous evidence marshaled in the complaint.

Lastly, FHFA contends the Court should dismiss Plaintiffs' complaint because there "is no allegation that President Trump ever asked Director Watt to take any relevant action, let alone that Director Watt refused." FHFA Br. 28. But *Collins* does not require proof that the President submitted a directive to Director Watt to demonstrate the removal restriction harmed Plaintiffs. Instead, it held that a public statement from the President asserting that he disapproved of the Director and would have removed him "clearly" establishes harm. 141 S. Ct. at 1789. FHFA says the inquiry is "whether the former President's ability to have his policies carried out was impeded," Br. 28, and the President's public statement—the precise evidence *Collins* discussed—expressly satisfies FHFA's own test: "My Administration was denied the time it needed to fix th[e] problem because of the unconstitutional restriction on firing Mel Watt." Compl., Ex. A. Under *Collins*, the President's statement "clearly" shows the removal restriction caused harm, and the Court should reject Defendants' request to second-guess the former President's description of his own thought process and ignore the precise hypothetical evidence *Collins* said was dispositive.

B. The President's contemporaneous actions and the statements of his administration's officials confirm the removal restriction caused harm.

The President's contemporaneous actions confirm the facts in his public statement. By the end of President Trump's first week in office, he had handpicked officials to lead numerous financial regulators, including the Treasury Department, the SEC, the FTC,

HUD, the SBA, the CFTC, and the NCUA. Compl. ¶ 46. In contrast, Director Watt, President Obama's FHFA Director, was permitted to serve out the remainder of his statutory term—two full years into the Trump administration. By then, he "was the last remaining Obama-appointed regulator leading a federal agency." Compl. ¶ 48 (quotation marks omitted). The only reasonable inference is that President Trump considered himself legally prohibited from removing Director Watt except for cause—as his letter responding to the *Collins* decision states.

This conclusion is also supported by common sense. At the time of Mr. Watt's nomination, he had been serving as a Democratic congressman for twenty years. Compl. ¶ 40. Because he had almost no Republican support, his confirmation was possible only after the Democratic Senate majority abolished the filibuster for presidential nominations to federal agencies. Compl. ¶ 42. And his nomination garnered only two Republican votes. *Id.* Thus, Director Watt's two years of service during the Trump administration cannot plausibly be attributed to the idea that he was some sort of bipartisan pick.

Multiple Senators acknowledged Watt's political leanings. Senator Corker opposed Watt's nomination, stating that he "didn't believe a politician should lead the agency." Compl. ¶ 41 (cleaned up). Toward the end of Director Watt's term, Democratic Senator Mark Warner wryly stated that he would not "make a large wager on an appointee that would follow [Director Watt's] direction in the agency" and expressed his concern that "a new director, particularly appointed by [the Trump] Administration, could roll back all [Director Watt's] progress" and his "progressive leadership was going to be replaced." Compl. ¶ 71 (cleaned up).

Given this political reality, it is no surprise that the moment the President could clearly replace Director Watt, he did so. Indeed, the President announced Director Watt's temporary and permanent replacements before Director Watt's term had even ended. Compl. ¶ 48. And although the President could have lawfully permitted Director Watt to serve in a holdover capacity at the end of his statutory term, President Trump installed an acting director on the very day Director Watt's term concluded. *Id.*

In addition to the President's own actions and statements, those of other officials in the Trump administration, including Director Watt, confirm that Director Watt took positions contrary to the administration. First, Director Watt fundamentally disagreed with the administration's position that the executive branch should lead the Companies out of conservatorship without further legislation, telling the Senate that "it is the role of Congress, not FHFA, to make the decisions that chart the path out of conservatorship." Compl. ¶ 62. He steadfastly maintained this position throughout his tenure: Indeed, in his final appearance before Congress, Director Watt said he deemed it "extremely important" for him to "plainly and unequivocally reiterate [his] view that it is the responsibility of Congress, not FHFA, to decide on housing finance reform." Compl. ¶ 72; *see also* Compl. ¶¶ 67-68

In contrast, officials in the Trump administration took the opposite view. For example, Treasury Secretary Mnuchin stated that, although the administration welcomed the assistance of Congress, it would pursue "administrative options" for ending the conservatorships. Compl. ¶ 62-63. President Trump's choice to lead FHFA, Director Calabria, stated that HERA *required* him to release the Companies from conservatorship

and that he was "not going to wait on Congress." Compl. ¶ 64. And a Treasury report published after Director Watt left office explained that "reform should not and need not wait on Congress." Compl. ¶ 63.

Second, Director Watt and the Trump administration also disagreed over the Net Worth Sweep. Compl. ¶ 65. When asked about it, Director Watt responded that he did not "lay awake at night worrying about what's fair to shareholders" but rather focuses on "what is responsible for the taxpayers." *Id.* In contrast, President Trump described the Net Worth Sweep as a "scam," "socialism," and "a travesty." Compl. ¶ 66. Likewise, Mr. Calabria, was a prominent public critic of the Net Worth Sweep before joining the Trump administration. *Id.* In addition, rather than supporting Treasury's quarterly collection of the Companies' net worth, Secretary Mnuchin's top housing-finance advisor, Craig Phillips, said that "the taxpayer has actually been, in some ways, many ways, repaid from the bailout of Fannie and Freddie." *Id.*

The conflicting positions between Director Watt and the Trump administration were publicly known. *See* Compl. ¶ 67. Eventually, as Mr. Phillips would later say, the Trump administration reached the conclusion that "'we need to wait really for Director Watt's term to end and to have our appointee'" because he was too "liberal" to partner with, so "the decision was made to wait for a nominee." Compl. ¶ 69 (brackets omitted)[2]

[2] FHFA emphasizes that Mr. Phillips personally thought the Trump administration could have worked with Director Watt. FHFA Br. 7-8. But the key question is what the *Trump administration* concluded, not what Mr. Phillips thought, and he was unequivocal that the administration decided to "wait for Director Watt's term to end and to have our appointee" before moving forward. Compl. ¶ 69 (cleaned up).

Therefore, as the President's public statement, his contemporaneous action, and the actions and statements of his administration all indicate, the removal restriction caused harm because the President did not think he could lawfully remove Director Watt due to the restriction. Under *Collins*, this "clearly" shows harm, and Plaintiffs are entitled to "retrospective relief." 141 S. Ct. at 1788-89.

C. The alleged facts show the position Plaintiffs would be in were it not for the unconstitutional removal restriction.

1. The Trump administration had two goals: (1) releasing the Companies from conservatorship as promptly as practicable; and (2) ending government ownership of the Companies by selling Treasury's stake at a large profit. Compl. ¶ 49. Administration officials' public statements and actions demonstrate that each objective was a priority.

Ending the Conservatorships. First, there is little doubt that ending the conservatorships was a top policy objective of the Trump administration. President Trump's letter states that, "[f]rom the start," he would have fired Director Watt "and would have ordered FHFA to release these companies from conservatorship." Compl., Ex. A; Compl. ¶ 50(a). Before the administration even began, the President-elect's nominee for Treasury Secretary said the new administration intended to "get [the Companies] out of government control." Compl. ¶ 50(b). He later told Congress that "leaving" them "in conservatorship makes no sense." Compl. ¶ 50(c). President Trump's eventual pick for FHFA Director, Mark Calabria, then serving as Vice President Pence's chief economist, said "the Trump administration is 'committed' to ending the conservatorship of" the

Companies. Compl. ¶ 50(d). After becoming FHFA Director, he said the "centerpiece of our strategy is to end the Fannie and Freddie conservatorships." Compl. ¶ 50(g).

The administration's actions aligned with these public statements. In 2018, the Executive Office of the President issued a report outlining numerous proposals to "end the conservatorship of Fannie Mae and Freddie Mac" and "transition[] Fannie Mae and Freddie Mac to fully private entities." Compl. ¶ 50(e). Through a March 2019 directive, President Trump instructed Treasury to consult with FHFA and develop proposals for "[e]nding the conservatorships." Compl. ¶ 50(f). The September 2019 Treasury report in response to that directive said the Companies "should be recapitalized" and taken out of conservatorship "as promptly as practicable." Compl. ¶ 50(h) (quotation marks omitted). That same day, an FHFA press release praised the report, stating that "ending the conservatorships" is "a top priority for this Administration and the FHFA." *Id.* The following month, FHFA directed the Companies to "undertake those activities necessary to support an exit from conservatorship." Compl. ¶ 50(i). And Director Calabria's annual report to Congress stated that "FHFA's end-state vision" for the Companies is "to return" them "to operating as fully-private companies outside of conservatorship." Compl. ¶ 50(k).

Ending the conservatorships, however, could not be done overnight. Due largely to the immense dividend payments owed to Treasury under the Net Worth Sweep, the Companies had no capital. Compl. ¶ 51. Administration officials knew the Companies had to be recapitalized before exiting conservatorship. *Id.* Director Calabria told Congress that the Companies being "well-capitalized" was a "precondition for responsibly ending the conservatorships." *Id.* The 2019 Treasury report likewise said they "should be

recapitalized." Compl. ¶ 50(h). At Director Calabria's direction, both Companies hired financial advisors to help them recapitalize and exit conservatorship "as soon as possible." Compl. ¶ 50(j).

Administration officials also knew the Companies could not build the capital necessary to end the conservatorships promptly by merely retaining their quarterly profits. Compl. ¶ 52. Instead, the Companies needed to raise capital by selling new shares of common stock to private investors. Compl. ¶ 53. Secretary Mnuchin outlined the broad strokes of the plan to Congress: "So we really see two things. One, retaining earnings, that is one way we will accumulate capital. And then, two, **we will have** to raise third-party capital." *Id* (emphasis added). He thought the Companies "can raise a very significant amount of capital from the private sector," which comported with Director Calabria's view "that an exit from conservatorship is going to require a large capital raise by Fannie and Freddie." *Id.*

To complete a capital raise by issuing shares of common stock, that stock had to be attractive to investors. Compl. ¶ 55. At the time, however, Treasury's senior preferred stock had priority over the Companies' other stock, and Treasury's stock carried the massive liquidation preference. *Id.* The result was that no other shareholders in the Companies would ever receive a return on their investments. *Id.* And no private investor would purchase stock knowing that he or she was guaranteed to receive no return. *Id.* Therefore, Treasury's liquidation preference *had to be eliminated* before the Companies could issue new shares to raise capital, which would then allow an exit from conservatorship. Compl. ¶ 56. This step could be accomplished by either (1) "writing down the liquidation

preference to zero," or (2) "converting Treasury's senior preferred stock to common stock." *Id.*

Selling Treasury's Stake for Maximal Profit. President Trump and numerous Trump administration officials all confirmed that the administration's goal was to end government ownership of the Companies by selling Treasury's stake for a large profit. Compl. ¶ 57. President Trump's letter stated that his administration would have "sold the government's common stock in these companies at a huge profit and fully privatized" them. Compl. ¶ 57(a). In November 2016, Mr. Mnuchin said the new administration would "privatize" the Companies because it "makes no sense that the[y] are owned by the government." Compl. ¶ 57(b). And Director Calabria said he expected that, as part of a public offering of new shares of the Companies' stock, Treasury would "sell off its shares to recoup the taxpayer investment." Compl. ¶ 57(c); *see also id.* (A public offering "would allow Treasury to exercise its [common stock] warrants to recoup its investment."). As these statements reflect, Treasury intended to convert its common stock warrants—which would result in Treasury owning 79.9% of the Companies' common stock—and then sell that common stock to private investors. Compl. ¶ 58.

As mentioned, however, the Companies' common stock—whether existing or newly issued—could not be sold for a "huge profit" as President Trump intended if the Companies were not attractive to private investors. Compl. ¶ 58. And the Companies could not be attractive so long as the liquidation preference remained in place. *Id.* Therefore, both goals of the Trump administration—ending the conservatorships through a capital raise and selling Treasury's stake for a large profit—required eliminating the liquidation

preference. Compl. ¶ 59. That, as explained, could be accomplished in one of two ways—by writing down the liquidation preference to zero or converting Treasury's senior preferred stock to common stock. *Id.* Treasury recognized as much in its September 2019 report, which responded to the President's March 2019 directive and listed ending the conservatorships as a top priority of the administration. *Id.* In that report, Treasury recommended that the administration consider (1) "[e]liminating all or a portion of the liquidation preference of Treasury's senior preferred shares"; or (2) "exchanging all or a portion of that interest for common stock or other interests." *Id.*

The process of carrying out the administration's goals of exiting conservatorship and ending government ownership through a profitable sale required extensive planning. *See* Compl. ¶ 75. There were five key—and often sequential—steps that were necessary to achieve these goals; the Trump administration was able to complete four of them before time ran out. *Id.*

First, as Secretary Mnuchin explained to Congress, part of the plan was to "accumulate capital" by "retaining earnings." Compl. ¶ 53. To do this, the PSPAs had to be amended to end the Net Worth Sweep, which hobbled the Companies anew each quarter. Compl. ¶ 76. Director Calabria made clear that, to exit conservatorship, "you need to end what was called the Net Worth Sweep so that [the Companies] can start building capital." *Id.* Thus, in September 2019, Director Calabria and Treasury amended the PSPAs to permit the Companies to build a combined $45 billion in net worth without paying dividends. Compl. ¶ 77. A January 2021 amendment increased the amount even more. *Id.* By strengthening the Companies' financial position through retained earnings, the

administration simultaneously made the Companies more attractive to private investors. *Id.*

At the same time, the administration also pursued its goal of maximizing Treasury's profit. To that end, these amendments *increased* the liquidation preference in an amount equal to any earnings retained by the Companies. Compl. ¶ 77. Through this increase, Treasury preserved its ability to maximize its profit if it chose to eliminate the liquidation preference by converting its senior preferred shares to common stock (rather than writing down the liquidation preference to zero). Compl. ¶¶ 77, 82. All else being equal, the larger the liquidation preference, the more common stock Treasury would receive when converting its shares; and the more common stock Treasury received, the more it would profit from the sale of that common stock. Compl. ¶¶ 77, 82.

Second, the Companies had to cease paying Treasury quarterly cash dividends. Compl. ¶ 78. Director Calabria implemented this change within months of entering office. *Id.*

Third, the Companies needed a regulatory framework for determining the amount of capital necessary to operate under private ownership. Compl. ¶ 79. The regulatory process for issuing this complex, highly technical rule took months to complete and was not finalized until December 2020, just a few weeks before the Trump administration ended. *Id.*[3] The capital rule had to be in place before any public offering because private

[3] Defendants allege that Director Watt issued a capital rule that was "similar in kind" to Director Calabria's capital rule. FHFA Br. 29. When Director Watt issued this rule, however, he "emphasize[d]" to Congress that the rule "is not connected in any way to any

investors needed to know how much capital the Companies required in order to predict a return on equity. *Id.*

Fourth, FHFA and the Companies needed to develop regulatory and business plans for the public offering. Compl. ¶ 80. To that end, Director Calabria directed the Companies to hire financial advisors who, in his words, could "provide needed expertise to evaluate different capital raising options and help chart a roadmap to responsibly end the conservatorships." *Id.* Both Companies did so. *Id.*

Fifth, as explained, Treasury's liquidation preference had to be eliminated so the Companies' common stock was attractive to private investors. Compl. ¶ 81. Director Calabria said the PSPAs had to be 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." *Id.*

Significantly, several of these steps were *sequential*. Compl. ¶ 82. For example, the Companies could neither complete a plan for raising capital nor sell shares without a capital rule that told the market how much money the Companies intended to raise. *Id.* As Director Calabria stated, "the capital rule . . . must be in place for them to be able to raise capital." *Id.*

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efforts or ideas others may have about recapitalizing and releasing the Enterprises from conservatorship." *Ten Years of Conservatorship: The Status of the Housing Finance System: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 115th Cong. 30 (May 23, 2018) (statement of Melvin L. Watt, Dir., FHFA). In stark contrast, Director Calabria stressed that his capital rule was a "critical step" "toward responsibly ending the 12-year conservatorships." *Prepared Remarks of Dr. Mark A. Calabria, Dir. of FHFA, at FSOC Principals Meeting*, FHFA (Sept. 25, 2020), https://bit.ly/3I37FGW.

And crucially, until the Companies and their financial advisors had a plan in place, Treasury and FHFA could not determine which of the two ways of eliminating the liquidation preference would maximize its profit. *Id.* As explained, Treasury could either write down the liquidation preference or convert its senior preferred shares to common stock. *Id.*

Because of the unconstitutional removal restriction, the Trump administration ran out of time to achieve its two goals of exiting conservatorship and ending government ownership through a profitable sale of Treasury's stake. Director Calabria had repeatedly stated that the Companies would sell new shares of stock to private investors in 2021. Compl. ¶ 84. Thus, when the Trump administration ended, FHFA and Treasury were on track to complete the public offering about two and a half or three years after Director Watt's term had ended. Compl. ¶ 85. If President Trump had removed Director Watt at the beginning of his administration and installed his own FHFA Director, the administration could have started its work two years earlier. Compl. ¶ 86. Therefore, but for the removal restriction, the Companies would have raised capital by selling new shares of common stock in 2019,[4] which would have required the elimination of the liquidation preference so that Treasury could exit its stake through a profitable sale. *Id.*

2. Defendants argue that the President's inability to control FHFA—the Companies' conservator—did not actually matter because he had the ability to control Treasury. FHFA

[4] Given this timing, FHFA's citation of the statutory prohibition on selling the stock before January 2018 is irrelevant. *See* FHFA Br. 23.

Br. 27-28; Treas. Br. 17-18.[5] For example, Treasury says the President "could have directed Treasury to," among other things, "giv[e] up its dividend rights" or "trad[e]" its shares "for less valuable" ones. Treas. Br. 17. This argument completely ignores the Trump administration's commitment to sell Treasury's stake *for a large profit*. *See* Compl. ¶ 57-59; Ex. A ("huge profit"). Ordering Treasury to "give up" its interests or trade them "for less valuable" ones would have been directly contrary to the elected President's stated goals—as FHFA seemingly acknowledges. *See* Br. 27 (It "defies basic economics" to suggest "[h]olders of multi-billion dollar investments" would simply "renounce" them.). The elected President could accomplish *both* of his goals *only* with the cooperation of FHFA because Treasury could maximize its profit only through a capital raise, which (as explained) required FHFA and the Companies to take numerous steps. Compl. ¶ 83. Crucially, the amendments to the PSPAs *required* FHFA's mutual agreement. *Id.* The entire lesson of *Collins* is that the President is not required to give up policy goals or pursue them with one hand tied behind his back due to an unconstitutional removal restriction. He cannot be reduced "to a cajoler-in-chief." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 502 (2010).

The Defendants' complete failure to account for the President's interest in maximizing Treasury's profit also explains why they miss the point of the Trump administration's decision to *increase* the liquidation preference through amendments to the

[5] The Federal Circuit recently endorsed this argument *sua sponte* without receiving briefing on any of these issues. *See Fairholme Funds, Inc. v. United States*, No. 2020-1912, 2022 WL 518222, at *19-20 (Fed. Cir. Feb. 22, 2022).

PSPAs. Defendants contend that this increase somehow undermines Plaintiffs' claims, *see* FHFA Br. 31-32; Treas. Br. 21-22, but they never mention—let alone, engage with—the fact that "Treasury permitted the liquidation preference to increase" because "[t]hat increase, all things being equal, would allow Treasury to receive more common stock if it chose to convert its senior preferred shares and thus receive more profit when later selling those shares." Compl. ¶ 82; *see also* Compl. ¶ 77.

Defendants also argue for dismissal because there is no allegation that Director Watt "would have opposed an amendment" that "wrote down or converted Treasury's liquidation preference." Treas. Br. 18; FHFA Br. 27. But eliminating the liquidation preference was the *last* step on the road to exiting conservatorship. Compl. ¶ 81-82. The harm caused by the removal restriction was that Director Watt refused to take even *the first step*. As detailed—and in direct contradiction to the Trump administration—Director Watt believed FHFA should not lead the Companies out of conservatorship without new legislation. Compl. ¶¶ 62-64, 67-68, 72. Thus, there is no allegation that Director Watt rejected the final step of exiting conservatorship because the Trump administration could not even begin the *first steps* of exiting conservatorship with Director Watt leading FHFA.

Next, Defendants argue that the Court should dismiss Plaintiffs' claims because the 2019 Treasury plan included options other than eliminating the liquidation preference or exchanging Treasury's senior preferred shares for common stock. FHFA Br. 30; Treas. Br. 22-23. For example, Defendants note that the report mentions the possibility of taking the Companies into "receivership." FHFA Br. 30. But the other options listed in the report, including "receivership," were irreconcilable with all the public statements made by Trump

administration officials. *See* Compl. ¶ 60. Thus, reading the Treasury report's "menu" of options, FHFA Br. 30, alongside the public statements of the decisionmakers reveals that eliminating the liquidation preference or exchanging Treasury's senior preferred shares for common stock were the only options listed in the report that would permit the Trump administration to pursue its goals. Compl. ¶ 60.

Lastly, FHFA asserts that both an exit from conservatorship and new stock offering "were expected to coexist" with "Treasury's preferred stock and liquidation preference." FHFA Br. 29. The passage FHFA relies upon states that Treasury would "maintain limited and tailored Government support" by "leaving the PSPA commitment in place after the conservatorships." *See* Ex. to Decl. of R. Charlie Merritt in Supp. of Treas. Mot. to Dismiss, Ex. A., Doc. 94-1 at 3 (Mar. 11, 2022). But "the PSPA commitment" is *not* Treasury's liquidation preference or stock; those are interests Treasury received *in return* for its "commitment," which was the funding Treasury pledged to the Companies. And the following sentence states that Treasury will be "compensated for its continued support through the periodic commitment fee." *Id.* Thus, the passage FHFA cites merely says that, after conservatorship, Treasury would continue to pledge a "limited and tailored" funding commitment in exchange for a fee. It says nothing about Treasury's preferred stock and liquidation preferences—which, as a matter of economics, had to be converted or eliminated for the Trump administration to pursue its goals.

In the end, Defendants must resort to doubting the facts alleged and asking the Court to draw inferences in *their* favor. Those are not bases for dismissal, and the Court should deny their motions.

IV. Plaintiffs Are Entitled to an Injunction Placing Them in the Position They Would Be In But For the Constitutional Violation.

Plaintiffs are seeking an "injunction" that will "ma[k]e plaintiffs whole." *Forster v. Boss*, 97 F.3d 1127, 1129-30 (8th Cir. 1996). This is precisely the remedy *Collins* requires—as Justice Kagan acknowledged, stating that she "agree[d]" with the majority that, if "the President's inability to fire an agency head affected the complained-of decision," then "plaintiffs alleging a removal violation are entitled to injunctive relief" that would "restore the plaintiffs to the position they 'would have occupied in the absence' of the removal problem." *Collins*, 141 S. Ct. at 1801 (Kagan, J., concurring) (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)).

This type of relief—sometimes called a "reparative injunction"—is well known. *See* D. LAYCOCK & R. HASEN, MODERN AMERICAN REMEDIES 246 (5th ed. 2019). A reparative injunction is appropriate when "the wrongful act has already occurred." *Id.* The Eighth Circuit's decision in *Forster* is a leading example of this remedy. *See id.* at 245-47 (analyzing *Forster*). There, "the wrongful conduct" was "in the past." *Id.* at 245. But the Court of Appeals held that "a permanent injunction ordering defendants to remove" property left behind after a sale and to give plaintiffs a building permit had sufficiently "made plaintiffs whole." *See Forster*, 97 F.3d at 1129. A reparative injunction like the one Plaintiffs seek is thus a traditional remedy: As the Supreme Court has held, "all remedies" are designed "to restore the victims of [wrongful] conduct to the position they would have occupied in the absence of such conduct." *Missouri v. Jenkins*, 515 U.S. 70, 87 (1995).

This principle applies with equal force to remedies for constitutional violations. Therefore, courts "are tasked with shaping 'a remedial decree to place persons' who have been harmed by an unconstitutional provision 'in the position they would have occupied in [its] absence.'" *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 239 (4th Cir. 2016) (quoting *United States v. Virginia*, 518 U.S. 515, 547 (1996)). Any argument "that the court cannot order reparative relief—that it cannot attempt to undo the past violation"—is, as a leading treatise puts it, "frivolous." LAYCOCK & HASEN, *supra*, at 247.

Treasury asserts that Plaintiffs seek a "prospective" remedy. Treas. Br. 15. But as then-Judge Starr wrote for the D.C. Circuit, a remedy is "remedial in nature" if it "seek[s] to cure the constitutional violation, to place victims of unconstitutional conduct in the position they would have occupied in the absence of such conduct." *Inmates of Occoquan v. Barry*, 844 F.2d 828, 841 (D.C. Cir. 1988).

Contrary to Defendants' suggestion, FHFA Br. 18, Plaintiffs are *not* seeking a "structural" injunction that would require ongoing judicial supervision. Instead, they seek an injunction like those "traditionally issued by courts of equity . . . upon termination of litigation," which "required a single simple act." *Brown v. Plata*, 563 U.S. 493, 544 (2011) (Scalia, J., dissenting). So long as that "single simple act" is carried out—that is, Defendants either eliminate the liquidation preference or convert Treasury's preferred stock to common stock—there is no need for additional judicial intervention.

Treasury next contends that remedying this separation of powers violation would *itself* be a separation of powers violation. Treas. Br. 15. That contention cannot be squared with *Collins*, which clearly holds that Plaintiffs are entitled to retrospective relief if the

removal restriction caused harm. 141 S. Ct. at 1788-89. Any time a new administration controls the executive branch, it may have to take actions to remedy a constitutional violation that occurred during a prior administration. The federal government's duty to obey court orders does not "commandeer," Treas. Br. 15, the executive branch. *Cf. Regents*, 140 S. Ct. at 1901 (requiring Trump administration to adhere to Obama administration's DACA program); *Biden v. Texas*, 142 S. Ct. 926, 926-27 (2021) (Mem.) (denying stay request and thus requiring Biden administration to adhere to Trump administration's Migrant Protection Protocols). Moreover, far from undermining executive branch discretion, Plaintiffs' remedy would vindicate it by giving effect to the policy choices the elected President would have made absent the unconstitutional removal restriction.

Defendants also contend that Plaintiffs' requested remedy is different from other separation of powers cases. For example, FHFA contends that Plaintiffs' requested remedy is foreclosed by *Free Enterprise Fund*. FHFA Br. 25. But that decision purported to "sever" the removal restriction and did not address the issue of retrospective relief like *Collins* did. *See Free Enter. Fund*, 561 U.S. at 508-10. *Collins* adopted a decidedly different analysis: There was no provision to sever because the removal restriction was "never really part of" HERA, so retrospective relief depends on whether the restriction "inflicted harm." 141 S. Ct. at 1788-89. Neither *Free Enterprise Fund*, nor any of Defendants' other cases, Treas. Br. 15 n.4, engage in this analysis or address what should happen to past actions of an agency that are infected by a statute that violates the separation of powers.

Lastly, FHFA argues that Plaintiffs' remedy is foreclosed by "mandamus" principles and *Norton v. SUWA*. FHFA Br. 22-24. But Plaintiffs do not seek mandamus;

they seek an injunction like the kind the Supreme Court held is appropriate for constitutional violations. Moreover, as explained, Plaintiffs' requested remedy satisfies *Norton v. SUWA* in any event. *Supra*, at 17. To the extent *Norton v. SUWA*'s statutory interpretation of the APA is even relevant to equitable remedies, Defendants cite no case applying *Norton v. SUWA* to deny a remedy for a *constitutional* violation. Under Supreme Court precedent, including *Collins*, Plaintiffs are entitled to an injunction restoring them to the position they would have occupied were it not for the unconstitutional removal restriction.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motions to dismiss.

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Respectfully submitted,

/s/ David H. Thompson

David H. Thompson
Charles J. Cooper
Peter A. Patterson
Brian W. Barnes
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600

Scott G. Knudson
Taft, Stettinius & Hollister LLP
2200 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
(612) 977-8400

Counsel for Plaintiffs