No. 17-20364

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# In the United States Court of Appeals for the Fifth Circuit

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PATRICK J. COLLINS; MARCUS J. LIOTTA;
WILLIAM M. HITCHCOCK,
*Plaintiffs-Appellants*

v.

JANET YELLEN, SECRETARY, U.S. DEPARTMENT OF TREASURY;
DEPARTMENT OF THE TREASURY; FEDERAL HOUSING FINANCE AGENCY;
SANDRA THOMPSON, ACTING DIRECTOR, FEDERAL HOUSING FINANCE AGENCY,
*Defendants-Appellees*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS, No. 4:16-cv-03113

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**SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLANTS**

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## CERTIFICATE OF INTERESTED PERSONS

*Patrick J. Collins, et al. v. Janet Yellen, et al.*, No. 17-20364

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Attorneys whose names are denoted with a single asterisk entered appearances in the district court but have not entered appearances in the Fifth Circuit. Attorneys whose names are denoted with two asterisks appeared on some of the briefs Defendants previously filed in this Court but are no longer employed by the Department of Justice. Attorneys whose names are denoted with three asterisks appeared on the briefs for the Defendants in the Supreme Court but have not entered appearances in this Court.

Plaintiffs originally named Jacob J. Lew in his official capacity as Secretary of the Treasury as a defendant in this case. Secretary Steven T. Mnuchin was substituted for Secretary Lew pursuant to Federal Rule of Civil Procedure 25(d), and Secretary Mnuchin has since been succeeded by Secretary Yellen. While this appeal was pending, Joseph M. Otting was substituted by Mark A. Calabria. Later, Director Calabria was removed by the President and succeeded by Acting FHFA Director Sandra Thompson. In addition to the named parties listed above, all Fannie Mae and Freddie Mac shareholders have a financial interest in the outcome of this case.

Dated: July 26, 2021

/s/ Charles J. Cooper
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## INTRODUCTION

In remanding this case, the Supreme Court charged the lower courts with deciding in the first instance whether, absent the unconstitutional statutory restriction on the President's removal authority, the President would have "replaced one of the confirmed [FHFA] Directors who supervised the implementation of the third amendment." *Colins v. Yellen*, 141 S. Ct. 1761, 1789 (2021). While answering questions about hypothetical presidential personnel decisions may prove difficult in some future removal cases, in this one the task is relatively straightforward. Soon after entering office, President Trump replaced virtually every high-ranking official in the Executive Branch who did not enjoy for-cause removal protection, and there is every reason to think that he would have likewise replaced Melvin L. Watt—President Obama's pick to head FHFA.

Although Treasury and FHFA both continued to defend the third amendment in court during the two years that Director Watt served into the Trump Administration, the public record reveals that if a Trump appointee had headed FHFA during this period, the Administration likely would have further amended the purchase agreements in a manner that would have benefitted Plaintiffs. After the Supreme Court's ruling, the proper remedy is to order Defendants to do what would have been done but for the unconstitutional removal restriction. While the remedial analysis required by the Supreme Court's decision is admittedly novel, Plaintiffs submit that the proper course is to shift the burdens of proof and persuasion onto the government in light of evidence establishing a *prima facie* case that the unconstitutional restriction on the President's removal authority prevented the Administration from taking steps that would have restored Plaintiffs and other shareholders to a meaningful place in the capital structures of Fannie and Freddie. The Court should remand this case to the District Court to enter appropriate injunctive relief or, in the alternative, send this case back to the District Court so that Plaintiffs can take discovery into disputed factual issues that are relevant after the Supreme Court's decision.

## BACKGROUND

In return for providing financial assistance to Fannie and Freddie in 2008, Treasury received a special class of preferred stock that is senior in priority to all other stock issued by the Companies. ROA.35-36. As the holder of the senior-most class of stock in the Companies, Treasury is entitled to receive any sums owed on this stock before the Companies' other equity investors receive anything. Although the 2008 purchase agreements thus placed Treasury in a position to be paid ahead of other shareholders, the original agreements did not entirely eliminate the economic value of the Companies' more junior preferred and common stock; if the Companies did well, it was still possible for something to be left over after Treasury was paid. *See* ROA.32.

The August 2012 third amendment to the purchase agreements established a regime pursuant to which nothing would be left for more junior shareholders. After the third amendment, Treasury was entitled to receive: (1) a dividend equal to all of the Companies' net worth (including all future profits), less a small and diminishing capital reserve; and (2) a $189 billion "liquidation preference" payment in the event that the Companies are ever wound down and liquidated. ROA.80, ROA.435. So long as Treasury enjoys those rights as part of its senior preferred stock, the more junior shares owned by other investors have no economic value. As one senior White House official put it at the time the third amendment was adopted, this action was meant to "lay to rest permanently the idea that the outstanding privately held [stock] will ever get turned back on" and to "close[ ] off [the] possibility that [Fannie and Freddie] ever[ ] go (pretend) private again." ROA.56.

The Obama Administration was publicly committed to a policy of seeking to wind down Fannie and Freddie or at least keeping them under permanent government control. *See* ROA.72. Eventually a new President was elected who had a different perspective on the proper role of government in the housing finance system. In November 2016, Steven Mnuchin, President-Elect Trump's nominee to be Secretary of the Treasury, said that "[w]e've got to get Fannie and Freddie out of government ownership." *Mnuchin: Get Fannie Mae, Freddie Mac out of government ownership*, FOX BUSINESS NEWS, at 00:06 to 00:09 (Nov. 30, 2016), https://bit.ly/3iKDZUc. According to Secretary Mnuchin's top advisor on housing finance issues, ending the conservatorships of Fannie and Freddie was an early priority for the Trump Administration, but ultimately the Administration determined that it could not work with Director Watt—President Obama's choice to head FHFA. *Interview with Craig Phillips, Former Counselor to the Secretary of the Treasury*, SITUSAMC – ON THE HILL, at 10:14 to 11:05, https://bit.ly/3y4zE4J. As a result, the Trump Administration decided to defer pursuit of these changes until Director Watt's term expired in January 2019, some two years into the Administration. *Id.*

When President Trump took office, the Companies had massive capital shortfalls thanks in large part to the additional dividends that were paid to Treasury under the third amendment. *See* ROA.77. Filling these capital deficits was a necessary precondition to returning Fannie and Freddie to private control, and the only way to recapitalize the Companies within a reasonable time was to raise additional capital in the markets by selling new shares of stock in Fannie and Freddie. The purchase agreements, as altered by the third amendment, made it impossible for any shareholder other than Treasury to ever receive a return on its investment. Thus, amending the purchase agreements to restore the economic rights of the Companies' other shareholders was an essential step in any process that would involve selling new stock in the Companies to achieve the Trump Administration's stated policy objectives. The Trump Administration publicly acknowledged as much. Once the Administration began work in earnest on this issue after Director Watt's term expired, a Treasury Department plan for reforming the housing finance system discussed "eliminating all or a portion of the liquidation preference on Treasury's senior preferred shares or exchanging all or a portion of that interest for common stock or other interests in [Fannie and Freddie]." *See* Dep't of the Treasury, *Housing Finance Reform Plan* at 27 (Sept. 2019), https://bit.ly/2Uyvzre.

The Trump Administration's inability to pursue these reforms during 2017 and 2018 while Director Watt was still in office proved dispositive. Given intervening political and economic events, two years proved to simply not be enough time to accomplish the objectives laid out by the Administration. *Interview with Craig Phillips, Former Counselor to the Secretary of the Treasury*, *supra*, at 11:58–12:55. Mark Calabria, President Trump's choice to head FHFA, spent much of his roughly two years in office focused on preparing and promulgating a rule governing how much capital the Companies would need once under private control—another necessary precondition for ending the conservatorships. *See* 85 Fed. Reg. 82,150 (Dec. 17, 2020). Despite working diligently to prepare the Companies for an exit from conservatorship, Director Calabria signaled that Fannie and Freddie would not be ready to sell new stock until 2021—too late to achieve the Trump Administration's goals before a new President took office. Ben Lane, *Calabria now expects Fannie Mae and Freddie Mac IPOs in 2021*, HOUSINGWIRE, (Feb. 28, 2020), https://bit.ly/3hXsKJ4. Had Director Calabria or another Trump-appointee assumed the office of FHFA Director at the start of the Trump Administration, that projected 2021 issuance of new stock could have occurred in 2019. Instead, as a result of being hamstrung for two years by Director Watt's continued leadership at FHFA, the Trump Administration ultimately ran out of time before changes could be made to the purchase agreements that would have restored Plaintiffs and other private shareholders to a meaningful place in the Companies' capital structures.

## ARGUMENT

### I. The unconstitutional removal restriction caused compensable harm because it stopped President Trump from firing Director Watt.

There is no longer any doubt that "it is . . . possible" for an unconstitutional restriction on the President's removal authority "to inflict compensable harm" warranting retrospective relief. *Collins*, 141 S. Ct. at 1788–89. Although the Supreme Court's decision does not purport to explain comprehensively when such harm occurs, it includes two hypotheticals that provide critical guidance for this case on remand. The Court explained that compensable harm would "clearly" occur if: (1) a lower court enjoined the President from removing FHFA's Director without cause; or (2) the President "made a public statement expressing displeasure with actions taken by a Director and had asserted that he would remove the Director if the statute did not stand in the way." *Id.* at 1789. Those hypotheticals leave no doubt that Plaintiffs can demonstrate compensable harm by showing that the President would have fired FHFA's Senate-confirmed Director over policy differences but was inhibited from doing so by the unconstitutional statutory removal restriction. Plaintiffs can make such a showing.

Acting Director DeMarco's immediate successor was Director Watt, a longtime Democratic congressman from North Carolina who had a lengthy track record advocating for affordable housing and other democratic priorities relevant to housing finance policy. *See* ROA.565-567. President Obama nominated Director Watt, and in December 2013 the Senate confirmed him with only two Republican Senators voting in favor of the nominee. 159 Cong. Rec. S18375 (daily ed. Dec. 10, 2013). Director Watt was three years into his statutory five-year term when President Obama left office.

President Trump undoubtedly would have removed and replaced Director Watt immediately upon taking office but for the unconstitutional statutory removal restriction. As is customary when a President from a different political party enters the White House, President Trump selected new leadership for virtually every non-independent federal agency at the outset of his Administration. Indeed, by the time Director Watt's term expired in January 2018, he was "the last remaining Obama-appointed regulator" leading a federal agency. Katy O'Donnell, *Housing regulator settles sexual harassment suit tied to Mel Watt*, POLITICO (Sept. 27, 2019), https://politi.co/36UJR7U. Notably, President Trump moved immediately to replace

Director Watt as soon as his statutory term expired, designating Joseph M. Otting, the politically appointed Comptroller of the Currency, to head the agency in an acting capacity rather than allowing Director Watt to serve as a holdover while the Senate considered a permanent successor. *See* Letter from FHFA Concerning Otting Designation (5th Cir. Jan. 8, 2019); 12 U.S.C. § 4512(b)(4) (authorizing Director to serve "after the expiration of the term for which appointed until a successor has been appointed").

It is no secret that the political parties are deeply divided over matters of housing finance policy—a fact illustrated by President Biden's dismissal of President Trump's selection to head FHFA a few hours after the Supreme Court's decision in this case. *See* Katy O'Donnell, *Biden removes FHFA director after Supreme Court ruling*, POLITICO (June 23, 2021), https://politi.co/3y1cT1L. It cannot be credibly disputed that Director Watt would have suffered the same fate at the start of the Trump Administration but for his statutory removal protection. That is enough to establish that the unconstitutional removal restriction caused "compensable harm." 141 S. Ct. at 1789.

## II. The appropriate remedy for the constitutional violation should include restoring Plaintiffs to a meaningful place in the Companies' capital structures.

A. To craft an appropriate remedy for the compensable harm Plaintiffs sustained, the Court should issue an injunction that puts Plaintiffs in the position they would be in but for the constitutional violation. Contrary to Justice Kagan's suggestion in a concurring opinion that only two other Justices joined, *see* 141 S. Ct. at 1802 (Kagan, J., concurring in part and concurring the judgment), in developing such a remedy, it is not sufficient for the Court to focus narrowly on whether Treasury went along with FHFA's implementation of the Net Worth Sweep during the years when President Trump was inhibited from replacing Director Watt. "FHFA and Treasury consistently reevaluated the stock purchasing agreements and adopted amendments as they thought necessary," and there was nothing stopping the agencies from heading "back to the bargaining table" during this period. *Id.* at 1781 (majority op.). The question, then, is whether the agencies would have renegotiated the terms of the agreements during the first two years of the Trump Administration had FHFA been headed by a Director who President Trump chose. There is strong evidence that such a renegotiation would have happened.

During the first two years of the Trump Administration, Craig Phillips was Treasury Secretary Mnuchin's senior-most advisor on matters of housing finance policy. *See* Katy O'Donnell & Ben White, *Top Treasury official Craig Phillips to depart*, POLITICO (May 16, 2019), https://politi.co/3kPIUGb. After President Trump left office but before the Supreme Court's decision in this case, Mr. Phillips gave an interview in which he explained that, while housing finance reform was an early priority for the Trump Administration, officials ultimately decided to defer work on this issue until Director Watt's term expired so that Treasury could partner with an FHFA headed by someone who shared the Administration's policy vision:

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

*Interview with Craig Phillips, Former Counselor to the Secretary of the Treasury*, SITUSAMC – ON THE HILL, at 10:14 to 11:01 (May 26, 2021), https://bit.ly/3y4zE4J. Mr. Phillips went on to explain that the delay caused by the need to wait out the remainder of Director Watt's term ultimately proved critical because impeachment, the global pandemic, and the 2020 election all intervened to inhibit progress once Director Calabria finally took the helm in April 2019. *Id.* at 11:58 to 12:55.

The steps the Trump Administration took towards housing finance reform after Director Watt's departure provide important insight into what additional actions the Administration would have taken had it controlled all of the relevant levers of power within the Executive Branch from the beginning. Shortly after Director Watt's term ended, a presidential memorandum directed Treasury to consult with FHFA and develop a plan for, among other things, "[e]nding the conservatorships of [Fannie and Freddie] upon the completion of specified reforms." 84 Fed. Reg. 12479 (Mar. 27, 2019). That directive reflected longstanding Trump

Administration policy and echoed Secretary Mnuchin's comments in one of the first interviews he gave after being nominated to head the Treasury Department in 2016: "We've got to get Fannie and Freddie out of government ownership. It makes no sense that these are owned by the government and have been controlled by the government for as long as they have." *Mnuchin: Get Fannie Mae, Freddie Mac out of government ownership*, FOX BUSINESS NEWS, at 00:06 to 00:16 (Nov. 30, 2016), https://bit.ly/3iKDZUc.

Treasury responded to the presidential memorandum with a September 2019 plan for reforming the housing finance system, ending the conservatorships, and recapitalizing the Companies. *See* Dep't of the Treasury, *Housing Finance Reform Plan* (Sept. 2019), https://bit.ly/2Uyvzre. Treasury's plan called for both Companies to be "recapitalized with significant first-loss private capital so that Treasury's ongoing commitment under each [purchase agreement] could be drawn upon only in exigent circumstances." *Id.* at 3. As Treasury's plan implicitly recognized, this goal could only be accomplished if the Companies raised additional funds by selling new shares of stock in the capital markets, and equity investors would not be willing to purchase new shares in Fannie and Freddie so long as the third amendment entitled Treasury to 100% of the Companies' earnings in perpetuity. Accordingly, one necessary step in Treasury's contemplated reform was further amending the purchase agreements to change the structure of Treasury's investment so that the

Companies' other shareholders could once again participate in the Companies' financial performance. Treasury proposed to accomplish this by "eliminating all or a portion of the liquidation preference of Treasury's senior preferred shares or exchanging all or a portion of that interest for common stock or other interests in [Fannie and Freddie]." *Id.* at 27.[1]

In the months that followed release of Treasury's plan, Director Calabria set about pursuing recapitalization of the Companies through a new stock issuance; he instructed Fannie and Freddie to retain capital markets advisors to help them prepare for such an issuance and stated publicly that he anticipated that the Companies could sell new shares of stock as early as 2021. *See* Press Release, Fannie Mae Hires Financial Advisor (June 15, 2020), https://bit.ly/3kQGuHa; Ben Lane, *Calabria now expects Fannie Mae and Freddie Mac IPOs in 2021*, HOUSINGWIRE, (Feb. 28, 2020), https://bit.ly/3hXsKJ4. Again, any issuance of new stock in the Companies could only be carried off if there was a realistic possibility of shareholders other than Treasury receiving a return on their investments—meaning that Treasury's liquidation preference would need to be written down or else Treasury's senior preferred stock would need to be converted to common stock so that the Companies' private shareholders would receive dividends and liquidation payments side by side

[1] The "liquidation preference" on Treasury's senior preferred stock is the amount that Treasury is entitled to receive in any liquidation of the Companies before other shareholders receive anything. ROA.242.

with Treasury. *See* Prepared Remarks of Dr. Mark Calabria, Director FHFA, at Mortgage Banker's Association National Secondary Market Conference (May 20, 2019), https://bit.ly/2Wa2u5D (describing FHFA's consideration of how Fannie and Freddie could raise capital through "a public offering of some kind" and acknowledging that an "important step on the path to building the necessary capital will be to address the Net Worth Sweep").

Had Treasury and FHFA been able to begin pursuing these reforms immediately when President Trump took office, it is highly likely that the purchase agreements would have been amended to either: (1) reduce the liquidation preference on Treasury's senior preferred stock to zero and end further increases to the liquidation preference so long as the Companies did not make further draws on Treasury's funding commitment; or (2) convert Treasury's senior preferred stock to common stock. Either change would have directly benefitted Plaintiffs by making it possible for Plaintiffs and other shareholders to receive dividends if the Companies continued their strong financial performance and liquidation payments if they failed. Such reform would have also reflected the Trump Administration's view, articulated by Mr. Phillips while he was still at Treasury, that "the taxpayer has actually been, in some ways, many ways, repaid from the bailout of Fannie and Freddie" thanks to the dividends previously paid under the third amendment. *Interview with Craig*

*Phillips, Counselor to the Secretary of the Treasury*, ANTONIN SCALIA LAW & ECONOMICS CENTER, at 34:20–34:35 (May 16, 2019), https://bit.ly/2Wpjlld.

Rather than completing these steps, because of the unconstitutional restriction on presidential removal of Director Watt, the Administration ran out of time, and earlier this year a new President with different policy priorities took office. To remedy the constitutional violation, the Court should order Defendants to do what would have been done but for Director Watt's unconstitutional removal protection. At a minimum, an appropriate injunction must require Defendants to either reduce the liquidation preference to zero or convert Treasury's senior preferred stock to common stock.

### III. Uncertainty about what the Trump Administration would have done but for Direct Watt's unconstitutional removal protection should be resolved in Plaintiffs' favor.

The Supreme Court's decision does not articulate a detailed doctrinal framework for this Court to apply when fashioning a remedy for the constitutional violation, nor does it specify which side should bear the burdens of proof and persuasion. While the Court must largely write on a blank slate to answer these questions, we submit that at least where a plaintiff makes a *prima facie* case that an unconstitutional removal restriction prevented a presidential administration from pursuing policies that would have benefitted the plaintiff, the burden should shift to the government to establish that the constitutional violation caused no harm.

Consistent with this approach, any uncertainty about what would have happened but for an unconstitutional removal restriction ought to be resolved in Plaintiffs' favor.

Absent relevant statutory direction, courts have discretion in how they allocate the burdens of proof and persuasion, and "substantive policy" is the first and most important factor that courts consider when deciding how to allocate those burdens. MUELLER & KILPATRICK, 1 FEDERAL EVIDENCE § 3.1 (4th ed. 2021); *see Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 209 (1973) (allocation of burden of proof is "a question of policy and fairness based on experience"). The Constitution reflects the Framers' insight that personnel choices can have a major effect on government decisions that implicate liberty, and the elected President's constitutional authority to remove Executive Branch officers is one of the key elements of a system that separates and distributes power within the federal government so as to "preserve the liberty of all the people." *Collins*, 141 S. Ct. at 1780. The Supreme Court's cases on the President's removal authority exhibit great concern for this liberty interest. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2203 (2020); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 501 (2010). To better safeguard the liberty that the separation of powers protects, the Court should rule that the burden shifts to the government where, as here, plaintiffs are able to make a threshold showing that an unconstitutional removal restriction prevented a presidential administration from pursuing policies that would have benefitted the plaintiffs.

Shifting the burden to the government in cases like this one would also accord with another principle that guides courts when they decide how to allocate the burdens of proof and persuasion: "[W]here the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue." 2 MCCORMICK ON EVIDENCE § 337 (8th ed. 2020); *see Concrete Pipe & Prods. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 626 (1993) (observing that it is "entirely sensible to burden the party more likely to have information relevant to the facts about [the matter at issue] with the obligation to demonstrate [those] facts."). The public record outlined above demonstrates a strong *prima facie* case that with an additional two years of control over FHFA, the Trump Administration would have been able to achieve its goal of amending the purchase agreements to allow Plaintiffs and other shareholders to benefit from the Companies' continued strong financial performance. Any non-public facts relevant to this issue are in the exclusive possession of Defendants and their former officers and employees. Under these circumstances, Defendants ought to bear the burden. *Cf. Gomez v. Toledo*, 446 U.S. 635, 640–41 (1980) (defendant bears burden of establishing qualified immunity because it "depends on facts peculiarly within the knowledge and control of the defendant" and "will frequently turn on factors which a plaintiff cannot reasonably be expected to know").

The Supreme Court has adopted burden-shifting frameworks in analogous circumstances. In the employment discrimination context, once a plaintiff makes a *prima facie* case of race discrimination, the burden shifts to the defendant to proffer a legitimate, nondiscriminatory reason for its action. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Outley v. Luke & Assocs., Inc.*, 840 F.3d 212, 216 (5th Cir. 2016). The Supreme Court used a similar burden-shifting framework in the Equal Protection Clause context in *Alexander v. Louisiana*, 405 U.S. 625 (1972). Once the plaintiff demonstrated that race impermissibly factored into the decisional process, the Court held that "the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Id.* at 632. Likewise here, with Plaintiffs having made a threshold showing that the unconstitutional restriction on Director Watt's removal inhibited the Trump Administration's pursuit of housing finance reform measures that would have benefitted Plaintiffs, the burden should shift to Defendants.

In addition to shifting the burdens of proof and persuasion to the government, the Court should resolve in plaintiffs' favor any uncertainty over whether and how the Trump Administration would have amended the purchase agreements but for Director Watt's unconstitutional removal protection. Support for this approach can be found in cases that concern when an agency's failure to use the APA's notice-and-comment procedures is harmless error. Courts only find harmless error in such cases when it is "clear" that the failure to follow notice-and-comment procedures did not affect an agency's decision, *City of Arlington v. FCC*, 668 F.3d 229, 243–44 (5th Cir. 2012), *aff'd* 569 U.S. 290 (2013); improper failure to subject agency action to notice and comment is not considered harmless "if there is any uncertainty at all as to the effect of that failure," *Sugar Cane Growers Co-op. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002).

Like APA notice and comment, the separation of powers requires those who exercise government power to follow a set of procedures that are intended to promote better, less arbitrary, and more liberty-protective decisionmaking. *See PHH Corp. v. CFPB*, 881 F.3d 75, 183 (D.C. Cir. 2018) (Kavanaugh, J., dissenting). Also like notice and comment, separation of powers doctrine places no limits on what substantive actions the government can take so long as the mandated procedures are followed. The harmless error rule could be readily abused under these circumstances: an agency can always claim that it would have made the same decision had it followed the required procedures. "To avoid gutting the APA's procedural requirements," courts impose an extraordinarily heavy burden on the government to demonstrate harmless error when the government utterly fails to follow the APA's notice and comment requirements. *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487 (9th Cir. 1992) (Kozinski, J.). The rationale for that approach applies with at least as much force to cases in which an unconstitutional removal restriction inhibits the President's ability to oversee the Executive Branch.

Finally, the public record concerning how Director Watt's removal protection thwarted the Trump Administration's housing finance reform plans is sufficient to show that Plaintiffs are entitled to an injunction mandating further changes to the purchase agreements. To the extent the Court disagrees, at the very least it should remand this case to allow Plaintiffs to take discovery into these issues.

## CONCLUSION

The Court should remand this case to the district court with instructions to enter a permanent injunction requiring, at a minimum, that Defendants amend the purchase agreements to either: (1) reduce the liquidation preference on Treasury's senior preferred stock to zero and end further increases to the liquidation preference except as necessary to offset any further draws on Treasury's funding commitment; or (2) convert Treasury's senior preferred stock to common stock.

Date: July 26, 2021

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionately spaced typeface using Microsoft Word for Microsoft Office 365 in 14-point Times New Roman font. This supplemental brief is being submitted pursuant to the directive the Court issued on July 5, 2021.

Dated: July 26, 2021

s/ Charles J. Cooper
Charles J. Cooper

*Counsel for Plaintiffs-Appellants*

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit on July 26, 2021 by using the appellate CM/ECF system. The participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

Dated: July 26, 2021

s/ Charles J. Cooper
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