No. 2020-2190

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

WASHINGTON FEDERAL, MICHAEL MCCREDY BAKER, CITY OF AUSTIN POLICE RETIREMENT SYSTEM, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee.

On Appeal from the Court of Federal Claims
The Honorable Margaret M. Sweeney, Chief Judge
No. 1:13-cv-00385-MMS

APPELLANTS' SUPPLEMENTAL BRIEF IN RESPONSE TO UNITED STATES ADDRESSING *COLLINS v. YELLEN*

(Oral Argument set for August 4, 2021)

Steve W. Berman
Principal Attorney
HAGENS BERMAN SOBOL SHAPIRO LLP
1301 Second Avenue, Suite 2000
Seattle, WA 98101
(206) 623-7292
steve@hbsslaw.com

Robert M. Roseman
SPECTOR ROSEMAN & KODROFF P.C.
2001 Market Street
Suite 3420
Philadelphia, PA 19103
(215) 496-0300
rroseman@srkattorneys.com

Attorneys for Plaintiffs-Appellants Washington Federal, Michael McCredy Baker and City of Austin Police Retirement System

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I. INTRODUCTION

Although seeking to draw upon *Collins v. Yellen*, 141 S. Ct. 1761 (2021), for affirmance, the Government continues to evade the factual gravamen of this very different case. The complaint alleges the FHFA exceeded its statutory authority as regulator by forcing Fannie and Freddie into conservatorships in 2008 without paying their shareholders just compensation as required by the Fifth Amendment.[1] Yet the Government's supplemental brief focuses, once more, almost exclusively on the Third Amendment that the FHFA imposed as conservator in 2012. To streamline the issues for decision, the Washington Federal Plaintiffs will abandon their takings and illegal exaction claims to the extent grounded on the Third Amendment, and will also withdraw their conditional request for leave to amend.

As narrowed, then, the sole question for decision is whether the Washington Federal Plaintiffs have standing to assert direct claims arising out of the FHFA's actions in compelling the conservatorships. The Government fails to identify any holding or legal principles recognized in *Collins* that undermine the Washington Federal Plaintiffs' standing to challenge violation of their Fifth Amendment rights. To the contrary, *Collins* signals that constitutional property rights may not be cast aside on a standing rationale.

[1] Appx87-95¶¶1-16 (factual overview). Capitalized and abbreviated terms have the same meaning as in Appellants' Principal Brief (Corrected) ("PB"), Doc. No. 17 (Dec. 1, 2020).

II. ARGUMENT

A. The Washington Federal Plaintiffs hereby abandon claims grounded on the Third Amendment and also withdraw their conditional request for leave to amend.

At the trial level, the Washington Federal Plaintiffs preserved claims based on, in addition to imposition of the conservatorships, the Third Amendment. Appx25 n.10. With *Collins* still pending when this case went on appeal, the Principal Brief continued to preserve Third Amendment claims. PB at 18-20, 41.

To narrow the issues for this Court, the Washington Federal Plaintiffs hereby abandon any claims arising from the Third Amendment (or Net Worth Sweep). Appx146-154¶¶172-186; Appx162¶¶204-205; Appx166¶¶218, 220; Appx166-167¶222. The Washington Federal Plaintiffs also hereby withdraw their conditional request, framed as a proposed alternative disposition, for leave to amend. PB at 41-47; Appellants' Reply Brief at 22-24, Doc. No. 27 (Mar. 8, 2021). Especially after *Collins*, sufficient facts are alleged for standing to assert a direct constitutional claim for damages in this case.

B. The Government's arguments only highlight additional dimensions of *Collins* that support standing to pursue a Fifth Amendment claim stemming from imposition of the conservatorships.

1. Shareholder constitutional claims are not nullified by HERA's Succession Clause when a conservatorship is imposed.

The Government contends that "pursuant to the Succession Clause," 12 U.S.C. § 4617(b)(2)(A), "shareholders are barred from asserting derivative claims

under any circumstances." Supplemental Brief for the United States ("SB") at 9, Doc. No. 41 (July 16, 2021). Standing to pursue a derivative claim arising from imposition of the conservatorships, however, no longer presents an issue. Because the conditional request for leave to amend has been withdrawn, the Washington Federal Plaintiffs no longer seek, alternatively, to plead a derivative claim. Appx31-32 (dismissal order addressing this issue).

There is no dispute that direct claims do not pass through the Succession Clause to the FHFA as conservator. In particular, as the Government recognizes, the Supreme Court rejected the proposition that the Succession Clause "transferred to the FHFA the shareholders' right to bring their constitutional claim" and barred "the shareholders from asserting that claim ***on their own behalf***." *Collins*, 141 S. Ct. at 1780 (emphasis added). The constitutional claim in *Collins*, not foreclosed by the Succession Clause, was the shareholders' separation-of-powers argument. *Id.*

Given the paramount nature of constitutional protections, especially those personal to individuals under the Bills of Rights, the Supreme Court's rationale dictates the same if not greater respect for the Fifth Amendment takings claim at issue here. The constitutional right the Washington Federal Plaintiffs seek to enforce on ***their own behalf***—even more direct than in *Collins*—would be meaningless if they lack standing to assert it. As the Supreme Court reiterated on

the same day *Collins* was decided, "the protection of private property is indispensable to the promotion of individual freedom." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021) (regulation was *per se* physical taking).

2. Claims grounded on the FHFA's actions as regulator, not conservator, are unaffected by HERA's Anti-Injunction Clause.

The Government reiterates its argument that the Anti-Injunction Clause, 12 U.S.C. § 4617(a)(5)(A), bars this case. By the Government's own description, however, the 30-day time limit in that provision governs "challenges to the conservator's appointment." SB at 7. This stringent deadline does not apply here because the Washington Federal Plaintiffs are not objecting to appointment of the conservator and do not seek to unwind anything since the appointment. Instead, they seek damages for the Government's failure to comply with the Fifth Amendment mandate of just compensation for takings of private property. Appx165-168¶¶217-225. Hence, the Government is mistaken that "millions of transactions" occurring "in the intervening years" will be called into question if this case goes forward on the merits. SB at 7.

3. Addressing only the Third Amendment, the Supreme Court did not hold that Board consent was irrelevant.

Finally, the Government doubles down on its effort to construct its own factual narrative but, unless well-pled allegations are ignored on a motion to dismiss, this attempt cannot succeed. Even if, as the Government insists, the

Supreme Court relied on "facts not subject to dispute," the factual focus in *Collins* differed fundamentally from that here. SB at 1, 4, 6. As the Government acknowledges, the Supreme Court addressed only "the reasonableness and legitimacy of the conservator's actions in entering into the Third Amendment." *Id.* at 1. There is accordingly no basis to conclude from *Collins*, contrary to the most foundational precepts governing pleading, that the "FHFA had ample reason to place the enterprises into conservatorship, ***with or without the enterprises' consent***." *Id.* at 8 (emphasis added).

All of this, including consent, is hotly contested and was not decided in *Collins*. *See* PB at 7-16. Indeed, the Supreme Court noted that other lawsuits had been filed related to the Third Amendment. *Collins*, 141 S. Ct. at 1770. Shareholders in one of the related actions, who faced the same omnibus motion to dismiss leading to this appeal, filed an *amicus curiae* brief alerting the Supreme Court to the cases now on review before this Court. *See* Brief of *Amici Curiae* Bryndon Fisher, Bruce Reid, and Erick Shipmon in Support of Neither Party, 2020 WL 5898901, at 1 (U.S. Sept. 23, 2020). As would be presumed, *Collins* therefore did not prejudge other litigation that might generate its own petitions for certiorari.

III. CONCLUSION

Collins underscores that the Washington Federal Plaintiffs have standing to litigate their claims on the merits.

DATED: July 23, 2021

Respectfully submitted,

HAGENS BERMAN SOBOL SHAPIRO LLP

By: /s/ *Steve W. Berman*
Steve W. Berman
Principal Attorney
1301 Second Avenue, Suite 2000
Seattle, WA 98101
(206) 623-7292
steve@hbsslaw.com

OF COUNSEL:

Kevin K. Green
HAGENS BERMAN SOBOL SHAPIRO LLP
533 F Street, Suite 207
San Diego, CA 92101
(619) 929-3340
keving@hbsslaw.com

Robert M. Roseman
SPECTOR ROSEMAN & KODROFF P.C.
2001 Market Street, Suite 3420
Philadelphia, PA 19103
(215) 496-0300
rroseman@srkattorneys.com

Attorneys for Plaintiffs-Appellants Washington Federal, Michael McCredy Baker and City of Austin Police Retirement System

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